

LIBRARY
SUPREME COURT, U.S.

VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 173

**THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
APPELLANTS**

vs.

**UNITED STATES SMELTING REFINING AND
MINING COMPANY, AMERICAN SMELTING &
REFINING COMPANY, THE DENVER AND RIO
GRANDE WESTERN RAILROAD COMPANY, et al.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH**

FILED JULY 4, 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 173

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
APPELLANTS

vs.

UNITED STATES SMELTING REFINING AND
MINING COMPANY, AMERICAN SMELTING &
REFINING COMPANY, THE DENVER AND RIO
GRANDE WESTERN RAILROAD COMPANY, *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

INDEX

Volume I

	Original Print	
Record from U. S. D. C., District of Utah.....	1	1
Complaint—Civil 1324, filed June 13, 1947.....	1	1
Exhibits:		
C-1—Order of Commission, Oct. 14, 1946.....	23	28
C-2—Report of Commission on reconsideration, Oct. 14, 1946.....	24	29
C-2-a—Dissent of Alldredge, C., in Anaconda Cop- per Mining Co. Terminal Service.....	25	52
C-3—Seventy-fifth supplemental report of Commis- sion, Oct. 1, 1945.....	27	55
C-4—Order of Commission, Oct. 1, 1945.....	28	85
C-5—Report proposed by Examiners Leonard Way and S. R. Diamondson.....	29	86
Appendix "A"—Statement showing reasons that gen- eral conclusions reached in basic report are inapplica- ble to the terminal services involved in the instant case.....	42	116
Exhibit A-1—Order of Commission, July 6, 1931.....	47	124
Appendix "B"—History of supplemental proceedings here involved etc.....	48	124

Petitions in intervention (Civil 1324)		
State of Utah, filed June 17, 1947	157	377
State of Colorado, filed June 18, 1947	164	383
Public Service Commission of Utah, filed June 18, 1947	169	386
Public Utilities Commission of Colorado, filed June 18, 1947	174	391
Utah Mining Association, filed June 18, 1947	182	396
Colorado Mining Association, filed June 18, 1947	187	401
Petition in intervention (Civil 1325)		
Utah Mining Association, filed June 18, 1947	197	408
Petition in intervention (Civil 1525-1524)		
Utah Mining Association, filed October 11, 1948	202	412
Petition in intervention (Civil 1524)		
Public Service Commission of Utah, filed October 18, 1948	208	416
Petitions in intervention (Civil 1525)		
State of Utah, filed October 18, 1948	214	422
Public Service Commission of Utah, filed October 18, 1948	219	426
Colorado Mining Association, filed October 18, 1948	225	431
Answer of United States (Civil 1524), filed October 18, 1948	235	438
Answer of United States (Civil 1525), filed October 18, 1948	238	440
Answer of Interstate Commerce Commission (Civil 1524), filed October 18, 1948	241	442
Answer of Interstate Commerce Commission (Civil 1525), filed October 18, 1948	243	442
Minute entry dated October 18, 1948 (Civil 1525-1524)	245	443
Minute entry dated October 18, 1948 (Civil 1524)	246	444
Minute entry dated October 18, 1948 (Civil 1525)	247	445
Clerk's note <i>re</i> Item 14 of the <i>Præcipe</i>	249	446
Findings of fact, conclusions of law and decree requested by defendants and lodged January 10, 1949, (Civil 1524-1525)	250	446
Findings of fact and conclusions of law filed January 10, 1949, (Civil 1524-1525)	254	449
Final order and decree filed January 10, 1949 (Civil 1524-1525)	268	463
Clerk's note <i>re</i> entry of judgment	269	464
Petition for appeal, filed March 7, 1949 (Civil 1524-1525)	270	464
Order allowing appeal filed March 7, 1949 (Civil 1524-1525)	272	465
Original citation on appeal signed by Judge Tillman D. Johnson and filed on March 7, 1949 (Civil 1524-1525)	[omitted in printing]	
Assignment of errors of United States, filed March 7, 1949 (Civil 1524-1525)	275	465
Assignment of errors of Interstate Commerce Commission, filed March 7, 1949 (Civil 1524-1525)	279	466
Opinion of Court (Civil 1524-1525)	283	468
Petition to have original records in the District Court transmitted to the Clerk of the Supreme Court of the United States as a part of the Record upon Appeal, filed March 7, 1949 (Civil 1524-1525)	313	477

Order to transmit original court records to the Supreme Court upon appeal, filed March 7, 1949 (Civil 1524-1525)	315	478
Certificate of Service, filed March 7, 1949 (Civil 1524-1525)	317	479
Docket Entries:		
19. Civil 1324	319	481
Civil 1325	320	482
Civil 1524	321	483
Civil 1525	323	485
Praecipe for transcript of record, filed March 7, 1949 (Civil 1524-1525)	325	488
Clerk's certificate.....[omitted in printing]	329	490
Stipulation amending praecipe (Civil 1524-1525)	330	490
Excerpts from Reporter's transcript of hearing, June 18, 1947 (Civil 1324-1325)	336	492
Caption and appearances	336	492
Colloquy between Court and counsel	340	493
Offers in evidence	357	503
Excerpts from Reporter's transcript of hearing, October 18, 1948 (Civil 1524-1525)	648	516
Caption and appearances	648	516
Colloquy between Court and counsel	649	517
Argument on behalf of American Smelting & Refining Co.	664	525
Argument on behalf of the United States	737	529
Opinion of the Court	774	532
Reporters' certificates	780	535

EXHIBITS

H-1 (No. 1324, Civil):

Reporter's transcript of hearing before Commission in Ex Parte No. 104, Part II, May 19, 1932	785	535
Appearances of counsel	785	536
Testimony of L. F. Wilson	788	537
E. W. Deuel	813	551
George Williams	818	554
E. W. Deuel (recalled)	834	564
J. D. Watson	837	565
A. L. Coey	847	571
Exhibit W-1—Statement of freight tariff, & R. G. W. R. R. Co., May 16, 1932	853	574

H-1 (No. 1325, Civil):

Transcript of proceedings before Commission in Ex Parte No. 104, Part II	858	575
Notice of hearing, March 24, 1944	858	575
Notice of hearing, March 28, 1944	859	575
Notice of hearing, April 4, 1944	862	577
Reporter's transcript of hearing, May 29, 1944	865	578
Appearances of counsel	865	578
Testimony of William W. O'Brien	870	580

INDEX

	Original	Print
John F. Kelley	947	625
D. F. Wengert	948	625
W. M. Carey	951	627
F. C. MacDonald	957	631
Omar O. Victor	976	642
Exhibits:		
No. 2—Statement showing car movements within Midvale, Utah, smelter yard on March 30, 1944	1005	659
No. 3—Five statements (Description of each on first page of exhibit)	1008	663
No. 4—Report of Observer C. B. Higgins, at plant of United States Smelting, Refining and Mining Co., Midvale, Utah, March 28, 1944	1018	672
No. 5—Same—Observer Coleman Richardson	1027	682
No. 6—Same—Inspector McCormick	1044	707
No. 7—Same—Observer J. J. Mallaney, March 28 to 31 inc., 1944	1058	723
No. 8—Statement showing switching operations observed by representatives of Commission for period of March 28-31, 1944, at plant of U. S. S., R. & M. Co., Midvale, Utah	1069	736
No. 9—Statement showing typical cars of ore, both intrastate and interstate etc., Midvale, Utah, Jan. 1, 1944 to March 31, 1944	1109	755
No. 10—Lettergram, G. W. Cushing to J. A. Munroe, Feb. 7, 1919	1110	756

Volume II

No. 11—Day letter, G. W. Cushing to Fred Wild, Jr., Feb. 10, 1919	1111	757
No. 12—Telegram, J. A. Munroe to J. A. Reeves, March 13, 1919	1112	758
Telegram, J. A. Reeves to W. G. Barnwell, March 14, 1919	1114	759
Letter, Fred Wild, Jr. to G. W. Cushing, April 13, 1919	1116	760
No. 13—Statement showing ores and concentrates, typical cars, on which freight charges were paid at Midvale, Utah, etc., March, 1944	1118	763
No. 14—Excerpts from F. W. McManus, Agent tariff 6-F, I. C. C., No. 3, etc.	1120	767
No. 15—Statement showing total number of cars handled in and out of Midvale, Utah, plant etc., during period of Jan. 1 to March 31, 1944	1121	768

No. 16—Statement showing number of tons of ore moving in intrastate and interstate traffic etc., during March, 1944	1122	768
No. 17—Contract between Oregon Short Line R. R. Co. and Denver & Rio Grande Western R. R. Co., Oct. 1, 1926	1123	769
Report proposed by Examiners Leonard Way and S. R. Diamondson	1133	780
Exceptions of Public Service Commission of Utah to proposed report	1142	791
Exceptions of Union Pacific R. R. Co. to proposed report	1151	797
Exceptions of D. & R. G. W. R. R. Co. to proposed report	1159	801
Exceptions of United States Smelting, Refining and Mining Co. to proposed report	1184	816
Notices of hearing	1205	829
Seventy-sixth supplemental report of Commission, Oct. 1, 1945	1208	832
Order of Commission, Oct. 1, 1945	1217	843
Order of Commission, Nov. 29, 1945	1218	844
Petitions for reopening and reconsideration etc.		
Union Pacific R. R. Co.	1219	845
United States Smelting, Refining & Mining Co.	1235	855
Denver and Rio Grande Western R. R. Co.	1242	860
Order of Commission, Dec. 13, 1945	1241	859
Order of Commission, Dec. 29, 1945	1253	867
Order of Commission, Feb. 12, 1946	1254	868
Order of Commission, March 19, 1946	1255	869
Order of Commission, March 22, 1946	1256	869
Order of Commission, April 23, 1946	1257	870
Order of Commission, June 3, 1946	1258	871
Order of Commission, Nov. 29, 1946	1259	871
Order of Commission, Feb. 5, 1947	1260	872
Order of Commission, April 11, 1947	1261	872
H-2 (No. 1324, Civil):		
Reporter's transcript of hearing before Commission in Ex Parte No. 104, Part II, May 26 and 27, 1944	1265	873
Appearances of counsel	1265	873
Colloquy between Examiner and counsel	1270	874
Testimony of K. L. Moriarty	1275	877
W. M. Carey	1328	908
William O. McCormick	1346	918
C. B. Higgins	1354	923
F. C. MacDonald	1359	926
O. W. Tuckwood	1390	944
John F. Kelley	1416	959
F. C. MacDonald (recalled)	1484	998
Colloquy between Examiner and counsel	1502	1008
Testimony of A. E. Dangerfield	1514	1013

INDEX

VII

Original Print

O. W. Tuckwood.....	1574	1047
A. E. Dangerfield (recalled).....	1581	1051
K. L. Moriarty (recalled).....	1584	1053
R. A. Perry.....	1586	1054
O. W. Tuckwood (recalled).....	1629	1079
K. L. Moriarty (recalled).....	1632	1081
W. M. Carey (recalled).....	1656	1095
E. C. MacDonald (recalled).....	1668	1102
Leo Hennebach.....	1686	1113

Exhibits:

No. 4—Fourteen statements (Description of each on first page of exhibit).....	1721	1132
No. 5—Detailed statements of switching performed for which a charge is made?.....	1741	1154
Nos. 6 to 8 inc.—Reports of switching performed by D. R. G. W. at the American Smelting and Refining Co. plant at Garfield, Utah.....	1742	1178
No. 9—Statement of switching operations observed by representatives of Commission, March 23-26, 1944, at plant of American Smelting and Refining Co., Garfield, Utah.....	1789	1229
No. 10—History of switching rates at Garfield, Utah, smelter, D. R. G. W.....	1818	1243
No. 11—History of switching rates at Murray, Utah, smelter, D. R. G. W.....	1834	1263
No. 12—History of switching rates at Murray, Utah, smelter, Oregon Short Line R. R. and Union Pacific R. R.....	1847	1280
No. 13—History of switching rates at Leadville, Colorado, smelter, D. R. G. W.....	1859	1292
No. 14—Decision of U. S. D. C., District of Utah, Case of Oregon Short Line R. R. Co. vs. American Smelting & Refining Co.....	1878	1315
No. 15—Statement of representative tariff items covering destination weights, method of waybilling, etc.....	1881	1319
No. 16—Demurrage rules—Garfield and Murray, Utah and Leadville, Colorado, smelters.....	1888	1326
No. 19—Report of observations of switching done at Murray, Utah, plant of American Smelting & Refining Co.....	1892	1331
No. 20—Statement of switching operations observed by representatives of the Commission, March 28-30, 1944, at Murray, Utah, plant.....	1914	1359
No. 21—Statement showing incoming shipments for 12 months ending March 31, 1944, Garfield, Utah, smelter.....	1941	1370

rates on non-ferrous ores and concentrates have always included compensation for the terminal switching services necessary to determine the value of such commodities, is flagrantly misconstrued. There the report would make it appear:

(1) That what was in reality *uncontradicted* evidence in this respect at two hearings, was, instead, merely a *contention* first raised on reargument by the plaintiff industry and the plaintiff carriers.

(2) That the industry and the carriers have contended that the line-haul rates "include compensation for *any and all services within the plant.*"**

In fact, their contention has been that the *uncontradicted* evidence shows that the line-haul rates include compensation *only for such terminal switching services as are necessary to determine the value of such commodities and to*

Footnote continued from page 15

that service; whether they are required to perform it only at the time selected by the industry, and irrespective of the amount of traffic handled. To bolster this contention, they refer to an opinion expressed at a prior hearing in 1932 by the then general freight agent of the Denver & Rio Grande that the line-haul rates included compensation for weighing, assaying, sampling, thawing, and spotting. The present freight traffic manager of that carrier testified, in the instant proceeding, that the opinion theretofore expressed was correct. No showing was made that the witnesses had anything to do with the making of the rates or were even in the carrier's service when the rates were first established. They are not shown to have any information relative thereto except such as is shown in the tariffs and inferences they draw from the past practices of the carrier. One of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the switching services. That is a question that is susceptible of proof by factual evidence. It is the function of witnesses to furnish such evidence and the province of the Commission to make the conclusion of fact."

** This is apparently a misconstruction of a statement made by counsel for the plaintiff industry upon oral argument before Division 3 on May 4, 1945 (Tr. 461). Counsel there stated:

"I want to make as my second point that the fact that the line haul rates, by the uncontradicted evidence, include compensation for all these specified switching services named in the tariffs for weighing, for movement to the sampler, for movement to the thaw house and for final spot and that since that is true it is immaterial whether or not those movements are simple or complicated. In other words, I am going to show you that the switching terminal services here are essentially simple services but essentially it does not make any difference, they could be as complicated as they please, and we, having paid for them once, this Commission could not make us pay for them twice."

No. 22—Statement, showing outgoing shipments for 12 months ending March 31, 1944, Garfield, Utah, smelter	1944	1373
No. 23—Analysis of switching and weighing charges etc., for 12 months ending March 31, 1944, Garfield, Utah, smelter	1945	1374
No. 24—Same	1946	1375
No. 25—Statement showing total number of original carloads received at Garfield smelter for years 1909-1944	1947	1376
No. 27—Statement showing incoming shipments for 12 months ending March 31, 1944, Murray, Utah, smelter	1948	1377
No. 28—Statement showing outgoing shipments for 12 months ending March 31, 1944, Murray, Utah, smelter	1950	1379
No. 29—Analysis of switching and weighing charges etc., for 12 months ending March 31, 1944, Murray, Utah, smelter	1951	1380
No. 30—Same	1952	1381
No. 34—Statement of switching operations observed by representatives of Commission on Feb. 29, March 1 and 2, 1944, at Leadville, Colorado, plant	1953	1382
No. 35—Statement showing incoming shipments for 12 months ending March 31, 1944, Leadville, Colorado, smelter	1973	1391
No. 36—Same—outgoing shipments	1976	1394
Nos. 37 & 38—Analyses of switching and weighing charges etc., for 12 months ending March 31, 1944, Leadville, Colorado, smelter	1977	1395
H-5, (No. 1324, Civil)—Letter, Union Pacific Co. to Commission, June 3, 1944	1980	1397
Statement of points to be relied upon and designation of parts of record to be printed	1981	1398
Designation by appellees of additional parts of record to be printed	1987	1402
Order noting probable jurisdiction	1990	1403

effect final delivery. The evidence shows that the carriers' tariffs at all three smelters, have since 1920 expressly provided for charges in addition to the line-haul rates for any *intra-plant* terminal switching services, and that such charges have been collected.

(3) That such uncontradicted evidence constituted merely opinions expressed by witnesses not qualified to express them.

The testimony at the 1932 hearing was not, as the Commission's majority report would make it appear, testimony by the then *general freight agent*, but by the then *freight traffic manager* of the Denver and Rio Grande. It further appears that the witness' testimony in this respect was almost wholly developed by questions either from the Commission's examiner presiding at the hearing or from counsel representing the Commission. The transcript of the testimony at the 1944 hearing by the present freight traffic manager of the Denver and Rio Grande, shows that, after he had testified that he had handled traffic matters for that company since 1917, his qualifications were conceded, without objection by counsel for the Commission.

XVII.

Furthermore, it will be noted that the quoted portion of the majority report states:

"One of the principal and important facts at issue in this proceeding is whether the line-haul rates include compensation for the switching services. That is a question that is susceptible of proof by factual evidence. It is the function of witnesses to furnish such evidence and the province of the Commission to make conclusions of fact."

Nevertheless, in face of these unquestionable evidentiary principles, the majority report concludes (p. 359):

"It is clear that the line-haul rates when first established did not include the expensive terminal switching services at the smelter and that they have not been increased since that time to include, and do not now include, compensation for such services."

In other words, even assuming that the majority report was justified in rejecting the only evidence of record, i. e., that the line-haul rates have always included compensation for the terminal switching services in question, it is indisputable that there is no evidence whatever in the record that the line-haul rates do not include such compensation.

1. In the District Court of the United States
For the District of Utah
Civil Action File No. 1324
(File Endorsement Omitted)

BINGHAM AND GARFIELD RAILWAY COMPANY;

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY;
UNION PACIFIC RAILROAD COMPANY; and
AMERICAN SMELTING & REFINING COMPANY,

PLAINTIFFS
against

THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
DEFENDANTS

Complaint—Filed June 13, 1947

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF UTAH:

Bingham and Garfield Railway Company; The Denver and Rio Grande Western Railroad Company; Union Pacific Railroad Company; and American Smelting & Refining Company, bring this action against The United States of America and the Interstate Commerce Commission, hereinafter sometimes called the Commission, for the purpose of enjoining, setting aside and annulling an order of the Commission entered October 14, 1946, in proceedings entitled "American Smelting & Refining Company, *Ex Parte* No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services". A copy of said order* and of the supplemental report therein referred to are attached to this complaint, marked respectively Exhibit C-1 and Exhibit C-2. The prior report referred to in said order entitled "*Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11" is incorporated in and made part of this complaint by reference.

Said plaintiffs allege:

I.

The jurisdiction of this Court over this action is under and pursuant to the provisions of Section 41, Subdivision 28, and Sections 43-48, inclusive, of Title 28 of the United States Code.

* Such order was originally effective January 31, 1947, but by appropriate orders of the Interstate Commerce Commission its effective date has been postponed to July 31, 1947.

Clearly, therefore, under the evidentiary principles stated in the majority report itself, no evidentiary basis exists for the majority's conclusion of fact that the line-haul rates do not include such compensation.*

Finally, as this complaint will later show in greater detail, both the Examiner's report in these proceedings and the original supplemental report of Division 3 suppressed any mention whatever of the question whether the line-haul rates include compensation for such switching services, as

14 well as any reference to the uncontradicted evidence that such compensation is included in those rates. It

took not only exceptions to the Examiner's report, but two petitions for rehearing of the original supplemental report of Division 3, and two oral arguments before the Commission to obtain any expression whatever on what the majority report itself terms

"one of the principal and important facts at issue in this proceeding".

XVIII.

The history of these supplemental proceedings before the Commission concerning the terminal services rendered by the plaintiff carriers at the smelters of the plaintiff industry is set out in necessary detail in Appendix B to this complaint.**

* It will also be noted that this conclusion of fact is made in the face of the opinion of the District Court of the United States in the suit of *Oregon Short Line Railroad Company v. American Smelting and Refining Company*, which the majority report (p. 359) itself quotes as holding that

"* * * a fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate."

** As is shown in Appendix B, the plaintiff industry expressly charged before the Commission, in its exceptions to the Examiners' proposed report, in its two petitions for reconsideration, and in its two oral arguments, that the Examiners' report and the original supplemental report of Division 3 had deliberately suppressed any reference to the foregoing and other uncontradicted material evidence with the fixed idea of applying to the terminal services at the plaintiff industry such general conclusions in the Commission's basic report, although it appears from the face of the basic report, taken in connection with the uncontradicted evidence in these proceedings, that such general conclusions are wholly inapplicable. In so charging, the plaintiff industry made clear that it disclaimed any implication that there had been any conscious and deliberate unfairness; on the contrary, that it recognized that the situation was the result of an honest and obvious conviction that uniformity of terminal services at all industries must be achieved even though there be fundamental differences in conditions between such industries, and that in consequence any evidence of such fundamental differences in conditions might be wholly disregarded as irrelevant.

II.

The order hereby sought to be enjoined, set aside and annulled was made in a proceeding instituted by an order of investigation made by the Interstate Commerce Commission on its own motion as hereinafter set forth. The order relates to transportation and the matters involved arise within the judicial district of this Court, in which judicial district two of the plaintiffs, as hereinafter shown, have their respective principal offices.

III.

The plaintiff Bingham and Garfield Railway Company (herein after sometimes referred to as the Bingham and Garfield) is a corporation of the State of Utah, having its principal office at Salt Lake City, Utah.

Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; and (b) in connection with other such common carriers, also between points in that State and points throughout the United States. As a common carrier by railroad as specified in (b), plaintiff is subject to the provisions of the Interstate Commerce Act, U. S. Code, Title 49, Chapter 1, Part I. As a common carrier by railroad of property as specified in (a), however, plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) (4) of Part I thereof. Otherwise, plaintiff, as a common carrier by railroad of property as specified in (a) is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated, 1943.

IV.

The plaintiff, The Denver and Rio Grande Western Railroad Company (hereinafter sometimes referred to as The Denver and Rio Grande), is a corporation of the State of Delaware. At the time of the making of the Commission's order here sought to be enjoined, set aside and annulled, the properties of the plaintiff were in the possession of and being operated by Wilson McCarthy and Henry Swan, as Trustees, under an order of the District Court of the United States for the District of Colorado made November 18, 1935, and the Commission's order was accordingly made against such Trustees. On April 10, 1947, said District Court approved a Consummation Order returning to the corporation its properties. Such order provides that the reorganized The Denver and Rio Grande Western Railroad Company, shall have the right, if it so elects,

That history will show that such supplemental proceedings were arbitrary and superficial, and that in them material and uncontradicted evidence was wholly ignored or distorted, basic contentions of the plaintiffs persistently misrepresented, and basic legal issues evaded. Such history will disclose a fixed determination upon the part of the examiner presiding at the hearings of May 26 and May 27, 1944, upon the part of the examiners rendering the proposed report therein, upon the part of the majority of Division 3, and upon the part of the majority of the Commission, to make findings and an order in such supplemental proceedings based not upon any evidence in such proceedings, but in complete disregard of such evidence, and wholly on certain general conclusions expressed in the Commission's basic report of 1935, 209 I. C. C. 11. In such basic report the Commission undertook to express general conclusions as to what constitutes "customary and reasonable" switching services under line-haul rates in the delivery and receipt of the freight at industries generally, none of such freight moving, however, as here, under rates based on actual valuation and under tariffs expressly defining the terminal switching services included under the line-haul rates.

XIX.

In such basic report, the Commission held in substance (pp. 36, 38, 44, 45) that the customary and reasonable switching services of carriers in the delivery and receipt of freight at industries

"must not exceed the equivalent of team-track or simple switch placement."

and that the rendition of terminal services exceeding those specified, without adequate charges in addition to the line-haul rates, violates Section 6 (7) of the Act.

15

XX.

As will appear in greater detail in Appendix A to this complaint, such basic report shows on its face that such general conclusions are inapplicable:

(a) where, as in the instant case, the tariffs themselves define the terminal services included in the line-haul rates and specifically provide for terminal services under the line-haul rates in excess of simple switching or team-track delivery;

(b) where, also as in the instant case, the evidence shows that the line-haul rates include compensation for terminal switching services in excess of simple switching or team-track delivery.

to be substituted as a party in lieu of the Trustees, in any and all litigation or proceedings by or against the debtor corporation or said Trustees, now pending.

The Denver and Rio Grande Western Railroad Company, under the authority of said Consummation Order, hereby elects to be substituted in lieu of The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), as a party in the proceedings before the Interstate Commerce Commission, in which was made the order here sought to be enjoined, set aside and annulled.

Certified copies of both said orders of the District Court will be offered in evidence on the hearing of this complaint.

Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; (b) wholly within the State of Colorado between points within that State; and (c) either by itself or in connection with other such common carriers, also between points in each of said States and points throughout the United States. As a common carrier by railroad as specified in (c), plaintiff is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a) and (b), however, plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) (4) of Part I thereof. Otherwise, as a common carrier by railroad of property as specified in (a), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated, 1943, and as a common carrier by railroad as specified in (b), it is subject exclusively to the Public Utilities Act of the State of Colorado, Chapter 137, Volume 4, 35 Colorado Stat. Annotated.

V.

The plaintiff Union Pacific Railroad Company, (hereinafter sometimes referred to as the Union Pacific) is a corporation of the State of Utah, having its principal office at Salt Lake City, Utah.

Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; (b) wholly within the State of Colorado between points within that State; and (c) either by itself or in connection with other such common carriers, also between points in each of said States and points throughout the United States. As a common carrier by railroad as specified

in (c), plaintiff is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a) and (b), however, plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) (4) of Part I thereof. Otherwise, as a common carrier by railroad of property as specified in (a), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated, 1943, and as a common carrier by railroad as specified in (b), it is subject exclusively to the Public Utilities Act of the State of Colorado, Chapter 137, Volume 4, 35 Colorado Stat. Annotated.

VI.

The plaintiff American Smelting & Refining Company (hereinafter sometimes called the industry) is a corporation of the State of New Jersey, having its principal office at New York City, New York. As hereinafter more fully described, it is engaged, among other things, in the smelting of non-ferrous ores, concentrates and other non-ferrous metal bearing materials, and operates, among other plants for this purpose, its smelters at Garfield and Murray, Utah, and Leadville, Colorado.

As hereinafter more particularly described, the smelter at Garfield is served by the Bingham and Garfield, the Denver and Rio Grande and the Union Pacific; the smelter at Murray by the Denver and Rio Grande and Union Pacific; and the smelter at Leadville by the Denver and Rio Grande.

4

VII.

The defendant The United States of America is sued pursuant to express authority of the Congress of the United States as provided in Sections 43-48, inclusive, of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission is an administrative Commission, existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

VIII.

The order here sought to be enjoined, set aside and annulled requires the plaintiff carriers to cease and desist from certain alleged violations of the Interstate Commerce Act "in the particulars as set forth in the above report", i. e. the Commission's supplemental report on reconsidera-

tion (266 I. C. C. 349) issued on the same date as such order, and which, together with the Commission's report (209 I. C. C. 11), hereinafter referred to as the basic report, is expressly made part of the order.

IX.

The findings of violations of the Interstate Commerce Act in said supplemental report, are findings confined solely to alleged violations of Section 6(7) of that Act*, which reads as follows:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

X.

The findings in such supplemental report as to the Garfield Smelter, are (p. 360):

- 5 "We find that respondents' interstate line-haul rates cover the delivery and receipt of carload ship-

* It is not clear whether such supplemental report also intends to find that Section 5 (1) of the Act is violated by the joint switching agreements at the Garfield and Murray smelters. That report does recite (pp. 355, 356, 363) that the performance by the Denver & Rio Grande of all terminal switching services at the Garfield smelter, both for itself, for the Union Pacific and for the Bingham & Garfield; and the performance by the Union Pacific of all terminal switching services at the Murray smelter, both for itself and for the Denver & Rio Grande, respectively constitute "a pooling of traffic for which no authority under Section 5 (1) of the Act is shown." Assuming these "recitals" are intended to be findings of violations of Section 5 (1), it will later be shown herein that such terminal switching is exempted from the provisions of Section 5 of the Act by the express provision of the last paragraph of Section 1 (18) of the Act.

ments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Garfield, Utah, under the line-haul rates begin and end at the plant yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the plant yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the Act."

The findings as to the Murray smelter are (pp. 363, 364):

"We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the hold tracks as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Murray, Utah, under the line-haul rates begin and end at the hold tracks; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the hold tracks as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of Section 6 (7) of the act."

The findings as to the Leadville smelter are (p. 367)*:

"We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the flat yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondent; that the transportation services which it is the duty of re-

* As to the Leadville smelter, the report at least intimates (p. 366) that there is an additional violation of Section 6 (7) of the Act by reason of the ownership and maintenance by the Denver & Rio Grande of all standard gauge tracks within the plant area. Assuming what is not clear, that such intimation is intended to constitute a finding, further reference to it will be deferred to avoid obscuring the major findings of this report, but the fallacy of any such finding will later be shown herein.

spondent to perform for the American Smelting & Refining Company at Leadville, Colo., under the line-haul rates begin and end at the flat yard; and that the movement of earload shipments within the plant beyond those tracks is a service which it is not the duty of respondent to perform. We further find that the performance of service beyond the flat yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act."

As to such findings, the supplemental report states, (p. 355):

"Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

6 "The carriers, therefore, will not only be expected to establish reasonable charges, for the service for which they do not now maintain any charge but also charges which are not less than the full cost of service for those services for which they now publish charges."

Commissioners Alldredge and Mahaffie dissented from such report and order on the ground, among others, that the evidence shows that the line-haul rates in issue include compensation for the terminal switching services beyond the points specified in the majority findings. Commissioner Alldredge in his dissent referred to his dissent to the same effect in *Anaconda Copper Mining Co. Terminal Service*, 266 I. C. C. 387, 394-396, in which Commissioner Mahaffie likewise joined. A copy of this latter dissent is attached to this complaint as Exhibit C-2a.

Commissioner Miller on this same ground had dissented in part from the original supplemental report of the Commission, made by Division 3, 263 I. C. C. 719, hereinafter referred to as the report of Division 3. A copy of that report and of the order thereunder are attached marked respectively Exhibit C-3 and Exhibit C-4.

Commissioners Barnard and Atchison did not participate in the supplemental report on reconsideration, which is hereinafter referred to as the majority report.

Prior to the report of Division 3, a report had been proposed by Examiners Way and Diamondson of the Commission. A copy of such proposed report is attached, marked Exhibit C-5.

XI.

These findings in the Commission's majority report are directed primarily to terminal switching services rendered by the plaintiff carriers at the Garfield, Murray, and Leadville smelters of the industry in determining the value and effecting final delivery of inbound cars of non-ferrous ores and concentrates, on which commodities the carriers' tariffs publish graduated rates based on the actual value of each carload of such commodities and on destination weights.* Such findings, however, are not in terms so limited but apply to all carload commodities inbound and outbound.

XII.

The only evidence before the Commission as to the terminal switching services rendered by the plaintiff carriers at the Garfield, Murray, and Leadville smelters of the industry was evidence taken at two supplemental hearings under *Ex Parte 101*, Part II. The first hearing was held May 14, 1932, at Salt Lake City, Utah, and related exclusively to terminal switching services rendered by the respective plaintiff carriers at the Garfield smelter of the industry. The second hearing was held May 26 and 27, 1944, at Denver, Colorado, and related to terminal switching services rendered by the respective plaintiff carriers at the Garfield, Murray, and the Leadville smelters of the industry. Certified transcripts of all testimony and certified copies of all exhibits introduced at both hearings will be offered in evidence in support of this complaint.

7

XIII.

So far as findings in the Commission's majority report, quoted in Section IX of this complaint, purport to be based on the evidence submitted on the supplemental hearings in these proceedings relating to the terminal services at the Garfield, Murray, and Leadville smelters of the industry, such findings are not only unsupported by any evidence in these proceedings, but they are in conflict with the following uncontradicted evidence introduced at such supplemental hearings:

(A) Neither of the so-called "plant yard" at Garfield, the so-called "hold tracks" at Murray, nor the so-called "flat yard" at Leadville, have ever been, in the approximately 50 years of operation of those respective smelters,

* Rates on non-ferrous ores and concentrates based on actual value were approved by the Commission in *Non-Ferrous Metals* 24 I. C. C. 319-327.

points at which the carriers have delivered inbound cars to the industry or have received outbound cars from the industry. During the entire period of operation of such smelters, the carriers have invariably delivered inbound cars to the industry at the various points of actual unloading within the respective smelter areas and have received outbound cars from the industry at the various points of actual loading within the smelter area.*

(B) The so-called "plant yard" at Garfield, the so-called "hold tracks" at Murray, and the so-called "flat yard" at Leadville, while located in the respective smelter areas, have at all times constituted in fact the railroad terminals of the respective carriers and not industrial tracks of the industry. Such points are merely the points at which the carriers line-haul engines cut off from their inbound trains and couple on to their outbound trains, and at which the carriers switch engines break up such inbound trains and make up such outbound trains. They are also the points from which the carriers switch engines, after breaking up inbound trains, switch inbound cars for delivery at actual unloading points within the smelter area, and to which they haul outbound cars from actual points of loading within that area for makeup into outbound trains.

(C) While the tracks constituting the so-called "plant yard" at Garfield, and the so-called "hold tracks" at Murray, are owned and maintained by the industry, they are used exclusively by the respective carriers for railroad terminal purposes, including in addition to those already specified, the holding and storage of empty and loaded cars. Certain of the tracks of the so-called "plant yard" at Garfield are used exclusively by the carriers serving that smelter, as repair tracks, adjacent to which each of the carriers maintains its own repair shops. The
8 tracks constituting the so-called "flat yard" at Leadville, while on land owned by the industry, are owned

* The trackage lay-out and terminal switching operations at the Garfield, Murray and Leadville smelters are described in detail in Exhibit B-3 attached to Appendix B.

As to the Garfield smelter, see pp. 65-88 of that Exhibit. See particularly testimony of Denver and Rio Grande witness, Mr. Moriarty, and the admission of the Commission's witness, Mr. McDonald, that the "plant yard" tracks at Garfield constitute the joint railroad terminals of the plaintiff carriers and not "interchange tracks" as between those carriers and the plaintiff industry.

As to the Murray smelter, see pp. 88-101 of that Exhibit. As to the Leadville smelter, see pp. 101-115.

and maintained by the Denver and Rio Grande, and are used by that carrier for railroad terminal handling of inbound and outbound cars of independent shippers and consignees, as well as of cars of the industry. Other than the railroad terminals constituted by the so-called "plant yard" at Garfield, the so-called "hold tracks" at Murray and the so-called "flat yard" at Leadville, none of the carriers have any other railroad terminal yards available or adequate for the essential and customary railroad terminal handling of cars delivered to or received from the industry.

Neither do any of the plaintiff carriers provide any track scales for the determination of destination weights as required by their tariffs, but such carriers use track scales within the respective smelter areas owned and maintained by the industry. Likewise, none of the carriers provide thaw houses for the thawing in winter of frozen ore as provided in their tariffs, but use thaw houses within the respective smelter areas owned and maintained by the industry.

(D) The carriers' tariffs have never provided that that "plant yard" at Garfield, the "hold tracks" at Murray, or the "flat yard" at Leadville constitute points for delivery or receipt of cars, nor that their transportation services under the line-haul rates begin or end at such points. On the contrary, the carriers' tariffs have provided, and now provide, that the line-haul rates include delivery of cars at the points of actual unloading and receipt of cars at points of actual loading within the respective smelter areas, except that since July 5, 1938 the tariffs at Garfield and Murray have provided certain additional charges for "interrupted movements . . . resulting from orders from, or requirements of, the smelter."

(E) The plaintiff carriers cannot determine the applicable rates on inbound cars of ores and concentrates upon which their tariffs prescribe rates based on actual value, until the value of each car of such ores and concentrates has first been determined by the industry by passing such ores and concentrates through the so-called samplers at each of the smelters. Such determination of value and of destination weights requires the switching of such cars for loaded and empty weighing to and from the track scales maintained by the industry within the respective smelter areas, the switching of such cars to the industry's samplers, and in the winter, when the lading of such cars is frozen, the switching of such cars to and from the thaw houses.

maintained by the industry within the respective smelter areas.*

(F) Since November 27, 1920, and presently at Leadville, and until July 5, 1938 at Garfield and Murray, the carriers' tariffs have expressly provided that the line haul rates included such terminal switching services necessary to determine the value of non-ferrous ores and concentrates.

Since July 5, 1938 at Garfield and Murray, such tariffs, however, have purported to impose certain additional charges for "interrupted movements . . . resulting from orders from, or requirements of, the smelters."**

* The necessity of such terminal switching movements, in determining value for the application of the carriers' rates based on actual value and the necessity for such rates, is shown in the testimony of Denver and Rio Grande witness, Mr. Carey, quoted at pp. 7-8 of Appendix B to this complaint, and in the testimony of the industry's witness, Mr. Tuckwood, quoted at pp. 8-10 of the same Appendix.

** Such tariff provisions now, and since November 27, 1920 in effect at Leadville, and in effect until July 25, 1938 at Garfield and Murray, read as follows:

Item #15-A—~~INITIAL~~ OF DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line-haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende, and Saluda, Colorado, Garfield, Murray and Midvale, Utah, will include *movement of a commodity within a smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company. (Italic supplied)*

Item #20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (see also Item No. 10)."

The majority report (p. 353), in purporting to set out these tariff provisions, erroneously sets out the immediately prior tariff provisions effective February 25, 1920. It also erroneously states the effect of the amendments to such prior tariff provisions made by the tariff of November 27, 1920. The Commission's report states:

"Effective November 27, 1920, the tariff was amended to provide for free switching on line-haul shipments moving to and from the smelter thaw house."

A reference to the tariff provision of November 27, 1920, quoted above, will show it does not provide for *free* switching to and from thaw house, but provides that such switching *is included in delivery under the line-haul rate*. It will also show that the tariff of November 27, 1920, eliminated the limiting word "*one*" which appears before the words "movement of a commodity within a smelter plant over track scales," in the tariff of February 25, 1920.

Footnote continued on page 12

10 (G) Not only have the carriers tariffs at all times provided that the line-haul rates include the specific terminal switching necessary to determine the value of such ores and concentrates, but such line-haul rates have at all times included compensation for such terminal switching.* The imposition "of reasonable and compensatory charges in addition to the line-haul rates" for such terminal switching services necessary to determine value, as required by

Footnote continued from page 11

These same tariff provisions applied at Garfield and Murray until July 5, 1938 on interstate traffic and June 25, 1938 on intrastate traffic when, as shown in the majority report (pp. 353, 354) they were changed to read as follows:

"Garfield, Midvale and Murray, Utah.

- (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

- (c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

- (e) The line haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter."

* The uncontradicted testimony of Mr. Williams, the late freight traffic manager of the plaintiff, The Denver and Rio Grande, that the line-haul rates have always contemplated and have included compensation for the terminal switching services necessary to determine the value of such ores and concentrates, is set out at pp. 1 and 2 of Appendix B to this complaint. At p. 4 of that Appendix, reference is made to the uncontradicted confirmatory testimony of Mr. Carey, the present freight traffic manager of The Denver and Rio Grande, and of Mr. Tuckwood, general traffic manager of the plaintiff industry.

the Commission's majority report and order herein, would therefore require the plaintiff carriers to collect, and the plaintiff industry to pay twice for the same services.

(H) The only exception to the foregoing statements in (F) and (G) is that on the intrastate movement of so-called Utah copper concentrates, handled by the Bingham and Garfield from Arthur and Magna, Utah, to the Garfield smelter for line hauls, respectively, of approximately two and three miles, the evidence expressly shows that the line-haul rates do not include compensation for the terminal switching performed by the Denver and Rio Grande, and the tariffs, therefore, expressly provide for terminal switching charges of \$2.25 per car in addition to the line-haul rates. This same situation exists as to intrastate cars of sand handled by the Bingham and Garfield from short haul points to the Garfield smelter.

(I) The evidence shows moreover that the carriers have collected and the industry has paid all charges in strict conformity with such tariff provisions, including the terminal switching charges in addition to the line-haul rates provided since July 5, 1938 for so called "interrupted movements" on inbound ores and concentrates at the Garfield and Murray smelters, and including the terminal switching charges in addition to the line-haul rates provided by the tariffs in all instances on the so-called Utah copper concentrates and sand delivered by the Bingham and Garfield in conjunction with the Denver and Rio Grande at the Garfield smelter.

(J) Only 7% of all inbound traffic, respectively, at the Garfield and Leadville smelters, and only 33% at the Murray smelter, is interstate traffic, 93% at Garfield and Leadville, and 67% at Murray being purely intrastate traffic.

(K) Under the carriers' tariffs, ores and concentrates may be sampled in transit at public samplers to determine value before delivery at the Garfield and Murray smelters, or may be sampled in transit at those smelters for re-consignment to points beyond, without any charge in either instance for the switching services involved in such sampling. These switching services are identical with the switching services which are involved in sampling for value cars on which final delivery is made at the Garfield and Murray smelters. To require the imposition of terminal switching charges in addition to the line-haul rates for the terminal switching necessary to determine value on cars finally delivered at the Garfield and Murray smelters, would result in the violation of Section 2 of the

11 Act, so long as such sampling in transit privileges without switching charges in addition to the line-haul rate remain in effect. The record shows that such sampling in transit privileges are essential to the very existence of the so-called marginal mines in order to enable them to obtain the highest price for their ores and concentrates, and are essential to the carriers in order that they may obtain the highest applicable freight rate. The order sought to be enjoined does not require the cancellation of such sampling in transit privileges, and obviously could not properly do so since neither the public samplers nor the mining interests affected thereby have been made parties to these proceedings.

XIV.

The Commission's majority report does not question the foregoing evidence referred to in Section XII of this complaint, except in two respects. These two respects, however, are vitally significant of the fundamental errors underlying the Commission's orders and findings in these proceedings.

XV.

The majority report states (p. 355) with reference to the Garfield smelter:

"It is clear from the foregoing that even under the published tariffs providing for a charge of \$1 per car for each movement after an interruption has occurred resulting from orders from, or requirements of, the smelter, respondents have failed to charge for switching movements that are not held out in the tariffs to be performed without compensation. For example, the smelter paid the \$1 charge on but 117 carloads of interstate traffic and on 364 carloads of intrastate traffic. The record shows the inbound movement during that period was 1,438 carloads interstate and 21,544 carloads intrastate. The record shows that 210 carloads of interstate traffic were switched to and from the thaw house and a corresponding service rendered on 908 carloads of intrastate traffic. Frozen traffic is handled in six distinct switching moves and the fair and reasonable inference is that at least on that character of traffic there were services rendered on which charges were due under the tariff at the rate of \$1 per car for each such movement not otherwise provided for in the tariff."

Nowhere else does the majority report even suggest, much less find, that in any other instance the plaintiff carriers have failed to collect or the plaintiff industry failed to pay any terminal switching charges provided by the published tariffs.

It is to be observed, moreover, that the foregoing statement in the majority report, intimating that the plaintiff carriers have failed to collect, and the plaintiff industry has failed to pay, in certain instances, switching charges for so-called "interrupted movements" at Garfield, is based, at most, on inference. If there have been such instances, which the record fails to establish,* the plaintiff carriers and the plaintiff industry would admit that any failure to collect or to pay any terminal switching charges, or any other charges, provided by the carriers' published tariffs, would constitute a violation of Section 6 (7). However,

12 | neither the Commission's findings of violations of Section 6 (7) at Garfield, nor its order to cease and desist from such alleged violations, are limited to instances of failure to collect and pay such charges in addition to the line-haul rates as are now provided by the carriers' tariffs for terminal switching services involving "interrupted movements". On the contrary, under such findings and order, Section 6 (7) would be violated unless charges in addition to the line-haul rates should be collected and paid for all terminal switching services beyond the "plant yard" *even though no "interrupted movements" be involved, and even though the carriers' tariffs provide additional charges only for "interrupted movements"*.

XVI.

At page 358 of the majority report,** the nature of the record before the Commission, showing that the line-haul

* Even in connection with these alleged instances at Garfield, it should be noted that both the plaintiff carriers and the plaintiff industry testified on hearing and contended on argument (Tr. 135-136; 309-310; 531-533) that the terminal switching movements to which the report refers did not constitute "interrupted movements" within the definition of the tariffs, since they were not movements "resulting from orders from, or requirements of, the smelter."

** The majority report there states:

"At the reargument it was contended by the industry, as well as by the carriers, that the line-haul rates include compensation for any and all services performed within the plant. This they contend is true irrespective of the level of the rates and irrespective of how complicated that service may be, how many engines the carriers are required to keep in the plant to perform that service; how much time is devoted exclusively to

Footnote continued on page 16

Furthermore, the basic report states (p. 24):

"The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge . . . is a question of fact to be determined in each case."

XXI.

As further shown in Appendix A, the instant case is fundamentally distinguishable from all cases heretofore decided by the Commission under *Ex Parte 104, Part II*, in which the Commission has held that the rendition of terminal services at the industries involved violates Section 6 (7) because in excess of team-track or simple switch delivery, in the following respects:

(a) In no such previous cases did the tariffs, as in the instant case, expressly provide that the line-haul rates include terminal services in excess of team-track or simple switching delivery;

(b) In no such previous cases did the Commission find that the line-haul rates included compensation for terminal services in excess of team-track or simple switching delivery;

(c) In no such previous cases were the line-haul rates on any of the commodities involved, as in the instant case, based on actual value and destination weights, requiring terminal switching movements in order to determine the value and weight of such commodities for the determination by the carriers of their lawful charges;

(d) In no such previous cases, therefore, has the Commission undertaken to hold that Section 6 (7) would be violated where, as in the instant case, the tariffs specifically provide that the terminal switching services necessary to determine value of commodities moving under rates based on actual value are included in the line-haul rates, or where the line-haul rates themselves include compensation for such terminal switching services.

* The Supreme Court in *United States v. American S. & F. Plate Company* 301 U. S. 402, 411, held, with reference to the Commission's basic report in this respect:

"The Commission properly held that each case must be decided upon the circumstances disclosed."

21

XXII.

The Commission's order herein in requiring the plaintiff carriers to cease and desist from the alleged violations of Section 6 (7) of the Act, as set forth in its findings in its supplemental report on reconsideration, is without foundation in law, is based on errors of law, is arbitrary and capricious, is in violation of the Interstate Commerce Act, and exceeds the statutory powers of the Commission in the following respects:

16 (1) Such order is without adequate finding or any evidence to support it.

(2) The findings upon which such order purports to be based are themselves without evidence to support them and contrary to the uncontradicted evidence of record.

(3) Such order and findings are based on a fundamental error of law in that as a matter of law Section 6 (7) of the Act can be violated only by departure from the provisions of published tariffs and cannot be violated by compliance therewith, even though such tariff provisions violate other sections of the Act. The Commission has made no findings whatever that the plaintiff carriers have departed from their published tariffs or have not complied with them, and there is no evidence whatever which would support such findings. Neither has the Commission made any findings of violations of other sections of the Act.

(4) Such order and the findings upon which it purports to be based involve a further fundamental error of law in that, as a matter of law, the plaintiff carriers could not violate Section 6 (7) of the Act by performing without charge in addition to the line-haul rates terminal services specified by their tariffs as included within those rates, even though their line-haul rates did not, as the uncontradicted evidence shows they do, include compensation for such terminal services, and although thereby violation of other sections of the Act might be involved.

(5) Such order and the findings upon which it purports to be based involve a further fundamental error of law in that, as a matter of law, the plaintiff carriers could not violate Section 6 (7) of the Act by performing terminal services at the charges published in their tariffs even though, as to which there is no evidence, such charges be "nominal", "unreasonably low" or "less than the full cost of service for those services", and although thereby violation of other sections of the Act might be involved.

(6) Such order and the findings upon which it purports to be based, as interpreted at Sheet 7 of the majority report, not only involve the fundamental errors of law specified under (3), (4) and (5), but are void for uncertainty, and meaningless when applied to the uncontradicted evidence of record. As to such findings, the majority report states (p. 355):

"Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

"The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge but also charges which are not less than the full cost of service for those services for which they now publish charges."

There is no evidence that any terminal switching service beyond the "plant yard" at Garfield, the "hold tracks" at Murray and the "flat yard" at Leadville is performed at "unreasonably low charges" or "without charge". The uncontradicted evidence is that charges for such services are included in the line-haul rates. Neither is there any evidence that the charges in addition to the line-haul rates now published at Garfield and Murray for so-called "interrupted movements" are "nominal", "unreasonably low" or "less than the full cost of service", nor did the Commission make any investigation in these respects.

17 (7) Such order, in connection with the findings upon which it purports to be based, would, itself, require the plaintiff carriers to violate Section 6 (7) of the Act by seeking to compel them to disregard their published tariffs and to collect charges in excess of those provided by such tariffs, without any finding that such tariffs themselves violate the Act in any respect and without any evidence upon which to base such a finding.

(8) Such order and the findings upon which it purports to be based would require the plaintiff carriers (i. e. The Bingham & Garfield, the Denver & Rio Grande and the Union Pacific), in violation of Section 6 (7) of the Act, to collect and the plaintiff industry to pay at Garfield and Murray charges in addition to the line-haul rates for all terminal movements beyond the "plant yard" at Garfield and the

"hold tracks" at Murray, whether or not any "interrupted movements . . . resulting from orders from, or requirements of, the smelters" be involved, although the effective tariffs at Garfield and Murray provide charges in addition to the line-haul rates on either inbound or outbound shipments only for such "interrupted movements", and although the Commission neither makes any finding that such tariff provisions are unlawful in any respect nor requires their cancellation.

(9) Such order and the findings upon which it purports to be based would require the plaintiff carrier Denver & Rio Grande, in violation of Section 6 (7) of the Act, to collect, and the plaintiff industry to pay at Leadville charges in addition to the line-haul rates on all terminal switching movements beyond the "flat yard", although the effective tariffs at Leadville expressly provide, and since 1920, have provided that such line-haul rates include

" . . . movement of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to designated unloading points indicated by the sampling company."

(all such terminal movements being beyond the "flat yard"), and although the Commission neither makes any finding that such tariff provisions are unlawful in any respect, nor requires their cancellation.

(10) If the Commission's order is intended to require the plaintiff carriers to cancel their present tariff provisions so far as inconsistent with that order and with the findings upon which it purports to be based, such order is without authority in law. Nothing in Section 6 (7) of the Act authorizes the Commission to require the cancellation of any provisions of published tariffs even though such tariff provisions may violate other sections of the Act, and any order of the Commission requiring cancellation of published tariffs must be based upon findings of violations of other sections of the Act and on evidence to support such findings. (See pp. 6-9 of Exhibit B-6 to Appendix B to this complaint.)

(11) Such order is without findings, or evidence to support such findings, that the line-haul rates are less than minimum reasonable rates for the line-haul service, including movement beyond the "plant-yard" at Garfield, the "hold tracks" at Murray and the "flat yard" at Leadville.

On the contrary, the only evidence of record shows that the line-haul rates include compensation for movement beyond the points specified, and therefore are not less than minimum reasonable rates.

(12) Such order and the findings upon which it purports to be based, would require the plaintiff carriers to violate Section 1 of the Act by collecting charges in addition to the line-haul rates for terminal services, compensation for which is already included in such line-haul rates, thereby requiring the carriers to collect, and the plaintiff industry to pay twice for the same terminal services.

(13) Such order and the findings upon which it purports to be based, would require the plaintiff carriers to violate Section 2 of the Act, by collecting charges in addition to the line-haul rates for terminal services at Garfield and Murray, for the switching services involved in sampling to determine the value of ores and concentrates, where final delivery thereof is made at either of those smelters, although such carriers are required under their published tariffs, providing for the sampling in transit of such commodities at such smelters, to perform at such smelters, without charge in addition to the line-haul rates, exactly the same switching services for the same purposes, on the same commodities, originating at the same points, under the same line-haul rates, if such commodities after sampling are re-consigned for final delivery to other points specified in such tariffs.*

* The statement in the majority report with reference to this issue illustrates the wholly arbitrary nature of that report and of the findings and order in connection therewith. The majority report states, (pp. 357-358)

"The industry contends that any charges for the various services attending the weighing of the cars, and switching to and from the thaw house and sampler, would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act, as no charges are made for identical services when the ore and concentrates are sampled and reshipped out of the plant, in many instances from one smelter owned by the American Smelting and Refining Company to another owned by the same company. This proceeding is one to determine whether section 6(7) is being violated. If it is, a continuation of such a violation cannot be sanctioned, because its removal may necessitate changes in other concessions granted in the carriers' tariffs. If the industry's contention were sound, a question which it is not necessary for us to pass on here, the obvious remedy available to respondents would be to cancel the offending transit provisions, or to provide reasonable charges for the services rendered in addition to those attending a through movement."

Footnote continued on page 25

If the statement, page 366, of the majority report, "As stated, the Denver and Rio Grande owns and maintains all standard-gage tracks within the plant area. The Commission considered a similar situation in *Sioux City Term. Ry. Switching*, 241 I. C. C. 53 and 241 I. C. C. 623, and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of section 6(7) of the act",

is intended as a finding that the plaintiff, Denver and Rio Grande, by the ownership and maintenance of tracks within the smelter area at Leadville used by such plaintiff carrier for the handling of traffic not only of the plaintiff industry but of independent shippers, violates Section 6(7)

Footnote continued from page 24

1. This proceeding is not, as the majority report states, only "to determine whether Section 6(7) is being violated." The Commission's original order in *Ex parte* 104, Part II, instituting a general investigation, as well as its subsequent orders instituting the instant supplemental proceedings with specific reference to the terminal services at the smelters of the plaintiff industry, in terms extend to any violations of the Act. (See Exhibit A-1 to Appendix A, and Exhibits B-1 and B-2 to Appendix B to this complaint.)

2. The ungrammatical construction of the quoted statement makes it difficult to determine its exact meaning.

Presumably, what that statement means is that even if the order in the instant case, in connection with the findings upon which it purports to be based, requires the plaintiff carriers to violate Section 2, such violation can be avoided by the cancellation by those carriers of the sampling in transit provisions presently published in their tariffs. It is to be noted that these sampling in transit provisions are referred to as "the offending transit provisions." The report, however, makes no finding that such sampling in transit provisions violate either Section 6(7) or any other section of the Act. Moreover, Commissioner Alldredge, in his dissenting opinion from the majority report (pp. 367-368) points out that these sampling in transit provisions were specifically approved by the Commission in *Non-ferrous Metals*, 204 I. C. C. 319, 389, notwithstanding the Commission's knowledge that no compensation was charged in addition to the line-haul rates for the switching services involved in such sampling in transit.

3. The off-hand suggestion that the plaintiff carriers, by cancelling such sampling in transit provisions, might avoid any violation of Section 2 which may be involved in the Commission's order herein, ignores the uncontradicted evidence that such provisions are of vital importance to the non-ferrous mining interests in the western States (see testimony of Mr. Tuckwood quoted at pp. 10-12 of Appendix B to this complaint), that such interests were not made parties to this proceeding, and that any tariffs which the plaintiff carriers might file for the purpose of cancelling such provisions, would undoubtedly be suspended by the Commission itself on the petition of those interests.

of the Act, and if the Commission's order requires the plaintiff Denver and Rio Grande to desist from such ownership and maintenance, such finding and order would be not only unauthorized under Section 6(7), but unwarranted by, and in conflict with the Commission's report in the case cited.

XXIV.

If the statement at pages 355-356 of the majority report, with reference to the terminal switching agreement between the Denver and Rio Grande and the Union Pacific at Garfield, that:

"Under the terms of the switching agreement by the Denver and Rio Grande and the Union Pacific, the expenses incurred and switching charges received by the former are apportioned between the carriers in the ratio that the movement of revenue carloads handled under the joint switching service for each carrier bears to the total movement of such revenue cars handled. This is a pooling of traffic for which no authorization under section 5(1) of the act is shown"

and the reference at page 363 of the majority report to the terminal switching agreement between the same plaintiff carriers at Murray, are intended as findings that such switching agreements violate Section 5(1) of the Act, and if the order requires said plaintiff carriers to cease and desist from performing such switching agreements, such findings and order would be unauthorized and without warrant in law, in that such switching agreements are expressly exempted from the provisions of Section 5(1) of the Act by the last sentence of Section 1(18) of the Act, reading as follows:

"Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Moreover, the evidence shows that the terms of such switching agreements do not, within the meaning of Section 5(1), constitute a

"pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof."

The plaintiff industry was a party to and participated in the proceedings before the Commission in which

the order and findings here assailed were made. That order, and the findings upon which it purports to be based, would require the plaintiff carriers to collect and the plaintiff industry to pay additional charges for the terminal services therein described, over and above the charges heretofore collected and now collected by the plaintiff carriers, and over and above the charges heretofore and now prescribed by their published tariffs. Such order would require the plaintiff carriers to act contrary to their proper managerial judgment in that, as shown by the uncontradicted evidence, such additional charges would result in reducing the revenues of the plaintiff carriers by preventing the movement of substantial amounts of non-ferrous ores and concentrates which now move under their present tariff charges. The plaintiff carriers and the plaintiff industry therefore have pecuniary interests in the rates, charges and services which would be affected by the order of the Commission here assailed, and unless that order is restrained, enjoined and set aside by order of this Court as herein prayed, said plaintiffs will suffer irreparable injury and damage.

WHEREFORE, plaintiffs, being without adequate remedy at law, respectfully pray:

FIRST: Upon the filing of the complaint the presiding judge of this Court shall call to his assistance in the hearing and determination hereof two other judges, of whom at least one shall be a circuit judge.

SECOND: That process may issue against defendants United States of America and Interstate Commerce Commission, and that due and proper service of such process and of this complaint be forthwith made by filing a copy of said complaint in the office of the Secretary of the Interstate Commerce Commission and another copy thereof in the Department of Justice, as provided by law.

THIRD: That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States a hearing be held, and that thereupon an interlocutory decree be issued staying and suspending said order of the Interstate Commerce Commission pending final hearing and determination of this complaint.

FOURTH: That upon final hearing of this cause a permanent injunction issue decreeing that the order of the Interstate Commerce Commission hereinbefore described is beyond the lawful authority of said Commission and

wholly null and void; that said order be set aside and annulled; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce the aforesaid order.

21 FIFTH: That this Court grant the respective plaintiffs such other and further relief as may be deemed proper in the premises.

/S/ C. C. PARSONS

/S/ W. Q. VAN COTT

/S/ H. B. THOMPSON

/S/ PAUL RAY

Attorneys for Plaintiffs

OTIS GIBSON

/S/ ELMER B. COLLINS

JOHN F. FINERTY

Of Counsel

June —, 1947.

23

Exhibit C-1

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1946.

AMERICAN SMELTING & REFINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon reconsideration of the record in this proceeding concerning the lawfulness and propriety of the terminal services, charges and practices of Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company, in the receipt and delivery of carload freight at plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., and the Commission having under date of May 14, 1935, made and filed a report, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11,

containing its legal conclusions with respect to the general situation presented and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the services rendered to the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that the Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company violate the Interstate Commerce Act in the particulars as set forth in the above report:

It is ordered, That the Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company be, and they are hereby, notified and required to cease and desist, on or before January 31, 1947, and thereafter to abstain, from such unlawful practice.

By the Commission.

W. P. BARTEL
Secretary

(SEAL)

24

Exhibit C-2

24796

INTERSTATE COMMERCE COMMISSION

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Submitted June 27, 1946. Decided October 14, 1946.

On reconsideration, findings in prior report, 263 I. C. C. 719, that respondents' line-haul rates do not include services beyond the tracks described of record at plants of the American Smelting & Refining Company located at Garfield and Murray, Utah, and Leadville, Colo., and that the performance of such services by respondents beyond those tracks, without reasonable compensation in addition to the line-haul rates, is unlawful, affirmed.

Appearances same as in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION :

In the prior report herein, 263 I.C.C. 719, decided October 1, 1945, division 3 considered the propriety and lawfulness of switching services rendered by respondents at plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., and found, in substance, that respondents' line-haul rates do not include compensation for such services beyond certain tracks described of record, and that the performance of such services, without compensation in addition to the line-haul rates, was unlawful.

Upon petitions of the parties, the proceeding was reopened on June 3, 1946, for reargument before, and reconsideration by, the entire Commission. Oral argument has been heard.

The prior report herein covers three industrial plants. It contains a full and complete statement of all the material facts of record including, among others, a description of the track layouts leading to and within the plants; the loading and unloading points; the volume of traffic that moves to and from the plants and to and from the several loading and unloading points; and the amount and character of the services performed within the plant. With a view, therefore, of avoiding unnecessary repetition, that report is hereby incorporated and made a part hereof, and only such facts are restated as are deemed necessary to a proper understanding of this report.

349

(350)

GARFIELD PLANT

This plant is principally engaged in processing copper and is served by the Union Pacific,¹ Denver & Rio Grande,² and Bingham & Garfield.³ All loaded and empty cars are delivered or received by the line-haul carriers in the plant yard. Generally speaking, all in-bound loaded cars, except Utah copper concentrates, are held in that yard until written instructions from the industry, issued three or four times a day, are received by the switching crew for placement.

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

³ Bingham & Garfield Railway Company.

The preponderance of in-bound traffic is concentrated, practically all of which is transported by the Bingham & Garfield at rates specifically limited to apply only to the plant yard. These are delivered on designated tracks in the plant yard adjacent to the track on which the plant scale is located. Except in freezing weather, these shipments, without specific order from the smelter, are pulled by the east-end engine, in drags of approximately 15 cars, through the east end of the plant yard beyond a cross-over from the Denver & Rio Grande lead to the Bingham & Garfield lead, a distance of approximately 1,200 feet, and then pushed west a similar distance to the scale, where they are shoved on the scale by the engine, one at a time, weighed, and then moved by gravity to the unloading point at the sampler building,* which is immediately beyond the scale. After unloading at the sampler, the cars drift by gravity to the west-end of the plant yard, about 600 feet, where the west-end engine gathers the empties and returns them to the plant yard. The east-end engine then moves the empty cars to the scale in the same manner as it handled the loaded cars and, after weighing, the cars again drift down to the west-end of the plant yard, where the west-end engine again gathers them and switches them to appropriate tracks in the plant yard for movement out-bound. All of the foregoing movement takes place on the upper level. After copper concentrates are dumped into the sampler, the industry handles them by conveyor belts or other mechanical means, until the copper bullion is ready for out-bound movement.

During the winter months, raw materials, such as crude ore, concentrates, tailings, or sand, arriving in a frozen condition, are pulled from the plant yard, weighed, and drifted by gravity to the west end of the yard, whence the cars are switched to the thaw house by the west-end engine, where they remain from 2 to 4 days. The thaw house is also on the upper level. After thawing, the cars are returned to

(351)

the plant yard, reweighed, and, with the exception of those loaded with concentrates, held until written instructions for placement have been issued by the industry. As stated, concentrates are handled without written instructions.

* This sampler can only be used for sampling concentrates. Crude ore must first pass through crushing mills before it can be sampled.

About 6,800 earloads, or 34 percent of all metal-bearing raw materials received at the plant during the representative period, after being weighed once or twice, dependent on the weather, were unloaded into receiving bins on the middle level. The distance traversed from the plant yard to the unloading bins is about 3,200 feet. Four percent of the ore in these cars, or about 270 earloads, after it had been milled and sampled, was either reloaded into railroad cars for intraplant movement to stock piles, or was reloaded into cars which were held in the plant yard for shipper's further instructions, or was reforwarded to other destinations under a sampling-in-transit arrangement, as hereinafter described. In addition to the latter cars, 1,399 intrastate and 95 interstate earload shipments of miscellaneous tailings, 192 of which moved to and from the thaw house, were unloaded at stock piles or at the ore docks on the middle level.

Of the 6,800 earloads referred to, 947 earloads consisted of crude ore, and constituted the bulk of the interstate inbound tonnage. Of this number, 183 cars were switched to the scale through the east end of the yard, as described in connection with concentrates, and, after weighing, drifted by gravity to the west end of the yard from where the west-end engine switched them to the thaw house. Subsequently, these cars were again weighed, loaded, and returned to the plant yard, awaiting orders from the smelter for further movement. The necessity for weighing the ore prior to and after thawing is explained hereinafter, in connection with moisture sampling. The remaining cars, which did not move through the thaw house, were weighed and moved to the west end of the yard, as described, and also returned to the plant yard. All earloads of crude ore are returned to the plant yard, after weighing or thawing, for spotting orders. On the receipt of such orders, the cars are pulled west to the switch connecting with the ore dock tracks on the middle level, and set on those tracks for unloading into bins. The number of shipments that can be switched to the ore bins is limited by the smelter's requirements. At times only a few cars are moved for the purpose of matching up with other cars, and the remainder on hand are switched later. The carrier is not at liberty to spot cars as soon as they arrive at the plant, but must await instructions from the smelter. In addition to the interstate shipments of crude ore, there were handled in like manner 3,535 earloads of intrastate crude ore, of which 298 earloads moved through the thaw house. All of these cars were ultimately switched by the west-end engine to the unloading bins

(352)

described. The actual spotting of the cars is performed by plant employees. It will thus be seen that with respect to frozen ore, there are 6 distinct switching moves after the road-haul engine has cut off the car in the plant yard and prior to placement for unloading: (1) To the scale; (2) to the thaw house; (3) to the plant yard; (4) to the scale; (5) to the plant yard; and (6) to the unloading spot.

In-bound carloads of crude ore and concentrates and of other miscellaneous metal-bearing materials are sampled to determine the percentages of moisture they contain, while they are moving into the plant yard, except when they are frozen, by removing some of the material in buckets. When the lading is frozen, the moisture is dried out in the thaw house, and the car is reweighed to ascertain the dry weight, on which basis the smelter makes settlement with the shipper. The published rates apply on the so-called wet weight of the shipment as it first goes over the scale, and are dependent upon value, as more fully explained hereinafter. In other words, for the purpose of determining the freight charges, the value of the ore and concentrates, based on the dry weight, is converted to a wet weight basis and applied to the shipping weight. A few cars of miscellaneous tailings are pipe sampled^a and unloaded into stock piles on the middle level, without passing through the sampling mill.

Empty ore cars are pulled by the east-end engine from the unloading bins on the middle level to a switch connection with the scale track on the upper level, and then pushed west to the scale, whence they drift by gravity to the west end of the plant yard and are assembled by the west-end engine into out-bound trains. A small percentage of these empty cars is not weighed, for the reason that the crude ore was unloaded at a stock pile. Such cars are taken directly to the plant yard by the east-end engine. About 85 percent of all in-bound cars are weighed after unloading.

Practically all carloads of miscellaneous in-bound materials and supplies, such as salt, coal, brick, pig iron, fuel oil, lumber, *et cetera*, were switched from the plant yard to the scale, weighed, and, on specific order, moved west to the switchback, leading to the lower level for unloading at various points, or were set on tracks on that level for further handling by smelter facilities.

^a Pipe sampling of tailings or concentrates is performed by inserting a tube at several different points in the load, and the material extracted is then assayed to determine value.

The preponderance of the interstate out-bound loaded movement consists of copper bullion, sulphuric acid, and converter dust. Empty cars for loading copper bullion reach the plant yard over the Bingham & Garfield and are generally switched twice a day by the west-end engine, without being weighed, to the so-called copper-casting building (353).

ing on the lower level. As a general rule, they are set on tracks serving that building and are spotted by the smelter facilities. The cars are weighed empty and loaded in the copper-casting building. Loaded cars switched from the lower level to the plant yard, a distance of over 1 mile, encounter excessive grades, particularly to the first switch-back, which limit the capacity of the engine to 5 cars. Approximately 16 carloads of copper are shipped daily. All out-bound loads of copper move over the Bingham & Garfield.

Tank cars for loading sulphuric acid, and open-top cars for loading converter dust, are switched from the plant yard to the loading point on the lower level, in much the same manner as bullion empties, except that those for acid are weighed. The switching of the loaded cars is quite similar to that of switching loaded cars of copper bullion, and the number of cars that can be handled is also limited by the grade.

From 1905 to 1908, switching within the Garfield plant was performed free by the Denver & Rio Grande "in accordance with agreement reached at time construction of the plant was discussed." Effective April 16 on intrastate traffic, and May 23, 1908, on interstate traffic, that carrier published for the first time the following tariff provision:

Switching from track to track within smelter plants served by the Denver and Rio Grande Railroad all cars containing freight which has paid transportation charges to the plant * * * free.

This provision remained in effect until February 25, 1920, when the following provisions were first incorporated in the tariffs:

Initial or delivery switching at smelters in Colorado and Utah—Delivery of a Line Haul carload shipment destined to smelters at * * * Garfield, Murray and Midvale, Utah, will include one movement of commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company.

Intra-plant or internal switching at smelters in Colorado and Utah—From track to track within smelter plant for each additional movement not provided for above \$2.50 per car.

Effective November 27, 1920 the tariff was amended to provide for free switching on line-haul shipments moving to and from the smelter thaw house. Similar provisions were published by the Union Pacific.

In purported compliance with the principles announced in the original proceeding, 209 I. C. C. 11, the governing tariffs of the Denver & Rio Grande and Union Pacific were amended, effective July 5, 1938, on interstate traffic and June 25, 1938, on intrastate traffic, to provide:

Garfield, Midvale and Murray, Utah.

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be

(354)

accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE--By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

These tariff provisions and charges are in effect at the present time.

Specific switching charges are at present in effect in connection with traffic switched by the Denver & Rio Grande for account of the Bingham & Garfield. A charge of \$2.25 per car, in addition to the line-haul rate, is paid by the smelter for switching concentrates originating at Magna or Arthur, Utah, to the sampler. A similar charge applies on clay or sand received from the Bingham & Garfield in the plant yard and switched to unloading point. On all intrastate carload traffic not specifically provided for above,

the Denver & Rio Grande maintains a switching charge of \$3.60 per car, for switching between track connection with the Bingham & Garfield and points within the smelter yard, which is absorbed by the latter carrier. A charge of \$3.96 is maintained for similar service on interstate traffic.

Based on the foregoing tariff provisions and charges, the Bingham & Garfield paid to the Denver & Rio Grande during the representative period, a total of \$23,787.72 at \$3.96 per car on 6,007 cars for switching interstate line-haul traffic. The smelter paid to the switching carrier \$117 on 112 carloads of crude ore and 5 carloads of matte and speiss, based on the \$1 charge per car referred to above, for additional moves within the plant, \$105 for switching 210 carloads to and from the thaw house, and \$810.50 for weighing 1,621 empty cars.

An exhibit of record purports to show the amounts paid by the smelter and the Bingham & Garfield for switching
(355)

and weighing charges accruing to the Denver & Rio Grande, during the same period, on intrastate line-haul traffic and for intraplant service. The figures shown on this exhibit are apparently in error in certain respects. For example, it is shown that the smelter paid \$4,014 on 1,115 cars at \$3.60 per car for switching line-haul traffic. As indicated above, the charge applies for switching between track connection with the Bingham & Garfield and points within the smelter yard, and is absorbed by that carrier. The exhibit also shows that the smelter paid \$32,724 on 14,544 cars at \$2.25 per car on concentrates and sand transported by the Bingham & Garfield; \$364 on 364 cars at \$1 per car for additional moves within the plant; and \$454 for 908 cars at 50 cents per car for moving to and from the thaw house. In addition, the smelter paid to the Denver & Rio Grande \$1,522.80 on 564 cars for intraplant moves at \$2.70 per car, and \$2,838 on 5,676 cars at 50 cents per car for weighing empty cars. The Bingham & Garfield paid \$118.80 on 33 cars on the \$3.60 basis above referred to.

It is clear from the foregoing that, even under the published tariffs providing for a charge of \$1 per car for each movement after an interruption has occurred resulting from orders from, or requirements to, the smelter, respondents have failed to charge for switching movements that are not held out in the tariffs to be performed without compensation. For example, the smelter paid the \$1 charge on but 117 carloads of interstate traffic and on 364 carloads of intrastate traffic. The records shows the in bound move

ment during that period was 1,438 carloads interstate and 21,544 carloads intrastate. The record shows that 210 carloads of interstate traffic were switched to and from the thaw house and a corresponding service rendered on 908 carloads of intrastate traffic. Frozen traffic is handled in 6 distinct switching moves, and the fair and reasonable inference is that at least on that character of traffic, there were services rendered on which charges were due under the tariff at the rate of \$1 per car for each such movement, not otherwise provided for in the tariff.

Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge, but also charges which are not less than the full cost of the service for those services for which they now publish charges.

Under the terms of the switching agreement between the Denver & Rio Grande and the Union Pacific, the expenses (356)

incurred and switching charges received by the former are apportioned between the two carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5 (1) of the act is shown.

Owing to the complex nature of ores produced in the intermountain district and shipped to Utah smelters, there has been in effect for many years a so-called sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters, by allowing shipments of ores and concentrates to be sampled in transit at 1 or more of the Utah smelters, or the independent sampler at Murray, Utah, and then move to the smelter selected by the shipper. During the representative period, a total of 31 carloads of crude ore were sampled in transit at Garfield and reforwarded to other destinations, without charge in addition to the line-haul rate for the weighing and

switching service performed at the Garfield smelter. The sampling-in-transit provision published in D. & R. G. W. tariff I. C. C. No. 783, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Garfield, without charge for the first stop at the sampler, or for the out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 606.

The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it is stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry to which the shipment is consigned, will be a reasonable rule to apply in the future. The applicable tariffs provide that such ores and concentrates shall be billed from point or origin at a rate based on approximate value and, after the ore has been sampled, the rate will be revised in accordance with the value determined, and certified to the carrier as the basis on which settlement is made between shipper and consignee.

It is not deemed necessary to discuss the industry's contention that the charges published to apply beyond the plant yard do not apply to smelters, further than to say that the fact that the line-haul rates are based on value, does not place smelters in a special class as to the quantum of service embraced in those rates. Where rates are based

(357)

on value, the obligation is generally on the consignor to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, owing to the fact that there is considerable variation in the value of ores from the same region and the consignors, in many instances, do not have facilities for sampling at origin. It is a custom of the smelting industry to make settlement between the seller and buyer on a basis of weights and value determined by the buyer. The smelters voluntarily agreed to furnish the necessary information, and the carriers provided specific

ly in their tariffs that the rates collected or approximate values will be revised "in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry." There is no sound basis for the contention that such a concession increases respondents' common-carrier obligations and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the sampling. The furnishing of the values is the obligation only of the smelters and not of the carriers.

A carrier is required to ascertain the weight of shipments, and this is ordinarily done at origin stations or en route as near origin as practicable. When a car is so weighed and reweighed at destination at the request of the consignee, or for his benefit or purpose, a charge should be made for switching to and from the scales as well as for the actual weighing, unless the billed weight is found not to be within the tolerance limit. Carriers ordinarily use the weights stenciled on cars as the correct empty weight of those cars. A charge should therefore be made for weighing all empty cars at origin and destination unless, on weighing, the stenciled weights are found to be not within the allowed tolerance.

When shipments originate and terminate at stations where carriers do not have scales and do not pass track scales en route, and when their tariffs do not provide for estimated weights, a carrier would be justified in weighing the cars at destination, without charge therefor, on private scales of the consignee, instead of attempting to estimate the weight. The weighing of cars at destination as a step in ascertaining the moisture content and to ascertain invoice weights or for any other industrial purpose, and the reweighing of cars after thawing, and the weighing of empty cars at the smelter, is for the benefit of the industry and constitutes an interruption in switching, prevents the placement and removal of cars in a continuous movement, and are services not embraced in the line-haul rates.

The industry contends that any charges for the various services attending the weighing of the cars, and switching to and from the thaw house and sampler, would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act, as no charges are made for identical

(358)

services when the ore and concentrates are sampled and reshipped out of the plant, in many instances from one smelter owned by the American Smelting and Refining Com-

pany to another owned by the same company. This proceeding is one to determine whether section 6 (7) is being violated. If it is, a continuation of such a violation cannot be sanctioned, because its removal may necessitate changes in other concessions granted in the carriers' tariffs. If the industry's contention were sound, a question which is not necessary for us to pass on here, the obvious remedy available to respondents would be to cancel the offending transit provisions, or to provide reasonable charges for the services rendered in addition to those attending a through movement.

At the reargument it was contended by the industry, as well as by the carriers, that the line-haul rates include compensation for any and all services performed within the plant. This they contend is true, irrespective of the level of the rates and irrespective of how complicated that service may be; how many engines the carriers are required to keep in the plant to perform that service; how much time is devoted exclusively to that service; whether they are required to perform it only at the time selected by the industry; and irrespective of the amount of traffic handled. To bolster this contention, they refer to an opinion expressed at a prior hearing in 1932 by the then general freight agent of the Denver & Rio Grande, that the line-haul rates included compensation for weighing, assaying, sampling, thawing, and spotting. The present freight-traffic manager of that carrier testified, in the instant proceeding, that the opinion theretofore expressed was correct. No showing was made that the witnesses had anything to do with the making of the rates, or were even in the carrier's service when the rates were first established. They are not shown to have any information relative thereto, except such as is shown in the tariffs, and inferences they draw from the past practices of the carrier. One of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the switching services. That is a question that is susceptible of proof by factual evidence. It is the function of witnesses to furnish such evidence, and the province of the Commission to make the conclusion of fact.

Neither at the time of, or subsequent to, the publication of the so-called "free" switching provision was any change made in the transportation rates. Moreover, the fact that the carriers recognized that the line-haul rates did not include compensation for the switching service is shown by the fact that the Oregon Short Line Railroad Company,

now the Union Pacific, filed suit in the District Court of the United States, District of Utah, Central Division, on (359)

November 20, 1916, to recover the sum of \$60,378.71, on account of switching services performed by the carrier for the smelter at Murray. This action was filed to recover the value of such switching services between December 1, 1912, and October 31, 1916, and under an agreed statement of facts the amount claimed was admitted to be the reasonable value of the services rendered.

The carrier contended that the word "free" in the tariffs, which became effective May 23, 1908, on interstate traffic, meant free in the sense that the carrier thereby undertook to donate and give to the smelter the value of the services so rendered; that such donation was in effect a rebate from the rate prescribed in the tariff; that such rebate was not only unlawful in itself, but amounted to an unreasonable discrimination against other shippers; and that such a provision, even though in a tariff publicly filed with the Interstate Commerce Commission, showed upon its face that it was illegal.

The smelter maintained that the word "free," used in the tariff, meant only that the switching service described therein would be performed without any additional charge than that provided in the rate; that the value of such service was considered in making the rate and included therein; that there was no law which required the separation of the switching charge from the transportation charge; and that the switching charge being included in the transportation rate was not a rebate, as claimed.

The court found that there was nothing in the record to show the circumstances under which the tariffs were made and filed, but that it was possible that, in making the tariff providing the rate of transportation, the reasonable value of the contemplated switching service was included. It stated, however, that such, of course, might not be the fact, and that perhaps in a prosecution by the United States, or in a complaint made by a shipper, facts would be developed which would show that this service was in fact a rebate and an unreasonable discrimination against other shippers. However, the court said "as the record now stands there is not only a failure of proof with respect to these matters, but a fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate." The action was dismissed.

It is clear that the line-haul rates when first established did not include the expensive terminal switching performed at the smelter, and that they have not been increased since that time to include, and do not now include, compensation for such services.

With respect to movement of all commodities, both in-bound and out-bound, the evidence is convincing that the switching at the plant must be coordinated with the industrial operations thereof, and that the line-haul carriers
(360)

could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant area, without interfering with one another and without encountering interference from the intrastate traffic and from the intraplant operations.

We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services, which it is the duty of respondents to perform for the American Smelting & Refining Company at Garfield, Utah, under the line-haul rates, begin and end at the plant yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the plant yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act.

MURRAY PLANT

This plant is engaged in processing lead ores and concentrates and is served by the Union Pacific and Denver & Rio Grande. There are four tracks within the plant, particularly described in the prior report, designated tracks 5 and 6, and the north coke and south coke tracks, collectively referred to as hold tracks, which are used for holding in-bound and out-bound loaded cars.

Written switching instructions are given to the switch crew by the industry and all cars are moved to meet the requirements of the plant.

A total of 351 carloads of lead concentrates was received at this plant during the representative period, constituting 18 percent of the total in-bound shipments of raw materials received. The method of handling this traffic is to push the

cars over the track scale, uncouple, and weigh them. After each car is weighed, it is said that it is rolled forward by momentum supplied by the next car placed on the scale. The switch engine then backs up over a switch a short distance from the scale, passes the scale, couples the cars, and pushes them to the hold tracks. The concentrates are pipe and moisture sampled on the hold tracks. The pipe samples are transported to the sampler, ground, screened, and subsequently assayed for value of metal content. After their value is determined, the concentrates are switched from the hold tracks to the unloading spot.

There were also received 421 carloads of iron concentrates which were handled in the identical manner as lead concentrates, with respect to weighing, placement on hold tracks, moisturing, and sampling. Godfrey dust, of which (361)

there were 159 carloads received during the same period, was handled in the same way as lead concentrates.

A total of 696 carloads of crude ore was also switched to the hold tracks and sampled for moisture. Between 80 and 85 percent of these crude ores were unloaded on the high line, as described in the prior report, for crushing and screening in mill 1 and for sampling. There are two methods of handling this ore after milling and sampling. It may be carried by conveyor belts to the point where it is converted into calx. Approximately 96 of the total of 696 cars were handled in this manner. The remaining cars, after passing through mill 1 and the sampling room, were reloaded into railroad cars. The practice is to place 3 loaded cars with 1 empty car in front of them. The ore is unloaded from the first loaded car, passed through the mill and loaded into the empty car. That process is followed with the other cars. The cars are then switched in reverse movement to the sintering plant, an approximate distance of 3,400 feet. About 15 percent of the crude ore was switched from the hold tracks to mill 2 or mill 4. The ore spotted at mill 2 was crushed and sampled, and then reloaded into railroad cars and switched in reverse movement to the sintering plant, approximately 3,300 feet. Exceedingly hard ores were spotted at mill 4 and, after being ground, were reloaded into railroad cars and switched about 2,600 feet to mill 1 for further grinding, or to stock piles located along various tracks in the plant yard.

The prior report described the manner in which carloads of arsenic dust, speiss, matte, and other in-bound raw materials were handled after placement on the hold tracks.

In-bound material and supplies, aggregating 666 carloads, were all first switched to the hold tracks.

Of the total of 845 carloads of out-bound shipments during the representative period, 437 carloads consisted of lead bullion, all of which moved to interstate destinations. Boxcar empties for bullion shipments were weighed and, after loading, the cars were switched to the hold tracks, made up into drags with other out-bound loads and returned empties, and were taken to the scale, weighed, and delivered into the Pallas yard. There were 282 carloads of speiss calx shipped during the same period, which were handled out-bound in a similar manner to the bullion shipments, that is, they were switched to the hold tracks, made up into trains, weighed, and taken to the Pallas yard. All of the calx moved to intrastate destinations.

Concentrates and crude ore which arrived at the plant in a frozen condition were weighed and switched to the hold tracks, and from that point were switched to the thaw house. After thawing, the cars were returned to the scale for reweighing and then switched to the hold tracks and, as soon as the industry was prepared to unload them, to

(362)

unloading points. The necessity for weighing this traffic prior to and after thawing has been previously explained in connection with moisture sampling at the Garfield smelter.

Prior to May 25, 1908, switching at the Murray plant was performed free by the Oregon Short Line "in accordance with understanding reached with the carriers when the plant site was under consideration." The identical tariff provisions and switching charges of the Union Pacific and Denver & Rio Grande, hereinbefore set forth with respect to the Garfield smelter, are applicable at Murray.

For switching performed in connection with interstate line-haul traffic, the smelter paid, during the representative period, \$450 on 448 carloads of crude ore, 1 carload of concentrates, and 1 carload of coal, based on the \$1 charge per car for additional moves within the plant; \$80.50 for switching 117 and 44 carloads of crude ore and concentrates, respectively, to and from the thaw house at 50 cents per car; and \$540 for weighing 1,080 empty cars, at 50 cents per car.

During the same period the smelter paid \$13,505.40 for switching 5,002 cars in intraplant moves at \$2.70 per car; \$683 for weighing 1,366 empty cars, at 50 cents per car; \$383 on 383 cars based on the \$1 charge per car for addi

tronal moves within the plant; and \$128.50 on 257 cars, at 50 cents per car, for movements to and from the thaw house.

All in-bound and out-bound shipments are switched to the hold tracks. Raw materials, constituting the bulk of the traffic, are held there for moisturing and sampling, and awaiting instructions from the smelter with respect to the further movement of the cars. The final point of delivery of sampled ore or concentrates depends upon the assay after sampling.

Although a question was raised at the hearing and discussed in briefs, as to the extent of the Commission's jurisdiction to determine the legality of terminal switching services rendered on intrastate traffic, it is not deemed necessary to determine that question here. It will suffice to say that all circumstances and conditions that cause interruptions to, or that interfere with, the switching of interstate traffic, whether they be due to insufficient track capacity or unsafe conditions of the tracks, restrictions in use of tracks either as to time or operations, obstructions to free movement of engines or cars, switching of intraplant, intrastate, or interstate traffic, whether performed by industry or carrier engines, and other such factors, are matters that should be considered. This is especially true when, as here, the movements of in-bound and out-bound interstate shipments are so intermingled with intrastate and intraplant switching and so integrated into the operations of the industry that they are inseparable. For all practical

(363)

purposes, the industry controls the work, except as to the mechanical operations of the switching crews while they are operating in the plant. The switching is performed under the direction of a yardmaster employed by the industry, who specifies the particular cars and the time when, and places to or from which, they are to be moved. This is necessary, because the time and place when cars are to be spotted or removed from loading points are controlled by variable factors, as shown above, and must be coordinated with the operating practices and needs of the industry. Even the industry does not know when or where cars are to be spotted upon arrival at the plant. It is, therefore, clear that the manner in which the industrial operations of this plant are conducted prevents the switch engine that operates solely within the plant from performing switching beyond the hold tracks in a continuous and uninterrupted movement.

The previous discussion deals with the situation where the Union Pacific does all of the switching under a pooling arrangement not shown to be authorized by the Commission, as required by section 5 (1) of the act.

In *Kingan & Co. Terminal Allowance*, 255 I. C. C. 531, the carrier had not instituted a pooled switching operation but it was there indicated that, while it was impracticable and undesirable for each of the carriers serving the plant to perform its own switching, it would be possible for them to serve the plant by pooling operations and coordinating them to the plant's operations. Division 3 there said:

No duty devolves on a carrier to pool switching services in order to accommodate an industry when they could not individually perform the service with their own power, at their own convenience and free from interference.

It follows, as a matter of course that the fact that carriers have pooled services, as they have done here, does not create an obligation that did not previously exist, and that if they cannot individually serve the plant because of interference by one carrier's engine with another, there is no obligation on them to do so under a pooling arrangement. *United States of America v. Aberdeen & R. R. Co.*, 264 I. C. C. 683.

The actual switching operations as described above prove that it is impracticable, if not impossible, for each of the carriers serving the industry to perform its own switching without interference and at its convenience.

We find that respondents' interstate line-haul rates cover the delivery and receipt of earload shipments at reasonably convenient points; that the hold tracks as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services, which it is the duty of respondents to perform for the American Smelting & Refining Company at Murray, Utah, under the line-haul rates, begin and end at the hold
(364)

tracks; and that the movement of earload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the hold tracks as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act.

LEADVILLE PLANT

This plant is engaged in processing lead ores and concentrates and is served by the Denver and Rio Grande.

There are 6.04 miles of standard-gage trackage within the plant area, all owned and maintained in good condition by the Denver & Rio Grande.

The Denver & Rio Grande furnishes and maintains two switch engines which operate daily, except Sunday, between the flat yard and loading or unloading points within the plant. Occasionally it is necessary for one engine to perform some switching on Sundays. During cold weather, when the thaw house is in use, these engines leave Leadville at 6:30 a. m., arriving at the plant about 7 o'clock. In the summer months they begin their respective 8-hour tours of duty at 6:30 and 8 a. m. These engines interfere with each other when both are switching cars to and from the thaw house and to some undisclosed extent at other times but generally, because of the small volume of traffic, they are able to keep out of one another's way.

Traffic to and from the smelter is generally handled from and to Malta, Colo., by another engine which operates between that point and Leadville, but on occasions, "by arrangement with the smelter, by them arranging their work," the switch engines make trips to Malta and to two processing plants near the smelter to bring shipments of ore-bearing material to the smelter and, along therewith, shipments from those plants, to the flat yard for weighing and line-haul movement beyond.

The present practice is for the line-haul engine to set in-bound cars and receive out-bound cars in the flat yard. The switching engines handle all cars, both loaded and empty, to and from the scales and between the flat yard and the loading and unloading points, as well as most intraplant movements.

All switching in the plant is done under the direction and control of a yardmaster employed by and acting for the smelter. Written orders specifying the sequence in which, and the places to and from which, all cars are to be moved are given the switching crew by the yardmaster. Those orders are occasionally changed by oral supplemental orders. A great many of the moves made in accord therewith consist of one or two cars at a time.

The principal in-bound traffic consists of materials and supplies, and raw materials, including limerock, crude ore,

(365)

concentrates, and residue. During the 12 months' period ended March 31, 1944, the total in-bound movement was 2,260 carloads, of which 158 carloads, or 7 percent moved from interstate origins.

During the same period, the smelter shipped out-bound to interstate destinations 62 carloads of matte and speiss, and 409 carloads of lead bullion.

The average number of cars handled in-bound and out-bound, both interstate and intrastate, was 228 cars per month and, using 312 days to the year, 8.76 cars per day.

All shipments of concentrates, without exception, were switched from the flat yard to the scale and thence to the conveyor shed, where the concentrates were moisture- and pipe-sampled before unloading. Residue was similarly handled, but owing to plant requirements it was generally necessary to stock-pile this commodity at scattered points throughout the plant yard.

Crude-ore moved from the flat yard over the scale to the mill for crushing. Moisture sampling takes place after weighing. The ore was ground and sampled to determine assay value. All subsequent handling of this traffic after unloading at the mill was by smelter facilities. An insignificant percentage of crude ore was stock-piled. In cold weather the ore was switched from the scale to the thaw house, where it remained from 2 to 4 days, and was then re-weighed and switched to the designated unloading point.

In all instances, after unloading concentrates, residue, or crude ore, the empty cars were returned to the scale for weighing and then switched to the flat yard for movement out of the plant.

As indicated, the principal out-bound movement was lead bullion, consisting of one or two carloads daily. Cars for loading this commodity were first weighed empty and, after being loaded, were switched to the scale and then to the flat yard.

Ore produced at nearby mines in the vicinity of Leadville is trucked to the smelter and dumped directly into plant equipment for intra-plant movement over the scale, either to the crushing mill or into stock piles. The volume of such traffic in March, 1944 was equivalent to 29 carloads. In addition, about 6 carloads of trucked-in ore, and about 2 carloads of scrap iron per month, not belonging to the industry, moved from a loading dock in the plant yard to the flat yard, were weighed and shipped in line-haul movements. Between 70 and 80 carloads per month are handled for about 2.25 miles over the scale and through the flat yard for account of one processor, and 22 cars per month for a much shorter distance for another, together with cars from the same point for the smelter.

Most of the switching performed by the two switch engines takes place within the plant.

(366)

The Denver & Rio Grande tariff provision shown hereinbefore as effective May 23, 1908, February 25, 1920, and November 27, 1920, at Garfield and Murray, were contemporaneously applicable at Leadville, and, as presently in force, provide that delivery of a line-haul carload shipment destined to the smelter at Leadville will include movement within the smelter plant over track scales, to and from the thaw house, to and from a smelter sampler, or to and from a combination sampler and concentrator, to a designated unloading point indicated by the smelter company. For each additional movement of line-haul carload shipments, not provided for above, from track to track within the smelter plant, (including weighing over scales within the plant), a charge of \$2.97 per car is provided. The provisions hereinbefore shown at Garfield and Murray, effective July 5, 1938, with respect to the assessment of certain charges for switching, in addition to the line-haul rates, were never made applicable at Leadville.

Under the present tariff no charges are assessed for switching interstate line-haul traffic to and from the thaw house, or to and from the sampler, or for weighing empty cars after unloading. All intraplant movements, including movements from stock piles to various unloading points, are charged for at \$2.97 per car. For this service the smelter paid to the Denver & Rio Grande, during the representative period, \$240.57 on 81 cars for switching intrastate line-haul shipments, and \$11,006.82 on 3,706 cars handled in intraplant service. Empty cars belonging to the smelter are switched without charge.

The previous discussion and conclusions relative to the carrier's duty to weigh cars, loaded and empty, and to ascertain values of concentrates and ores in connection with the smelter at Garfield, are equally applicable at the Murray and Leadville smelters.

As stated, the Denver & Rio Grande owns and maintains all standard-gage tracks within the plant area. The Commission considered a similar situation in *Sioux City Term. Ry. Switching*, 241 I. C. C. 53 and 241 I. C. C. 623, and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of section 6(7) of the act.

Considerable emphasis is laid on the fact that the flat yard and scales are used by the Denver & Rio Grande for

the traffic of the two processors and for the ore and scrap iron which the industry permits others to load in its plant. The traffic for those processing plants is handled to and from the flat yard, only when trips are made by the switch engines assigned to the industry to bring metal-bearing materials to the smelter. It would seem that the normal method of switching of those processing plants would be by the engine that operates between Malta and Leadville.

(367)

Such incidental usage for about 4 cars a day cannot be accepted, without better proof, as adequate compensation for the building and maintaining of 6.04 miles of track over a mountainous terrain. Although it is not entirely clear, the industry also appears to argue that the circumstances enumerated change the flat yard from a private facility into a railroad or public one, and somehow enlarges the obligation of the carrier under the line-haul rates. There is no basis for either view. The fact remains that the flat yard is on the property of the smelter, was built and is used primarily and principally for its traffic, and that the only other use made thereof is licensed by the industry and subject to its control. The fact that no charge is made against the railroad for the weighing of cars, or the use of the flat yard, cannot be used as an offset for charges for common-carrier transportation, including switching, which must be paid for only in money. *Louisville & N. R. v. Mottley*, 219 U. S. 467.

We conclude that the services performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent is not obligated to perform, and for which it is not compensated under its line-haul rates; and that performance of said services by respondent, without reasonable charge therefor, results in the industry receiving a preferential service not accorded to shippers generally.

We find that respondent's interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the flat yard as described herein constitutes a reasonable point for the delivery and receipt of cars by respondent; that the transportation service, which it is the duty of respondent to perform for the American Smelting & Refining Company at Leadville, Colo., under the line-haul rates, begin and end at the flat yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of respondent to perform. We further find that the

performance of service beyond the flat yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act.

An appropriate order will be entered.

ALLDREDGE, *Commissioner*, dissenting:

The reasons given for the views expressed in my dissenting expression in *Anaconda Copper Mining Co. Terminal Service*, 266 I. C. C.—, decided concurrently herewith, apply with equal force to the situations at the Garfield, Murray, and Leadville plants here considered.

Further support for the conclusion that the line-haul rates in issue in this proceeding and in the Anaconda case include compensation for the switching services described, (368)

particularly as applied to the Murray plant, may be found in our approval in *Nonferrous Metals*, 204 I. C. C. 319, of the line-haul rates as a whole on ores and concentrates in mountain Pacific territory, notwithstanding our knowledge that no compensation in addition to those rates was received by the railroads for switching services performed in connection with the sampling in transit of these ores and concentrates. Our recognition of this situation is revealed clearly by the following statement on page 389 of the report in that proceeding:

Ore, concentrates, and matte may be sampled in transit at Murray, Midvale, Salt Lake City, and Sandy, Utah, Kingman, Ariz., and Hailey, Idaho, at no extra charge except for a charge on certain out-of-line hauls.

In the report herein, it is stated that the ownership and maintenance by the Denver & Rio Grande of all standard gage tracks within the Leadville plant area constitute a similar situation to that considered in *Sionx City Term Rg. Switching*, 241 I. C. C. 53 and 241 I. C. C. 623, wherein we found that the providing and maintaining by the Sionx City Terminal Railway Company of private sidings for the loading and unloading of the traffic of certain shippers, within the plant areas of those shippers, resulted in a violation of section 6 (7) of the act. I do not agree that the two situations are similar. The Denver & Rio Grande tracks within the Leadville plant are used for the same purposes as the tracks on the Anaconda Copper Mining Company lands are used by their owner, the Great Northern, which purposes are described in the report in the Anaconda proceeding in my dissenting expression therein. As stated in that dissent, I regard such tracks as a part of the car-

rier's necessary and legitimate terminal facilities. In this connection, it should be emphasized that in addition to the finding in *Sioux City Term. Ry. Switching, supra*, referred to in the report herein, a further finding was made in that case that compensation to the railroad for switching cars to tracks on the industries' property there used for storing, inspecting, cleaning and repairing cars *was* included in the line-haul rates. The furnishing and maintenance of the latter tracks within the plant areas of the industries was not condemned. In my opinion, it is the latter situation, and not the one cited by the majority, that is parallel to that here presented.

I am authorized to state that COMMISSIONER MAHAFFIE joins in this expression.

CHAIRMAN BARNARD, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER AITCHISON did not participate in the disposition of this proceeding.

25

Exhibit C-2a

DISSENTING REPORT OF COMMISSIONER ALLDREDGE IN
ANACONDA COPPER MINING CO. TERMINAL
SERVICE, 266 I. C. C. 387, 394-396

ALLDREDGE, *Commissioner*, dissenting:

I cannot agree that the practices and services here held violative of section 6 (7) of the act are actually in contravention of that section, or of any other provision of the act.

The conclusion reached by the majority, that performance by respondents of certain switching services without compensation in addition to the line-haul rate violates section 6 (7), seems manifestly erroneous. In my opinion, any doubt that naturally might have been entertained in this connection was removed by the clear and express provisions in the governing tariffs which have been in effect since November 1941, that initial delivery at this industry's plant of shipments on which road-haul charges have been paid *does include* the particular switching services here condemned. Aside from these tariff provisions, the evidence seems to me entirely convincing that compensation for these services is, and for many years has been, embraced in the line-haul rates. That evidence consists principally of the unquestioned holding out by respondents to perform these services, uncontradicted testimony by com-

petent witnesses that the line-haul rates were established and have been maintained with these services in contemplation, and the undisputed testimony of these witnesses that these rates have included, and do include, compensation for the services described.

Even if the latter testimony were not in the record, there would be the necessary legal presumption, in the absence of evidence to the contrary, that respondents have received compensation in their line-haul rates for the services here considered. A decision in point in this connection is that of the Supreme Court in *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 321. In that case the line-haul railroads that transported cattle from various points in the United States to delivery points in the Chicago stockyards had, from the opening of the stockyards in 1865 until June 1, 1894, used the tracks of the Union Stock Yards and Transit Company for delivery of the cattle *without charge in addition to the line-haul rates* from the points of origin to Chicago; but these line-haul carriers, by tariff provisions effective June 1, 1894, imposed a charge of \$2 per car for delivery services within the stockyards area, without any change in the line-haul rates. One of the questions decided by the Court was whether prior to June 1, 1894, compensation for these terminal services had been included in the line-haul rates. Its discussion of this issue was as follows (page 336):

Under these circumstances, in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the terminal services? That such assumption may not be indulged in results from the ruling in *Cornington Stock Yards v. Keith*, 139 U. S. 128, where it was decided that, as for a through rate to a given point, the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at point of delivery. Applying this principle, it results that the

26 through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stockyards.

In the basic report in this general proceeding, 209 I. C. C. 11, we said at page 17:

There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing

is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable.

In my opinion, the evidence here clearly establishes that the services incident to the delivery of shipments within the industry plant area are both customary and reasonable. Throughout the entire non-ferrous metal industry of the West such a practice has been uniform for more than 50 years. It has not been shown by any evidence of record that the performance by respondents of such terminal services without compensation, in addition to that which is included in the line-haul rates, is preferential of this industry or prejudicial to any other industry or shipper.

If the foregoing conclusions are sound, it is obvious that the finding by the majority that the furnishing and maintaining by the Great Northern of tracks in the plant area of the Anaconda Copper Mining Company violate section 6 (7) of the act is also unwarranted. It is well settled that it is the use of an industrial or side track by a railroad in the performance of terminal service that determines whether it is a public track or a private track, and not the fact that the industrial or side track may be located on the private property of the industry. *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 279 U. S. 66; *St. Louis-S. F. Ry. Co. Construction*, 170 I. C. C. 565; *Swift & Co. v. Baltimore & O. R. Co.*, 266 I. C. C. 55. The Great Northern's tracks on Anaconda property include tracks used for the storage of cars after unloading until they are wanted again by a shipper, tracks to a car-repair facility, and tracks used as a classification and transfer yard. It is apparent that these tracks are the carrier's necessary and legitimate terminal facilities. Equally warranted is the maintenance by the Great Northern of sampler tracks and tracks to and from the thaw shed, as the thawing and sampling there performed are necessary to the determination of the applicable line-haul rates.

I am authorized to state that COMMISSIONER MAHAFFIE joins in this expression.

24654

INTERSTATE COMMERCE COMMISSION

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OF EXPENSES

PART II, TERMINAL SERVICES

Submitted June 1, 1945. Decided October 1, 1945.

Respondents' line-haul rates found not to include services beyond the tracks described of record at plants of the American Smelting & Refining Company located at Garfield and Murray, Utah, and Leadville, Colo., and the performance of such services by respondents beyond those tracks found to be in violation of section 6 (7) of the Interstate Commerce Act.

W. M. Campbell, W. M. Carey, Elmer B. Collins, and L. T. Wilcox for respondents.

O. W. Tuckwood and John F. Finerty for the industry.
Charles A. Root for Public Service Commission of Utah.
Thomas S. Wood for Public Utilities Commission of Colorado.

D. H. Williams for Interstate Commerce Commission.

SEVENTY-FIFTH SUPPLEMENTAL REPORT OF THE COMMISSION
DIVISION 3, COMMISSIONERS MILLER, PATTERSON,
AND BARNARD

By DIVISION 3:

Exceptions were filed by the parties to the report proposed by the examiner, and oral argument has been had.

In the original report in this proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, certain principles were announced which the Commission indicated would be followed in considering the propriety and lawfulness of switching services performed by respondents at industrial plants. This supplemental report deals with the practice of respondent carriers in performing switching service within the plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo.

Prior to the hearing in this proceeding, an inspection, by employees of this Commission, was made of the physical

characteristics of these three plants and the track layouts of each, and an investigation was conducted of the methods of switching and practices of respondents with respect to the receipt and delivery of freight at each plant. The results of the inspection were incorporated into the record in the form of testimony and exhibits—

719

(720)

Garfield, Utah.—This plant, principally engaged in the processing of copper, is approximately 18 miles west of Salt Lake City Utah, and is served by the Union Pacific,¹ Rio Grande,² and Bingham & Garfield.³ The Garfield station on the Rio Grande is 1.9 miles east of the plant. The nearest stations to Garfield on the Union Pacific and Bingham & Garfield are at Lake Point and Magna, Utah, about 2 miles west and 4.2 miles east, respectively, of Garfield. None of these carriers maintain scales at these stations, nor do any of them connect with one another at Garfield, except within the plant and by means of the plant tracks.

The plant site is on the side of a mountain. There are 21.58 miles of standard-gage track in the plant on three levels. About 4.5 miles of this trackage and 6 miles of narrow-gage trackage are used exclusively by plant equipment. On the upper level, which is in the southern portion of the plant, there are a plant yard, and other tracks, thaw house, scale, and smelter and sampling facilities for handling concentrates. The plant yard, which is owned and maintained by the industry and used exclusively for its traffic, contains 10 parallel tracks, numbered consecutively from north to south, 1 to 10, and ranging in length from 1,800 to 2,400 feet.⁴ These tracks merge at the east end of the yard into two parallel leads used respectively by the Rio Grande and Bingham & Garfield. The Union Pacific enters the plant yard from the west over a lead connecting with the tracks in the plant yard. Four tracks, 600 feet long, south of and parallel to track 10, beginning near the west end of the plant yard, diverge eastward from track 10 and run into the thaw house. These tracks are used

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

³ Bingham & Garfield Railway Company.

⁴ Maps of record show all of the tracks involved in this proceeding drawn to scale. The distances used in describing them in this report are based on the scale and are approximate only.

occasionally for switching and storage purposes when the weather is warm enough so that it is not necessary to use the thaw house. There are also two repair tracks and a track on which to store bad order cars at the east end of the plant yard. Each of respondents has a repair shop adjacent to these tracks.

On the middle level there are, among other facilities, sulphide ore bins, sampling mills, blast furnace ore bins, and coke and lime-rock bins, served by four parallel tracks, on trestles, designated ore dock tracks, B, C, D, and F on the west end and dock tracks 4, 3, 2, and 1, respectively, on the east end. These tracks are over 2,600 feet in length. On the west, these tracks merge into a connection with the (721)

Union Pacific lead, while on the east, they converge into tracks which extend over 2,000 feet eastwardly to a connection with the Bingham & Garfield lead to the plant yard.

On the lowest level, comprising that portion of the plant site north of the middle level, are tracks leading from the switch-back track in the western end of the plant site and serving converter, reverberatory, and blast-furnace buildings, acid plant, powerhouse, roasters, warehouse, sand bins, and numerous other buildings and smelter facilities. All tracks in the plant are owned and maintained in good condition by the industry.

The Union Pacific and the Rio Grande each make one trip daily to the plant and the Bingham & Garfield makes three trips daily. The Rio Grande road-haul engines pull in-bound trains into the plant yard, generally on No. 5 track. The Bingham & Garfield and Union Pacific road engines push in-bound trains onto tracks Nos. 3 or 4. These five daily trains consist of mixed trains of ore, concentrates, bullion empties, empty acid tank cars, and material and supplies. The industry owns three small steam engines, one of which is used daily from about 8 a. m. to 4 or 5 p. m. for intraplant switching on all standard-gage tracks on the middle and lower levels of the plant site. The other two engines are held in reserve.

In accordance with a joint switching agreement between the Union Pacific and the Rio Grande, the latter carrier furnishes and maintains 2 switch engines and 3 crews which daily perform all switching of loaded and empty cars in the plant yard and between that yard and loading and unloading points, and 8 or 10 points of interchange with the industry's engine, within the plant. These engines also

do considerable intraplant switching. Two engines operate from 7:30 a. m. to 3:30 p. m., 1 within the east end of the plant site and the other in the west end. One of them also operates throughout the entire plant area from 3:30 p. m. to 11:30 p. m. At least 95 percent of the east-end engine's time is consumed in weighing cars and switching Utah copper concentrates for delivery at the sampler, as herein-after described, and it also removes empty cars from the east end of the middle level. The other 2 engines operate generally within the west end of the plant area on all 3 levels, and to some extent within the plant yard.

The switching performed by the Rio Grande for account of the Bingham & Garfield is covered by appropriate tariff provisions and charges, referred to later. "The switching operations will be discussed in connection with the particular traffic handled at this plant. As the industry's engine operates over the same tracks, and during the same hours, as the carrier's engines, except that it seldom goes on the upper level, there is potential interference, but the testimony is that the crews are skilled men and that the

(722)

Rio Grande has not had to complain about interference caused by the industry engine.

For the 12-months period ended March 31, 1944, the in-bound movement of miscellaneous materials and supplies to the plant from Utah origins totaled 211 cars, and from interstate origins 220 cars. During the same period, 21,333 carloads of concentrates, sand, tailings, crude ore, and other raw materials moved in-bound from Utah origins and 1,218 carloads from interstate origins. Of the total of 22,982 carloads delivered to the plant, the Rio Grande transported 3,312 cars, the Union Pacific 3,934 cars, and the Bingham & Garfield 15,736 cars. Of those transported by the latter carrier, 13,025 carloads consisted of Utah copper concentrates. Approximately 93 percent of the total in-bound traffic was interstate.

The out-bound movement consisted principally of 5,855 carloads of copper bullion, 755 tank carloads of sulphuric acid, and 225 carloads of converter dust. Of the 6,960 carloads shipped out-bound during the representative period, 6,486 carloads, or 93 percent, moved to interstate destinations. The out-bound shipments were divided as follows: Rio Grande 450 cars, Union Pacific 541 cars, and Bingham & Garfield, 5,969 cars.

All loaded and empty cars are delivered or received by the line-haul carriers in the plant yard previously de-

scribed. Generally speaking, all in-bound loaded cars, except Utah copper concentrates, are held in that yard until written instructions from the industry, issued three or four times a day, are received by the switching crew for placement. The excepted traffic is handled as a routine matter as hereinafter explained.

The preponderance of in-bound traffic is concentrates, practically all of which is transported by the Bingham & Garfield at rates specifically limited to apply only to the plant yard. These are delivered on tracks 3 or 4 in the plant yard adjacent to the plant scale on track 1. Except in freezing weather, these shipments, without specific order from the smelter, are pulled by the east-end engine in drags of approximately 15 cars through the east end of the plant yard beyond a cross-over from the Rio Grande lead to the Bingham & Garfield lead, a distance of approximately 1,200 feet, and then pushed west a similar distance to the scale, where they are pushed on the scale by the engine, one at a time, weighed, and then moved by gravity to the unloading point within the sampler building,⁵ which is immediately west of the scale and north of track No. 1. All of these tracks are on the upper level and within the plant yard. After unloading at the sampler, the cars drift by gravity to the west end of the plant yard, a distance of about 600 feet, where the west-end engine gathers the

(723)

empties and returns them to the plant yard. The east-end engine moves the empty cars to the scale where they are weighed. The cars are then switched to appropriate tracks in the plant yard by the west-end engine for movement out-bound. After copper concentrates are dumped into the sampler, the industry handles them by conveyor belts or other mechanical means until the copper bullion is ready for out-bound movement.

During the winter months, raw materials, such as crude ore, concentrates, tailings, or sand arriving in a frozen condition, are pulled from the plant yard, weighed, and drifted by gravity over track to the west end of the yard, whence the cars are placed in the thaw house by the west-end engine, where they remain from 2 to 4 days. After thawing, the cars are returned to the plant yard, reweighed, and, with the exception of those loaded with concentrates,

⁵ This sampler can only be used for sampling concentrates. Crude ore must first pass through crushing mills before it can be sampled.

held until written instructions for placement have been issued by the industry. As stated, concentrates are handled without written instructions.

About 6,800 carloads, or 34 percent of all metal-bearing raw materials received at the plant during the representative period, after being weighed once or twice, dependent on the weather, were unloaded into receiving bins for milling and sampling on ore-dock tracks B, C, or D on the middle level. The distance traversed from the plant yard to the unloading bins is about 3,200 feet. Four percent of the ore in these cars, or about 270 carloads, after it has been milled and sampled, was reloaded into railroad cars for intraplant movement to stock piles, was reloaded into cars after sampling and held in the plant yard for shipper's further instructions, or was reforwarded to other destinations under a sampling-in-transit arrangement, as hereinafter described. In addition to the latter cars, 1,399 intrastate and 95 interstate carload shipments of miscellaneous tailings, 192 of which moved to and from the thaw house, were unloaded at stock piles or at the ore docks on the middle level.

Of the 6,800 carloads referred to, 947 carloads consisted of crude ore, and constituted the bulk of the interstate inbound tonnage. Of this number, 183 cars were switched to the scale the east-end of the yard as described in connection with concentrates, and, after weighing, drifted by gravity down track 2 to the west end of the yard from where the west-end engine switched them to the thaw house. Subsequently, these cars were again weighed, loaded, and returned to the plant yard awaiting orders for further movement. The necessity for weighing the ore prior to and after thawing is explained hereinafter, in connection with moisture sampling. The remaining cars were weighed and moved to the west end of the yard, as described, and also returned to the plant yard. All carloads of crude ore, unlike concentrates, are returned to the plant yard, after weighing or thawing, for spotting orders. On the receipt of such orders, the cars are pulled west to the switch con-

(724)

necting with the ore dock tracks on the middle level and set on those tracks for unloading into bins. The number of shipments that can be switched to the ore bins is limited by the smelter's requirements. At times only a few cars are moved for the purpose of matching up with others cars, and the remainder on hand are switched later. The carrier is not at liberty to spot cars as soon as they arrive at the

plant but must await instructions from the smelter. In addition to the interstate shipments of crude ore, there were handled in like manner 3,535 carloads of intrastate crude ore, of which 298 carloads moved through the thaw house. All of these cars were ultimately switched by the west-end engine to ore-dock tracks B, C, or D, and unloaded into bins. The actual spotting of the cars is performed by plant employees.

In-bound carloads of crude ore and concentrates and of other miscellaneous metal-bearing materials are sampled to determine the percentages of moisture they contain, while they are moving into the plant yard, except when they are frozen, by removing some of the material in buckets. When the lading is frozen the moisture is dried out in the thaw house and the car is reweighed to ascertain the dry weight, on which basis the smelter makes settlement with the shipper. The published rates apply on the so-called wet weight of the shipment as it first goes over the scale and are dependent upon value as more fully explained hereinafter. In other words, for the purpose of determining the freight charges, the value of the ore and concentrates based on the dry weight is converted to a wet-weight basis and applied to the shipping weight. A few cars of miscellaneous tailings are pipe-sampled and unloaded in stock piles on the middle level without passing through the sampling mill.

Empty ore cars are pulled by the east-end engine to the switch connection with track 1 on the upper level and then pushed west to the scale, whence they drift by gravity to the west end of the yard and are assembled by the west-end engine into out-bound trains. A small percentage of these empty cars are not weighed for the reason that the crude ore was unloaded at a stock pile. Such cars are taken directly to the plant yard. About 85 percent of all in-bound cars are weighed after unloading.

Of the 431 carloads of miscellaneous in-bound materials and supplies, such as salt, coal, pig iron, fuel oil, lumber, *et cetera*, 99 percent were switched from the plant yard to the scale, weighed, and, on specific order, moved west to the switch-back leading to the lower level for unloading at various points, or were set on tracks on that level for further handling by the smelter engine.

During the representative period, 1,514 carloads of bench sand moving over the Bingham & Garfield from Sands, Utah,

(725)

2.1 miles east of the smelter, where weighed and delivered on the sampler track on the upper level or on the ore dock.

tracks on the middle level. These cars were not weighed light.

As previously indicated the preponderance of the interstate out-bound loaded movement consists of copper bullion, sulphuric acid, and converter dust. Empty cars for loading copper bullion reach the plant yard over the Bingham & Garfield and are generally switched twice a day by the west-end engine, without being weighed, to the so-called copper casting building on the lower level. As a general rule, they are set on tracks serving that building and are spotted by the smelter facilities. The cars are weighed empty and loaded in the copper casting building. Loaded cars switched from the lower level to the plant yard encounter excessive grades, particularly to the first switch-back, which limit the capacity of the engine to 5 cars. Approximately 16 car-loads of copper are shipped daily. All out-bound loads of copper move over the Bingham & Garfield. The distance traversed between the copper casting building and the plant yard is not definitely stated but apparently exceeds 1 mile.

Tank cars for loading sulphuric acid and open-top cars for loading converter dust are switched from the plant yard to the loading point on the lower level in much the same manner as the bullion empties, except those for acid are weighed. The switching of the loaded cars is quite similar to that of copper bullion and the number of cars that can be handled is also limited by the grade.

Prior to February 25, 1920, switching within the plant of line-haul traffic was accorded by the Rio Grande without additional charge. On that date the switching was limited to one movement of a line-haul shipment within the plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator),⁶ to an unloading point designated by the smelter. For each additional movement from track to track within the plant, a switching charge of \$2.50 per car was applied.

In purported compliance with the principles announced in the original proceeding, the governing tariffs were amended, effective July 5, 1938, on interstate traffic, and June 25, 1938, on intrastate traffic, to provide, in substance, that the line-haul rate includes the movement of loaded cars from the road-haul point of delivery to the switching line to track scales and subsequent delivery to any designated track.

⁶ Effective November 27, 1920, a free switch was also accorded in line haul shipments moving to and from the smelter flux house.

within the plant which may be accomplished by one continuous switching movement without interruption resulting from orders from, or requirements of, the smelter. It was also provided that the line-haul rate included the uninter-

(726)

rupted out-bound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to the point of interchange with the road-haul carrier. For each additional movement within the plant, except as hereinafter shown, a charge of \$1 per car was applicable. Ore or concentrates arriving at the smelter in a frozen condition may be switched to and from the thaw house at a charge of 50 cents per car for the round trip. After thawing, the car may be switched to track scales and thence to the sampler or other designated location within the plant as indicated above. In bound or out-bound empty cars may be switched to track scales for weighing, on demand of the smelter, at a charge of 50 cents per car. When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnace, the service (including weighing over scales within plant) are charged for at \$2.70 per car for each movement. These tariff provisions and charges are in effect at the present time.

Specific switching charges are at present in effect in connection with traffic switched by the Rio Grande for account of the Bingham & Garfield. A charge of \$2.25 per car, in addition to the line-haul rate, is paid by the smelter for switching concentrates originating at Magna or Arthur, Utah, to the sampler, hereinbefore described. A similar charge applies on clay or sand received from the Bingham & Garfield in the plant yard and switched to unloading point. On all intrastate carload traffic not specifically provided for above, the Rio Grande maintains a switching charge of \$3.60 per car for switching between track connection with the Bingham & Garfield and points within the smelter yard, which is absorbed by the latter carrier. A charge of \$3.96 is maintained for similar service on interstate traffic.

Based on the foregoing tariff provisions and charges, the Bingham & Garfield paid to the Rio Grande during the representative period, a total of \$23,787.72 at \$3.96 per car on 6,007 cars for switching interstate line-haul traffic. The smelter paid to the switching carrier \$117 on 112 carloads of crude ore and 3 carloads of matte and Spoils, based on

the \$1 charge per car referred to above for additional moves within the plant, \$105 for switching 210 carloads to and from thaw house, and \$810.50 for weighing 1,621 empty cars.

An exhibit of record purports to show the amounts paid by the smelter and the Bingham & Garfield for switching and weighing charges accruing to the Rio Grande during the same period on intrastate line-haul traffic and for intraplant service. The figures shown on this exhibit are apparently in error in certain respects. For example, it is shown that the smelter paid \$4,014 on 1,115 cars at \$3.60 per car for switching line-haul traffic. As indicated above, this charge applies for switching between track connection with the

(727)

Bingham & Garfield and points within the smelter yard and is absorbed by that carrier. The exhibit also shows that the smelter paid \$32,724 on 14,544 cars at \$2.25 per car on concentrates and sand transported by the Bingham & Garfield; \$364 on 364 cars at \$1 per car for additional moves within the plant; and \$454 on 908 cars at 50 cents per car moving to and from the thaw house. In addition, the smelter paid to the Rio Grande \$1,522.80 on 564 cars for intraplant moves at \$2.70 per car and \$2,838 on 5,676 cars at 50 cents per car for weighing empty cars. The Bingham & Garfield paid \$118.80 on 33 cars on the \$3.60 basis above referred to.

Under the terms of the switching agreement between the Rio Grande and the Union Pacific, hereinbefore referred to, the expenses incurred and switching charges received by the former are apportioned between the two carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5 (1) of the act is shown.

Owing to the complex nature of ores produced in the intermountain district and shipped to Utah smelters, there has been in effect for many years a so-called sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters by allowing shipments of ores and concentrates to be sampled in transit at one or more of the Utah smelters or the independent sampler at Murray, Utah, and then move to the smelter selected by the shipper. During the representative period, a total of

31 carloads of crude ore were sampled in transit at Garfield and reforwarded to other destinations without charge in addition to the line-haul rate for the weighing and switching service performed at the Garfield smelter. The sampling-in-transit provision published in D. & R. G. W. tariff I. C. C. No. 757, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Garfield without charge for the first stop at the sampler or for the out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 606.

The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 294 I. C. C. 319, 327, it is stated that a rule which provides for

(728)

the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry to which the shipment is consigned, will be a reasonable rule to apply in the future. The applicable tariffs provide that such ores and concentrates shall be billed from point of origin at a rate based on approximate value and after the ore has been sampled the rate will be revised in accordance with the value determined and certified to the carrier as the basis for settlement between shipper and consignee.

It is not deemed necessary to discuss the industry's contention that the charges published to apply beyond the plant yard do not apply to smelters, further than to say that the fact that the line-haul rates are based on value does not place smelters in a special class as to the quantum of service embraced in those rates. Where rates are based on value, the obligation is generally on the consignor to furnish the true value. An exception to the general practice is made on ore and concentrates to meet the needs of the smelters and mines, owing to the fact that there is considerable variation in the value of ores from the same region and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the industry to make settlement between the seller and buyer on basis of weights and value determined by the buyer.

The smelters voluntarily agreed to furnish the necessary information and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised "in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry." There is no sound basis for the contention that such a concession increases respondents' common-carrier obligations and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the sampling. The furnishing of the values is the obligation only of the smelters and not of the carriers.

A carrier is required to ascertain the weight of shipments and this is ordinarily done at origin stations or en route as near origin as practicable. When a car is so weighed and reweighed at destination at the request of the consignee or for his benefit or purpose, a charge should be made for switching to and from the scales as well as for the actual weighing unless the billed weight is found not to be within the tolerance limit. Carriers ordinarily use the weights stenciled on cars as the correct empty weight of those cars. A charge should therefore be made for weighing all empty cars at origin and destination unless, on reweighing, the stenciled weights are found to be not within the allowed tolerance.

(729).

When shipments originate and terminate at stations where carriers do not have scales and do not pass track scales en route, and when their tariffs do not provide for estimated weights, a carrier would be justified in weighing the cars at destination without charge therefor on private scales of the consignee instead of attempting to estimate the weight. The weighing of cars at destination as a step in ascertaining the moisture content and to ascertain invoice weights or for any other industrial purpose, and the reweighing of cars after thawing and the weighing of empty cars at the smelter is for the benefit of the industry and constitutes an interruption in switching, prevents the placement and removal of cars in a continuous movement, and are services not embraced in the line-haul rates.

The industry contends that any charges for the various services attending the weighing of the cars and switching to and from the thaw house and sampler would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act as no charges are made for identical serv-

ices when the ore and concentrates are sampled and re-shipped out of the plant, in many instances from one smelter owned by the American Smelting and Refining Company to another owned by the same company. This proceeding is one to determine whether section 6 (7) is being violated. If it is, a continuation of such a violation cannot be sanctioned because its removal may necessitate changes in other concessions granted in the carriers' tariffs. If the industry's contention were sound, a question on which it is not necessary for us to pass on here, the obvious and only remedy available to respondents would be to cancel the offending transit provisions.

With respect to movement of all commodities, both in-bound and out-bound, the evidence is convincing that the switching at the plant must be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant area without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Garfield, Utah, under the line-haul rates begin and end at the plant yard; cars as the correct empty weight of those cars. A charge should those track is a service which it is not the duty of the carriers to perform. We further find that the

(730)

performance of service beyond the yard as described, without adequate and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act.

Murray, Utah.—This plant is engaged in processing lead ores and concentrates. Murray is 7.2 miles west of Salt Lake City on the line of the Union Pacific extending from the latter point to Lynndyl, Utah, and 6.7 miles from Salt Lake City on the Rio Grande. All shipments over the Union Pacific to or from the smelter move through that carrier's Pallas yard, about 0.5 mile south of the smelter property, and about 1 mile from the station at Murray.

The Union Pacific has two entrances to the property over-parallel leads, hereinafter called respectively the east and

west leads, connecting with the industry tracks at the southwest corner of the smelter property. The plant scale is on the east lead inside the property line but outside of the plant fence. The Rio Grande reaches the plant property with its own tracks but does not do any switching within the plant. It interchanges traffic with the Union Pacific on a transfer track at the latter's entrance to the plant.

From connections with the east and west leads, 33 standard-gage tracks, aggregating about 6 miles in length, diverge to the north and east and reach buildings and smelter facilities throughout the plant enclosure. These tracks are all stubbed and are owned and maintained by the industry. The plant trackage is in such poor condition that it causes frequent delays and interruptions in switching operations and makes it unsafe for line-haul or any engines, except light switching engines, to operate over it. The smelter yard is practically on one level and there are no severe curves.

The east lead continues northeastward with the industry's property line for about 1,000 feet from the plant scale and then, just inside the plant fence, curves eastward and diverges into two tracks which, in turn, diverge into six tracks. The northernmost of these six tracks is known as the old hand track. It is 700 feet in length² and is used as a storage track for in-bound loaded cars and for cars of finely ground ore moving from the plant mill to the roasters when in excess of the capacity of the roasters. The next track to the south, 600 feet long, is called the pug mill track and the last 325 feet thereof is used for the loading of flue dust. South of this track is the so-called middle belt track, 800 feet long, used for unloading finely ground ore for the roasters. The material is dumped into bins on this track and moved by conveyors to the roasters. Roast or sinter is loaded on a track south thereof, known as the roast track. It is the nearest track to the southern fence and is over

(731)

1,500 feet long. All roast or sinter moves from this track in intra plant service. Near the eastern end of the roast track are several short connecting tracks and cross-overs used for loading arsenic, calx, and bag-house dust, and for storing empty cars to be used for loading roast. Empty cars, called "idlers" have to be used between the engine and the loaded cars on the bag-house and one of the ad-

² The distances shown are approximate and are computed from the point of connection with the respective leads.

adjacent tracks because a fixed spout prevents passage of the engine. Between the middle belt track and the roast track is a track, 500 feet long, known as the old belt track, which terminates at a coke hopper south of the roasters and west of the D. & L. mixing building.

The west lead continues about 1,000 feet north of the scale and parallel to the east lead to a point just north of the plant fence, from where it diverges into 25 tracks which serve various loading and unloading points in the northern, central, and western portions of the plant enclosure. Two tracks, designated 5 and 6, extend northeastward parallel with the western fence for about 1,100 feet. They are used as hold tracks for in-bound and out-bound loaded cars. A short track takes off from track 5 and divides into 2 tracks that run into thaw house which is southeast of and adjacent to track 5. Each of the tracks within the thaw house has a capacity of six 40-foot cars.

A track, known as the bullion track, diverges from the west lead about 150 feet south of where that lead diverges into tracks 5 and 6. It is about 1,700 feet long and is used for loading bullion and sometimes for storing empty cars for bullion loading. Diverging from that track, and extending parallel to it for a distance of 1,000 feet, is the matte track on which cars are generally loaded for intraplant movement. This is the most northern track in the plant used for loading or unloading purposes. Track 4, 1,800 feet long, diverges from the west lead near the connection with the bullion track and is used for scrap-iron storage and also serves mill 4 and other smelter facilities. Idlers are used to reach mill 4 owing to interference caused by a stationary hoist. Track 3, 850 feet long, south of and parallel to track 4, diverges therefrom and serves two scrap iron and three coke bins located on the east 300 feet thereof.

The next track to the south is known as the north trestle track. It is over 1,400 feet long and terminates over ore hoppers near the blast furnaces. This track is used for unloading sintered or roasted ore into bins on the east 280 feet thereof. Locomotives and boxcars are not allowed to enter the shed over the bins, and flatcar idlers have to be used.

Adjacent to the north trestle track on the south is the so-called north coke track, 3,300 feet long, and connecting with the latter and extending parallel to it for a distance of 1,000 feet is the so-called south coke track. These two

(732)

tracks are used for holding in-bound loaded cars, and, with tracks 5 and 6, hereinbefore described, will be referred to collectively as hold tracks.

Track 1, over 1,500 feet in length, extends through the central part of the plant yard and over the hopper at mill 2 building. This track, east of the mill building, is also used for scrap iron and ore storage. Diverging from it are two tracks designated the rock track and track 2, 1,100 and 900 feet in length, respectively. The rock track serves ore bins extending for about 300 feet to the east end of the track. In reaching these bins, idlers must be used to avoid damage to foot boards and cylinder cocks of the engine, by materials on or about the tracks at the bins. Track 2 reaches four concentrate and two coke bins and a scrap iron storage dump in the order named.

From a switch connection with track 1, a lead diverges into several tracks extending through the central part of the yard. These tracks range in length from 300 to 1,000 feet, and are used to reach car repair, carpenter, boiler, and machine shops, and for unloading less-than-carload traffic; also for brick and lumber storage. The southern-most of these tracks is called the low line track and reaches unloading bins for iron concentrates, as more particularly described hereinafter. Idlers have to be used to spot cars on one of these tracks, called the coarse house track, at three shops, because a fixed spout prohibits the engine passing mill 2, which is about 100 feet west of the nearest shop and about 600 feet west of the end of the track.

The high line track is on a trestle and extends south of, and parallel to the low line track. From its connection with the west lead the high line track is 1,600 feet long and reaches, in the order named, bins into which ore is unloaded, the wedge mixing building, and mill 1. It passes through the mixing building, and engines are not permitted to enter that building.

Tracks 1, 2, 3, and 4, and the rock track, are in part, on trestles.

Under a joint arrangement between the Union Pacific and Rio Grande, the first-named carrier furnishes a switch engine and crew which performs all switching in the plant yard for account of both carriers. This engine is a small six-wheel shifter weighing about 70 tons and usually operates one 8-hour tour of duty beginning at 7 a. m., with overtime almost daily, and occasionally a second crew is

used. The Union Pacific's road-haul engines cut loose from in-bound trains and pick up out-bound cars at the Pallas yard and they also switch cars received from and delivered to the Rio Grande to and from that yard. The switch engine referred to above handles the cars between that yard and points of loading and unloading in the plant. The industry operates locomotive cranes to an undisclosed extent over the same tracks over which the switch engine operates.

(733)

An unspecified number of cars are leased from the Union Pacific for intraplant service exclusively.

During the 12-months period ended March 31, 1944, the total number of in-bound shipments of miscellaneous materials and supplies was 666 carloads. These shipments consisted of furnace coke, lime sand, coke breeze, coal, scrap iron, brick, clay, soda ash, lumber, structural steel, sulphuric acid, and track materials. Practically all of these shipments moved from intrastate origins, 374 carloads over the Rio Grande and 292 carloads over the Union Pacific. Raw materials received during the same period aggregated 1,943 carloads and consisted of lead and iron concentrates, crude ore, and miscellaneous commodities such as arsenic dust, Speiss, and matte. Of this traffic, the Rio Grande transported 950 carloads and the Union Pacific 993 carloads. Of the total, 726 carloads, or about 38 per cent, moved from interstate origins.

The out-bound movement during the same period aggregated 845 carloads, and consisted of 437 carloads of lead bullion, 282 carloads of Speiss calx, and 77 carloads of crude arsenic, the remaining 49 carloads consisting of bag-house dust, matte, dump slag, and miscellaneous ores. Of the total shipped, 554 carloads, or 66 percent, moved to interstate destinations. The preponderance of the intrastate shipments was Speiss calx. The out-bound movement was divided 514 carloads over the Rio Grande and 331 carloads over the Union Pacific.

Written switching instructions are given to the switch crew by the industry, and all cars are moved to meet the requirements of the plant.

A total of 351 carloads of lead concentrates was received at this plant during the representative period, constituting 18 percent of the total in-bound shipments of raw materials received. The method of handling this traffic is to push the cars over the track scale, uncouple, and weigh them. After each car is weighed, it is said that it is rolled northward by

momentum supplied by the next car placed on the scale. The switch engine then backs up over a switch a short distance south of the scale, passes the scale, couples the cars, and pushes them to the hold tracks. The concentrates are moistened and pipe-sampled on those tracks. The pipe samples are transported to the sampler, ground and screened, and subsequently assayed for value of metal content. After their value is determined, the concentrates are switched from the hold tracks to the middle belt track serving the so-called D. & L. bins, where the material is dumped and thereafter carried by conveyor belts to the D. & L. mixing building southeast of the bins. From the mixing building the material is handled by conveyor belts to the adjacent sintering plant. Lead concentrates receive no further railroad handling after they have been spotted at the D. & L. unloading bins.

There were also received 421 carloads of iron concentrates which were handled in the identical manner as lead (734)

concentrates with respect to weighing, placement on hold tracks, moistening, and sampling. Thereafter, above 75 percent of the cars were spotted alongside bins on the low-line tracks just west of the wedge mixing building. The remainder, or 25 percent, were unloaded by smelter operated cranes into the D. & L. bins served by the middle belt track and thereafter carried by conveyor belts to the nearby arsenic roasters.

Godfrey dust, of which there were 159 carloads received during the same period, was handled in the same way as lead concentrates.

A total of 696 carloads of crude ore was also switched to the hold tracks and sampled for moisture. Between 80 and 85 percent of these crude ores were unloaded in bins on the high line west of the wedge mixing building for crushing and screening in mill 1 and sampling. There are two methods of handling this ore after milling and sampling. It may be carried by conveyor belts into the wedge mixing building where it is converted into calx. Approximately 96 of the total of 696 cars were handled in this manner. The remaining cars, after passing through mill 1 and the sampling room, were reloaded into railroad cars. The practice is to place three loaded cars with one empty car in front of them. The ore is unloaded from the first loaded car, passed through the mill, and loaded into the empty car. That process is followed with the other cars. The cars are then

switched over the high line in reverse movement to reach the connection with the east lead and thence over the middle belt track to the sintering plant, an approximate distance of 3,400 feet. About 15 percent of the crude ore was switched from the hold tracks to mill 2, served by track 1, or mill 4, located on track 4. The ore spotted at mill 2 is crushed and sampled, and then reloaded into railroad cars and switched in reverse movement over track 1 to reach the middle belt track and over the latter track to the sintering plant, approximately 3,300 feet. Exceedingly hard ores are spotted at mill 4 and after being ground are reloaded into railroad cars and switched about 2,600 feet to mill 1 for further grinding or move to stock piles located along various tracks in the southern part of the plant yard. Only a very small proportion of the crude ore goes through mill 4.

A total of 103 carloads of arsenic dust was switched to the hold tracks and was ordered spotted at unloading bins on the low line. The wooden covers on these cars were removed by locomotive cranes, the shipments moistured and pipe-sampled, and unloaded into the bins by the cranes.

There were also received 94 carloads of Speiss which were moisture sampled on the hold tracks and then switched to mill 4. The commodity was there coarse ground and sampled and then reloaded into railroad cars and switched

(735)

either to stock piles or to mill 1. If to the latter points the Speiss was reground and conveyed by hopper to the ball mill which is a part of mill 1.

Shipments of matte, comprising 26 carloads, were set on the hold tracks by the switch engine and ordered to mill 1 for grinding. Matte contains both lead and copper and since Murray is a lead smelter, copper is not a useful material there but is considered an impurity. The matte was fine ground and sampled at mill 1 and was thereafter moved to track 4 and stock-piled. From that point the matte was handled by smelter facilities to the reverberatory furnaces.

The remaining in-bound raw materials consisted of 22 carloads of Selby dust, which is a fine dust containing a small proportion of arsenic. This traffic was switched from the hold tracks to the carpenter shop, where the wooden tops were removed from the cars and the shipments were sampled. Subsequently, the dust was stock-piled.

As indicated, an aggregate total of 666 carloads of in-bound material and supplies were received. The prepon-

derance of this traffic consisted of 197 earloads of lime sand, 247 earloads of furnace coke, and 91 earloads of coke breeze. All of the in-bound shipments were first switched to the hold tracks. Most of the lime sand was switched from there to the middle belt track for unloading at the D. & L. bins. The remainder was stock-piled. The furnace coke was switched to the coke bins on track 3. The coke breeze was unloaded at the coke hopper on the old belt track.

Of the total of 845 earloads of out-bound shipments during the representative period, 437 earloads consisted of lead bullion, all of which moved to interstate destinations. Boxcar empties for bullion shipments were weighed and set on either the bullion or matte track. After loading, the cars were switched to the hold tracks, made up into drags with other out-bound loads and returned empties, and were taken to the scale, weighed, and delivered into the Pallas yard. There were 282 earloads of Speiss calx shipped during the same period over the roast track from the arsenic loading shed. These shipments were handled out-bound in a similar manner to the bullion shipments, that is, they were switched to the hold tracks, made up into trains, weighed, and taken to the Pallas yard. All of the calx moved to intrastate destinations. The remaining out-bound movements consisted of 77 earloads of crude arsenic, 13 earloads of bag-house dust, and 27 earloads of dump slag, all moved to interstate destinations, and 7 earloads of matte and 2 earloads of miscellaneous ores moved to intrastate destinations.

Concentrates and crude ore which arrived at the plant in a frozen condition were weighed and switched to the hold tracks and from that point to the thaw house. After thawing, the cars were returned to the scale for reweighing and (736)

then switched to the hold tracks, and as soon as the industry was prepared to unload them, to unloading points. The necessity for weighing this traffic prior to and after thawing has been previously explained in connection with moisture sampling at the Garfield smelter.

The identical tariff provisions and switching charges of the Union Pacific and Rio Grande, hereinbefore set forth with respect to the Garfield smelter, are applicable at Murray.

For switching performed in connection with interstate line-haul traffic the smelter paid, during the representative period, \$450 on 448 earloads of crude ore, 1 earload of con-

concentrates, and 1 carload of coal, based on the \$1 charge per car for additional moves within the plant; \$80.50 for switching 117 and 44 carloads of crude ore and concentrates, respectively, to and from the thaw house at 50 cents per car; and \$540 for weighing 1,080 empty cars, at 50 cents per car, or aggregate switching and weighing charges of \$1,070.50.

During the same period the smelter paid \$14,699.90 for switching intrastate line-haul traffic, or for intraplant switching, divided as follows: Intraplant moves of 5,002 cars at \$2.70 per car, \$13,505.40; weighing 1,366 empty cars at 50 cents per car, \$683; additional moves within the plant of 383 cars at \$1 per car, \$383; and moves to and from the thaw house of 257 cars at 50 cents per car, \$128.50.

As has been seen, all in-bound and out-bound shipments are switched to the hold tracks. Raw materials, constituting the bulk of the traffic, are held there for moisturing and sampling, and awaiting instructions from the smelter with respect to the further movement of the cars. The final point of delivery of sampled ore or concentrates depends upon the assay after sampling.

Although a question was raised at the hearing and discussed in briefs as to the extent of the Commission's jurisdiction to determine the legality of terminal switching services rendered on intrastate traffic, it is not deemed necessary to determine that question here. It will suffice to say that all circumstances and conditions that cause interruptions to, or that interfere with, the switching of interstate traffic, whether they be due to insufficient track capacity or unsafe conditions of the tracks, restrictions in use of tracks either as to time or operations, obstructions to free movement of engines or cars, switching of intraplant, intrastate, or interstate traffic, whether performed by industry or carrier engines, and other such factors, are matters that should be considered. This is especially true when, as here, the movements of in-bound and out-bound interstate shipments are so intermingled with intrastate and intraplant switching and so integrated into the operations of the industry that they are inseparable. For all practical purposes, the industry controls the work, except as to the mechanical operations of the switching crews while

(737)

they are operating in the plant. The switching is performed under the direction of a yardmaster employed by the industry, who specifies the particular cars and the time when,

and places to or from which, they are to be moved. This is necessary because the time and place when cars are to be spotted or removed from loading points are controlled by variable factors as shown above and must be coordinated with the operating practices and needs of the industry. Even the industry does not know when or where cars are to be spotted upon arrival at the plant. It is, therefore, clear that the manner in which the industrial operations of this plant are conducted prevents the switch engine that operates solely within the plant from performing switching beyond the hold tracks in a continuous and uninterrupted movement.

The previous discussion deals with the situation where the Union Pacific does all of the switching under a pooling arrangement not shown to be authorized by the Commission as required by section 5 (1) of the Act.

In *Kingman Co. Terminal Allowance*, 255 I. C. C. 531, the carrier had instituted a pooled switching operation, but it was there indicated that, while it was impracticable and undesirable for each of the carriers serving the plant to perform its own switching, it would be possible for them to serve the plant by pooling operations and coordinating them to the plant's operations. Division 3 there said:

No duty devolves on a carrier to pool switching services in order to accommodate an industry when they could not individually perform the service with their own power, at their own convenience and free from interference.

It follows as a matter of course that the fact that carriers have pooled services as they have done here does not create an obligation that did not previously exist, and that if they cannot individually serve the plant because of interference by one carrier's engine with another, there is no obligation on them to do so under a pooling arrangement.

The actual switching operations as described above prove that it is impracticable, if not impossible, for each of the carriers serving the industry to perform its own switching without interference and at its convenience.

We find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the hold tracks as described herein; and that the service beyond the hold tracks is a service which it is not the duty of respondents to perform. We further find that the performance of service beyond the tracks described at the line-haul rates, without adequate compensation, is a violation of section 6 (7) of the act.

(738)

Leadville, Colo.—The Leadville branch of the Rio Grande connects with the main line at Malta, Colo., and extends 4.8 miles to Leadville. The American Smelting & Refining Company's plant, known as the Arkansas Valley plant, is located about midway between Malta and Leadville. Its principal business is processing lead ores and concentrates.

The plant yard is on two levels. The Rio Grande enters the plant enclosure at the northwest corner of the property on the upper level over a lead, herein called the main lead, diverging from the Leadville branch. This lead continues southward within the plant for a distance of about 1,400 feet from the point of entrance.

Just inside the plant entrance, a track diverges to the south from the main lead and serves 7 stubbed tracks, referred to in the evidence and hereinafter as the flat yard. These tracks run in a north-south direction, parallel to, and east of, the main lead. They range in length from 600 to 900 feet. Approximately 300 feet south of the connection referred to, another track, known as the scale track, diverges from the main lead and runs southwardly parallel to, and west of, that lead for a distance of over 800 feet. The scale track is stubbed but is connected with the main lead by a cross-over a short distance south of the scale. Traffic to and from the plant may thus move over the scale without being handled through the flat yard. If the traffic has not been weighed on track scale en route, the carrier may weigh the shipment on the plant scale before the car is placed in the flat yard. Out-bound cars are weighed before being placed in that yard.

Immediately south of the flat yard a track takes off from the main lead to the west and connects with six stubbed tracks, numbered 12 to 17, inclusive, that enter the thaw house. These tracks each have a capacity for four cars. The thaw house is about 1,400 feet from the scale. Tracks 9, 10 and 11 diverge from the main lead south of the thaw house and serve crushing and roasting plants, conveyor shed, and other buildings and facilities. There is a conveyor shed over track 9 about 375 feet from the stubbed end, and sample bins under track 11. It is not clear from the evidence whether the engines are permitted to enter that shed or pass over the bins. The inference therefrom is that they are not but that it is not necessary for them to do so.

A continuation of the main lead, known as track 7, extends eastward through the approximate center of the plant property and facilities. This track is stubbed and towards its east end is on a sharply descending grade. Six tracks, numbered 1 to 6, south of and parallel to track 7 connect with that track on the west. Tracks 1, 2, 5, and 6 are stubbed on the east ends and apparently are used to reach stock piles of zinc and Blackwell residue and coke breeze. Tracks 3 and 4 are shown as passing through a
(739)

building in which scrap-iron and ore bins are under the tracks and connecting with track 7 on the east thereof. It is not shown whether the engines are permitted to enter that building. Farther west, two other tracks, known as upper 6, south of, and upper 8 north of, track 7 also diverge eastward therefrom. They connect with track 7 on both ends. Upper 6 serves principally the sampling building and upper 8 the coal and Blackwell residue stock piles and the Diesel-oil tank. Three tracks, known as the bag house, bullion, and matte tracks, respectively, are reached by connections with track 7 and serve loading points for bag-house dust, lead bullion, and matte, in the southern part of the plant.

Another lead, known as the American track, takes off from the Leadville branch at a point on the property line about 500 feet east of the switch leading to the flat yard and extends southeastwardly 2,300 feet through the plant yard and by a switch-back connects with track 7 near the eastern limits of the plant property. The American and connecting tracks serve the so-called Cottrell plant and also a dock used by the industry for transferring ore from trucks to cars for intra-plant movement. This dock is known as the upper or American dock and has a capacity for the simultaneous loading of about seven cars.

The tracks on the lower level are reached over the switch-back above referred to, by a reverse movement over track 7 and the tracks connecting therewith, including track upper 8, on which there is a loading dock, known as the lower dock, which is used by mines in the vicinity of Leadville to load ore from trucks into railroad cars for out-bound movement over the Rio Grande.

There are 6.04 miles of standard-gage trackage within the plant area, all owned and maintained in good condition by the Rio Grande. There is also an unspecified amount of narrow-gage trackage, apparently owned by the indus-

try. The plant owns and operates 2 locomotive cranes and 57 open-top and 2 flat cars, used solely for intraplant moves.

The Rio Grande furnishes and maintains two switch engines which operate daily, except Sunday, between the flat yard and loading or unloading points within the plant. Occasionally it is necessary for one engine to perform some switching on Sundays. During cold weather when the thaw house is in use, these engines leave Leadville at 6:30 a. m., arriving at the plant about 7 o'clock. In the summer months they begin their respective 8-hour tours of duty at 6:30 and 8 a. m. These engines interfere with each other when both are switching cars to and from the thaw house and to some undisclosed extent at other times, but generally because of the small volume of traffic they are able to keep out of one another's way.

Traffic to and from the smelter is generally handled from and to Malta by another engine which operates between that point and Leadville, but on occasion, "by ar-

(740)

rangement with the smelter, by them arranging their work," the switch engines make trips to Malta and to two processing plants near the smelter to bring shipments of ore-bearing material to the smelter and, along therewith, shipments from those plants to the flat yard for weighing and line-haul movement beyond.

The present practice is for the line-haul engine to set in-bound cars and receive all out-bound cars in the flat yard. The switching engines handle all cars both loaded and empty to and from the scales and between the flat yard and the loading and unloading points as well as most intraplant movements.

All switching in the plant is done under the direction and control of a yardmaster employed by and acting for the industry. Written orders specifying the sequence in which, and the places to and from which, all cars are to be moved are given the switching crew by the yardmaster. Those orders are occasionally changed by oral supplemental orders. A great many of the moves made in accord therewith consist of one or two cars at a time.

The principal in-bound traffic consists of materials and supplies, including coke, coke breeze, coal, scrap iron, brick, general merchandise, *et cetera*, and raw materials, including limerock, crude ore, concentrates, and residue. During the 12-month period ended March 31, 1944, the total in-

bound movement was 2,260 carloads, of which 158 carloads, or 7 percent, moved from interstate origins.

During the same period, the smelter shipped out-bound to interstate destinations 62 carloads of matte and Speiss, and 409 carloads of lead bullion. In addition, 5 carloads of bag-house dust were shipped to intrastate points.

The average number of cars handled in-bound and out-bound both intrastate and interstate was 228 cars per month and, using 312 days to the year, 8.76 cars per day.

The switching performed in connection with the more important individual commodities moving in-bound during the representative period may be generally described as follows:

Practically all shipments of limerock were switched from the flat yard to the scale and, after weighing, moved over the main lead and track 7 and by a reverse move over tracks 10 and 11 to the sulphide mill for crushing. Some limerock moved to stock piles reached by track 7 and a reverse movement over track 3.

Coal, coke, and coke breeze were generally unloaded into bins adjacent to the blast furnaces and power house in the south-central part of the plant yard reached by track 7 and connecting tracks 3 and 4. A considerable amount of this traffic was also unloaded at stock piles or other unloading points throughout the plant yard.

(741)

Scrap iron, after weighing, was usually unloaded into bins adjacent to the coke bin on tracks 3 and 4 near the blast furnace, or moved to stock piles located in the eastern part of the yard and served by track 7 or the switch-back leading to the American track.

Brick was not weighed. This traffic was taken directly from the flat yard to point of use or to the brick shed west of the limerock unloading point served by track 10 from the west.

All shipments of concentrates, without exception, were switched from the flat yard to the scale and thence to the conveyor shed served by track 9. At that point the concentrates were moistured and pipe-sampled before unloading. Residue was similarly handled but owing to plant requirements it was occasionally necessary to stock-pile this commodity at scattered points throughout the plant yard.

Crude ore moved from the flat yard over the scale to the sulphide mill on track 10 for crushing. Moisture sampling takes place after weighing. The ore was ground and

sampled to determine assay value. All subsequent handling of this traffic after unloading at the mill by smelter facilities. An insignificant percentage of crude ore was stock-piled. In cold weather the ore was switched from the scale to the thaw house, where it remained from 2 to 4 days and was then reweighed and switched to the designated unloading point.

In all instances, after unloading concentrates, residue or crude ore, the empty cars were returned to the scale for weighing and then switched to the flat yard for movement out of the plant by the transfer engine.

As indicated, the principal out-bound movement was lead bullion, consisting of one or two carloads daily. Cars for loading this commodity were first weighed empty and set to the dressing plant on the bullion track, hereinbefore described. After loading, the cars were switched to the scale and then to the flat yard.

Matte is a furnace product similar to bullion but contains a certain percentage of copper. This material moves from the blast furnace in large cakes and is handled in intraplant service to the sulphide mill. After crushing, the material is loaded into a previously weighed boxcar and is switched over the scale to the flat yard for movement out-bound, usually to the Garfield smelter.

Bag-house dust is loaded into open-top cars on the bag-house track previously described. The loaded cars are switched to the scale to determine whether they are properly loaded and, if so, then to the carpenter shop at the eastern end of track 7. If not, they are returned to the bag house for further loading. This material contains arsenic and it is necessary to equip the cars with wooden covers. The moves to and from the scale are considered separate

(742)

intraplant moves. After the covers are fitted, the car is switched again to the scale and from that point to the flat yard.

Ore produced at nearby mines in the vicinity of Leadville is trucked to the smelter and dumped directly into plant equipment for intraplant movement over the scale either to the sulphide mill or into stock piles. The volume of such traffic in March 1944 was equivalent to 29 carloads. In addition, about 6 carloads of trucked-in ore, and about 2 carloads of scrap iron per month, not belonging to the industry, moved from the lower dock on upper track 8 to the flat yard, were weighed and shipped in line-haul move-

ments. Between 70 and 80 carloads per month are handled for about 2.25 miles over the scale and through the flat yard for account of 1 processor and 22 cars a month for a much shorter distance for another, together with cars from the same points for the smelter.

The testimony of the railroad witness is that one of the switch engines performs work outside the plant for as long as 5 hours on some days, very little on others, and that there might be days on which neither engine goes outside the plant. Neither engine went outside on any of the 3 days the Commission's employees observed the operations. A witness for the industry "judged" that "probably" about 25 percent of the time of both engines is spent outside of the plant.

Effective June 10, 1942, and at present in force, D. & R. G. W. tariff I. C. C. No. 736 provides, so far as here pertinent, that delivery of a line-haul carload shipment destined to smelter at Leadville will include movement within smelter plant over track scales, to and from the thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the smelter company. For each additional movement of line-haul carload shipments, not provided for above, from track to track within smelter plant, (including weighing over scales within the plant), a charge of \$2.97 per car is provided.

Under this provision no charges are assessed for switching interstate line-haul traffic to and from the thaw house, or to and from the sampler, or for weighing empty cars after unloading. All intraplant movements, including movements from stock piles to various unloading points, are charged for at \$2.97 per car. For this service the smelter paid to the Rio Grande during the representative period \$240.57 on 81 cars for switching intrastate line-haul shipments, and \$11,006.82 on 3,706 cars handled in intraplant service. Empty cars belonging to the industry are switched without charge.

The previous discussion and conclusions relative to the carriers' duty to weigh cars loaded and empty, and to ascertain values of concentrates and ores in connection with the smelter at Garfield are equally applicable at the Murray and Leadville smelters.

(743)

In addition to the arguments there considered, another is advanced by the Rio Grande in connection with the Leadville Smelter which, as we understand it, is that because

the large preponderance of the in-bound traffic, 93 percent, is intrastate and that traffic exceeds the out-bound traffic, 2,102 to 476 cars, although 98.9 percent of the latter is interstate, and because the supply of ore at the Leadville smelter is precarious, we should close our eyes to any and all violations of the Interstate Commerce Act and/or Elkins Act and leave the parties to continue the present practices subject only to such control as the State authority may choose to exercise over intrastate traffic. To state the contention is to demonstrate its unsoundness.

As stated, the Rio Grande owns and maintains all standard-gage tracks within the plant area. The Commission considered a similar situation in *Sioux City Term. Ry. Switching*, 241 I. C. C. 53 and 241 I. C. C. 623, and in the latter report on reconsideration found that the providing and maintaining tracks under such circumstances resulted in a violation of section 6 (7) of the act.

The industry argues that in the instant case the furnishing and maintaining of tracks for its private use without cost to it is not unlawful because the practice has been continued for a long period of time. Even if the practice did not violate the law prior to the enactment of section 6 (7) of the Interstate Commerce Act and the Elkins Act, those acts made the continued furnishing of the facilities unlawful and no right to violate a statute can be obtained by prescription. It is also contended that it should be presumed that the industry granted the Rio Grande an easement of way to build and maintain the plant tracks because a search of the industry's files back to 1880 disclosed no information as to the agreement, if any, between the industry and carrier. It is immaterial whether such an easement was or was not granted to the railroad and there is no presumption that because the main line of the railroad and a spur therefrom crosses the property of the industry, the right-of-way for those tracks was the consideration for building the plant tracks and maintaining them for over 44 years. The questions of whether the carrier owns those rights-of-way or only has a right of usage for a continuing or other consideration are matters which may readily be proved and are not matters for speculation based on the testimony of the traffic manager of the industry. Considerable emphasis is laid on the fact that the flat yard and scales are used by the Rio Grande for the traffic of the two processors and for the ore and scrap iron which the industry permits others to load in its plant. The traffic for those processing plants is handled to and from the flat yard only when trips are made by the

switch engines assigned to the industry to bring metal bearing materials to the smelter. It would seem that the
(744)

normal method of switching of those processing plants would be by the engine that operates between Malta and Leadville. Such incidental usage for about four cars a day cannot be accepted without better proof as adequate compensation for the building and maintaining of 6.04 miles of track over a mountainous terrain. Although it is not entirely clear, the industry also appears to argue that the circumstances enumerated change the flat yard from a private facility into a railroad or public one and somehow enlarges the obligations of the carrier under the line-haul rates. There is no basis for either view. The fact remains that the flat yard is on the property of the smelter, was built and is used primarily and principally for its traffic, and that the only other use made thereof is licensed by the industry and subject to its control. The fact that no charge is made against the railroad for the weighing of cars or the use of the flat yard cannot be used as an offset for charges for common-carrier transportation, including switching, which must be paid for only in money. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467.

We conclude that the services performed within the plant area beyond the flat yard, as described herein is an industrial service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; and that performance of said services by respondent without reasonable charge therefor results in the industry's receiving a preferential service not accorded to shippers generally.

We find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the flat yard as described herein; and that the service beyond the flat yard is a service which is not the duty of respondent to perform. We further find that the performance of service beyond the tracks described at the line-haul rates, without compensation, is a violation of section 6 (7) of the act.

An appropriate order will be entered.

MILLER, *Commissioner*, dissenting in part:

I am in accord with the finding that there is no merit in the contention that because the rates are based on value it is the duty of the carriers to establish and operate the necessary facilities, such as thaw houses and samplers. I also am in agreement with the finding that it is not the

duty of the carriers, under their line-haul rates to perform the intraplant switching necessary to enable the industry to ascertain the value of the ore.

However, respondents in this case, as in *Anaconda Copper Mining Co.*, 263 I. C. C.—, and in *United States Smelting, Refining, and Mining Co.*, 263 I. C. C.—, both decided (745)

concurrently herewith, contend that rates based on value are necessary in order to move the various grade ores; that the line-haul rates were made with full knowledge that respondents, for a number of years, had been performing the intraplant switching; and that those rates were made sufficiently high to compensate them for such services. If we accept that contention as correct—and the record does not contradict it—it is my view that since we are here prohibiting the performance by respondents of such switching services, without charge, the line-haul rates should be adjusted so as to eliminate that part of such rates which was included as compensation for the intraplant switching.

I think it appropriate to make the further observation, made by me in other recent decisions of this nature, that the record indicates that better cooperation between respondents and the industry should eliminate objection to some services by respondents not herein approved.

28

Exhibit C-4

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 1st day of October, A. D. 1945.

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the terminal services, charges and practices of Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company, in the receipt and delivery of carload freight at plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and

Leadville, Colo., and the Commission having under date of May 14, 1935, made and filed a report, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the services rendered to the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that the Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company violate the Interstate Commerce Act in the particulars as set forth in the above report:

It is ordered, That the Union Pacific Railroad Company, Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company be, and they are hereby, notified and required to cease and desist, on or before January 10, 1946, and thereafter to abstain, from such unlawful practice.

By the Commission, division 3.

W. P. BARTEL
Secretary

(SEAL)

29

Exhibit C-5

INTERSTATE COMMERCE COMMISSION

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Submitted

Decided

Respondents' line-haul rates found not to include services beyond the tracks described of record at plants of the American Smelting & Refining Company located at Gar-

field and Murray, Utah, and Leadville, Colo., and the performance of such services by respondents beyond those tracks found to be in violation of section 6 (7) of the Interstate Commerce Act.

W. M. Campbell, W. M. Carey, Elmer B. Collins, and L. T. Wilcox for respondents.

O. W. Tuckwood and John F. Finerty for the industry.

Charles A. Root for Public Service Commission of Utah.

Thomas S. Wood for Public Utilities Commission of Colorado.

D. H. Williams for Interstate Commerce Commission.

REPORT PROPOSED BY EXAMINERS LEONARD WAY AND S. R. DIAMONDSON

In the original report in this proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, certain principles were announced which the Commission indicated would be followed in considering the propriety and lawfulness of switching services performed by respondents at industrial plants. This supplemental report deals with the practice of respondent carriers in performing switching service within the plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo.

Prior to the hearing in this proceeding, an inspection, by employees of this Commission, was made of the physical characteristics of these three plants and the track layouts of each, and an investigation was conducted of the methods of switching and practices of respondents with respect to the receipt and delivery of freight at each plant. The results of the inspection were incorporated into the record in the form of testimony and exhibits.

Ex Parte No. 104—Sheet 2

Garfield, Utah.—This plant, principally engaged in the processing of copper, is approximately 18 miles west of Salt Lake City, Utah, and is served by the Union Pacific¹, Rio Grande², and Bingham & Garfield³. The Garfield station on the Rio Grande is 1.9 miles east of the plant. The nearest stations to Garfield on the Union Pacific and Bing-

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees).

³ Bingham & Garfield Railway Company.

ham & Garfield are at Lake Point and Magna, Utah, about 2 miles west and 4.2 miles east, respectively, of Garfield. None of these carriers maintains scales at these stations, nor do any of them connect with one another at Garfield, except within the plant and by means of the plant tracks.

The plant site is on the side of a mountain. There are 21.58 miles of standard-gauge track in the plant on three levels. About 4.5 miles of this trackage and 6 miles of narrow-gauge trackage are used exclusively by plant equipment. On the upper level, which is in the southern portion of the plant, there are a plant yard, and other tracks, thaw house, scale, and smelter and sampling facilities for handling concentrates. The plant yard, which is owned and maintained by the industry and used exclusively for its traffic, contains 10 parallel tracks, numbered consecutively from north to south, 1 to 10, and ranging in length from 1,800 to 2,400 feet.* These tracks merge at the east end of the yard into two parallel leads used respectively by the Rio Grande and Bingham & Garfield. The Union Pacific enters the plant yard from the west over a lead connecting with the tracks in the plant yard. Four tracks, 600 feet long, south of and parallel to track 10, beginning near the west end of the plant yard, diverge eastward from track 10 and run into the thaw house. These tracks, when the weather is warm enough so that it is not necessary to use the thaw house, are used occasionally for switching and storage purposes. There are also two repair tracks and a track on which to store bad order cars at the east end of the plant yard. Each of respondents has a repair shop adjacent to these tracks.

On the middle level there are, among other facilities, sulphide ore bins, sampling mills, blast furnace ore bins, and coke and lime rock bins, served by four parallel tracks, on trestles, designated ore dock tracks B, C, D, and F on the west end and dock tracks 4, 3, 2, and 1, respectively, on the east end. These tracks are over 2,600 feet in length. On the west, these tracks merge into a connection with the Union Pacific lead, while on the east they converge into tracks which extend over 2,000 feet eastwardly to a connection with the Bingham & Garfield lead to the plant yard.

* Maps of record show all of the tracks involved in this proceeding drawn to scale. The distances used in describing them in this report are based on the scale and are approximate only.

On the lower level, comprising that portion of the plant site north of the middle level, are tracks leading from the switchback track in the western end of the plant site and serving converter, reverberatory, and blast furnace buildings, acid plant, power house, roasters, warehouse, sand binds, and numerous other buildings and smelter facilities. All tracks in the plant are owned and maintained in good condition by the industry.

The Union Pacific and Rio Grande each make one trip daily to the plant and the Bingham & Garfield makes three trips daily. The Rio Grande road-haul engines pull inbound trains into the plant yard, generally on No. 5 track. The Bingham & Garfield and Union Pacific road engines push inbound trains onto tracks Nos. 3 or 4. These five daily trains consist of mixed trains of ore, concentrates, bullion empties, empty acid tank cars, and material and supplies. The industry owns three small steam engines, one of which is used daily from about 8 A. M. to 4 or 5 P. M. for intraplant switching on all standard-gauge tracks on the middle and lower levels of the plant site. The other two engines are held in reserve.

In accordance with a joint switching agreement between the Union Pacific and the Rio Grande, the latter carrier furnishes and maintains two switch engines and three crews which daily perform all switching of loaded and empty cars in the plant yard and between that yard and loading and unloading points, and eight or ten points of interchange with the industry's engine, within the plant. These engines also do considerable intraplant switching. Two engines operate from 7:30 A. M. to 3:30 P. M., one within the east end of the plant site and the other in the west end. One of them also operates throughout the entire plant area from 3:30 P. M. to 11:30 P. M. At least 95 per cent of the east end engine's time is consumed in weighing cars and switching Utah copper concentrates for delivery at the sampler, as hereinafter described, and it also removes empty cars from the east end of the middle level. The other two engines operate generally within the west end of the plant area on all three levels, and to some extent within the plant yard.

The switching performed by the Rio Grande for account of the Bingham & Garfield is covered by appropriate tariff provisions and charges, referred to later. The switching operations will be discussed in connection with the par-

ticular traffic handled at this plant. As the industry's engine operates over the same tracks, during the same hours, as the carrier's engines, except that it seldom goes on the upper level, there is potential interference but the testimony is that the crews are skilled men and that the Rio Grande has not had to complain about interference caused by the industry engine.

For the 12-months' period ending March 31, 1944, the inbound movement of miscellaneous materials and supplies to the plant from Utah origins totaled 211 cars, and from interstate origins 220 cars. During the same period, 21,333 carloads of concentrates, sand, tailings, crude ore, and other raw materials moved inbound from Utah origins and 1,218 carloads from interstate origins. Of the total of 22,982 carloads delivered to the plant, the Rio Grande transported 3,312 cars, the Union Pacific 3,934 cars, and the Bingham & Garfield 15,736 cars. Of those transported by the latter carrier, 13,025 carloads consisted of Utah copper concentrates. Approximately 93 percent of the total inbound traffic was intrastate.

Ex Parte No. 104—Sheet 4.

The outbound movement consisted principally of 5,855 carloads of copper bullion, 755 tank carloads of sulphuric acid, and 225 carloads of converter dust. Of the 6,960 carloads shipped outbound during the representative period, 6,486 carloads, or 93 percent, moved to interstate destinations. The outbound shipments were divided as follows: Rio Grande 450 cars, Union Pacific 541 cars, and Bingham & Garfield 5,969 cars.

All loaded and empty cars are delivered or received by the line-haul carriers in the plant yard previously described. Generally speaking, all inbound loaded cars, except Utah copper concentrates, are held in that yard until written instructions from the industry, issued three or four times a day, are received by the switching crew for placement. The excepted traffic is handled as a routine matter as hereinafter explained.

The preponderance of inbound traffic is concentrates, practically all of which is transported by the Bingham & Garfield at rates specifically limited to apply only to the plant yard. These are delivered on tracks 3 or 4 in the plant yard adjacent to the plant scale on track 1. Except in freezing weather, these shipments, without specific order from the smelter, are pulled by the east end engine in drags

of approximately 15 cars through the east end of the plant yard beyond a crossover from the Rio Grande lead to the Bingham & Garfield lead, a distance of approximately 1,200 feet, and then pushed west a similar distance to the scale, where they are pushed on the scale by the engine, one at a time, weighed, and then moved by gravity to the unloading point within the sampler building,³ which is immediately west of the scale and north of track No. 1. All of these tracks are on the upper level and within the plant yard. After unloading at the sampler the cars drift by gravity to the west end of the plant yard, a distance of about 600 feet, where the west end engine gathers the empties and returns them to the plant yard. The east end engine moves the empty cars to the scale where they are weighed. The cars are then switched to appropriate tracks in the plant yard by the west end engine for movement outbound. After copper concentrates are dumped into the sampler, the industry handles them by conveyor belts or other mechanical means until the copper bullion is ready for outbound movement.

During the winter months, raw materials, such as crude ore, concentrates, tailings, or sand, arriving in a frozen condition, are pulled from the plant yard, weighed, and drifted by gravity over track 2 to the west end of the yard, whence the cars are placed in the thaw house by the west end engine, where they remain from two to four days. After thawing, the cars are returned to the plant yard, reweighed, and, with the exception of those loaded with concentrates, held until written instructions for placement have been issued by the industry. As stated, concentrates are handled without written instructions.

About 6,800 earloads, or 34 percent of all metal-bearing raw materials received at the plant during the representative period, after being weighed once or twice, dependent on the weather, were unloaded into receiving bins for milling and sampling on ore dock tracks B, C, or D

Ex Parte No. 104—Sheet 5.

31 on the middle level. The distance traversed from the plant yard to the unloading bins is about 3,200 feet. Four percent of the ore in these cars, or about 270 earloads, after it had been milled and sampled, was reloaded into railroad cars for intraplant movement to stock piles; or

³ This sampler can only be used for sampling concentrates. Crude ore must first pass through crushing mills before it can be sampled.

was reloaded into cars after sampling and held in the plant yard for shipper's further instructions, or was reforwarded to other destinations under a sampling-in-transit arrangement, as hereinafter described. In addition to the latter cars, 1,399 intrastate and 95 interstate carload shipments of miscellaneous tailings, 192 of which moved to and from the thaw house, were unloaded at stock piles or at the ore docks on the middle level.

Of the 6,800 carloads referred to, 947 carloads consisted of crude ore, and constituted the bulk of the interstate inbound tonnage. Of this number, 183 cars were switched to the scale through the east end of the yard as described in connection with concentrates, and, after weighing, drifted by gravity down track 2 to the west end of the yard from where the west end engine switched them to the thaw house. Subsequently, ~~these~~ cars were again weighed loaded and returned to the plant yard awaiting orders for further movement. The necessity for weighing the ore prior to and after thawing is explained hereinafter, in connection with moisture sampling. The remaining cars were weighed and moved to the west end of the yard, as described, and also returned to the plant yard. All carloads of crude ore, unlike concentrates, are returned to the plant yard, after weighing or thawing, for spotting orders. On the receipt of such orders, the cars are pulled west to the switch connecting with the ore dock tracks on the middle level and set on those tracks for unloading into bins. The number of shipments that can be switched to the ore bins is limited by the smelter's requirements. At times only a few cars are moved for the purpose of matching up with other cars and the remainder on hand are switched later. The carrier is not at liberty to spot cars as soon as they arrive at the plant but must await instructions from the smelter. In addition to the interstate shipments of crude ore there were handled in like manner 3,535 carloads of intrastate crude ore, of which 298 carloads moved through the thaw house. All of these cars were ultimately switched by the west end engine to ore dock tracks B, C, or D, and unloaded into bins. The actual spotting of the cars is performed by plant employees.

Inbound carloads of crude ore and concentrates and of other miscellaneous metal-bearing materials are sampled to determine the percentages of moisture they contain, while they are moving into the plant yard, except when they are frozen, by removing some of the material in buckets.

When the lading is frozen the moisture is dried out in the thaw house and the car is reweighed to ascertain the dry weight, on which basis the smelter makes settlement with the shipper. The published rates apply on the so-called wet weight of the shipment as it first goes over the scale and are dependent upon value as more fully explained hereinafter. In other words, for the purpose of determining the freight charges, the value of the ore and concentrates based on the dry weight is converted to a wet weight basis and applied to the shipping weight. A few cars of miscellaneous tailings are pipe sampled and unloaded in stock piles on the middle level without passing through the sampling mill.

Ex Parte No. 104—Sheet 6.

Empty ore cars are pulled by the east end engine to the switch connection with track 1 on the upper level and then pushed west to the scale, whence they drift by gravity to the west end of the yard and are assembled by the west end engine into outbound trains. A small percentage of these empty cars are not weighed for the reason that the crude ore was unloaded at a stock pile. Such cars are taken directly to the plant yard. About 85 percent of all inbound cars are weighed after unloading.

Of the 431 carloads of miscellaneous inbound materials and supplies, such as salt, coal, brick, pig iron, fuel oil, lumber, etc., 99 percent were switched from the plant yard to the scale, weighed, and, on specific order, moved west to the switchback leading to the lower level for unloading at various points, or were set on tracks on that level for further handling by the smelter engine.

During the representative period, 1,514 carloads of beach sand moving over the Bingham & Garfield from Sands, Utah, 3.1 miles east of the smelter, were weighed and delivered on the sampler track on the upper level or on the ore dock tracks on the middle level. These cars were not weighed light.

As previously indicated, the preponderance of the interstate outbound loaded movement consists of copper bullion, sulphuric acid, and converter dust. Empty cars for loading copper bullion reach the plant yard over the Bingham & Garfield and are generally switched twice a day by the west end engine, without being weighed, to the so-called copper casting building on the lower level. As a general rule, they are set on tracks serving that building and are spotted by the smelter facilities. The cars are weighed empty and loaded in the copper casting building. Loaded cars switched

from the lower level to the plant yard encounter excessive grades, particularly to the first switchback, which limit the capacity of the engine to five cars. Approximately 16 carloads of copper are shipped daily. All outbound loads of copper move over the Bingham & Garfield. The distance traversed between the copper casting building and the plant yard is not definitely stated but apparently exceeds one mile.

Tank cars for loading sulphuric acid and open top cars for loading converted dust are switched from the plant yard to the loading point on the lower level in much the same manner as the bullion empties, except those for acid are weighed. The switching of the loaded cars is quite similar to that of copper bullion, and the number of cars that can be handled is also limited by the grade.

Prior to February 25, 1920, switching within the plant of line-haul traffic was accorded by the Rio Grande without additional charge. On that date the switching was limited to one movement of a line-haul shipment within the plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator)*, to an unloading point designated by the smelter. For each additional movement from track to track within the plant a switching charge of \$2.50 per car was applied.

Ex Parte No. 104—Sheet 7.

32 In purported compliance with the principles announced in the original proceeding, the governing tariffs were amended, effective July 5, 1938, on interstate traffic, and June 25, 1938, on intrastate traffic, to provide, in substance, that the line-haul rate includes the movement of loaded cars from the road-haul point of delivery to the switching line to track scales and subsequent delivery to any designated track within the plant which may be accomplished by one continuous switching movement without interruption resulting from orders from, or requirements of, the smelter. It was also provided that the line-haul rate included the uninterrupted outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to the point of interchange with the road-haul carrier. For each additional movement within the plant, except as hereinafter shown, a charge of \$1 per car was applicable. Ore or concentrates arriving at the smelter in a frozen condition may

* Effective November 7, 1920, a free switch was also accorded on line haul shipments moving to and from the smelter thaw house.

be switched to and from the thaw house at a charge of 50 cents per car for the round trip. After thawing, the car may be switched to track scales and thence to the sampler or other designated location within the plant as indicated above. Inbound or outbound empty cars may be switched to track scales for weighing, on demand of the smelter, at a charge of 50 cents per car. When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnace, the service (including weighing over scales within plant) are charged for at \$2.70 per car for each movement. These tariff provisions and charges are in effect at the present time.

Specific switching charges are presently in effect in connection with traffic switched by the Rio Grande for account of the Bingham & Garfield. A charge of \$2.25 per car, in addition to the line-haul rate, is paid by the smelter for switching concentrates originating at Magna or Arthur, Utah, to the sampler as hereinbefore described. A similar charge applies on clay or sand received from the Bingham & Garfield in the plant yard and switched to unloading point. On all intrastate carload traffic not specifically provided for above, the Rio Grande maintains a switching charge of \$3.60 per car for switching between track connection with the Bingham & Garfield and points within the smelter yard, which is absorbed by the latter carrier. A charge of \$3.96 is maintained for similar service on interstate traffic.

Based on the foregoing tariff provisions and charges, the Bingham & Garfield paid to the Rio Grande during the representative period, a total of \$23,787.72 at \$3.96 per car on 6,007 cars for switching interstate line-haul traffic. The smelter paid to the switching carrier \$117 on 112 carloads of crude ore and 5 carloads of matte and Speiss, based on the \$1 charge per car referred to above for additional moves within the plant, \$105 for switching 210 carloads to and from thaw house, and \$810.50 for weighing 1,621 empty cars.

An exhibit of record purports to show the amounts paid by the smelter and the Bingham & Garfield for switching and weighing charges accruing to the Rio Grande during the same period on interstate line-haul traffic and for intraplant service. The figures shown on this exhibit are apparently in error in certain respects. For example, it is shown that the smelter paid \$4,014 on 1,115 cars at \$3.60 per car for switching line-haul traffic. As indicated above, this charge applies for switching between track connection

with the Bingham & Garfield and points within the smelter yard and is absorbed by that carrier. The exhibit also shows that the smelter paid \$32,724 on 14,544 cars at \$2.25 per car on concentrates and sand transported by the Bingham & Garfield; \$364 on 364 cars at \$1 per car for additional moves within the plant; and \$454 on 908 cars at 50 cents per car moving to and from thaw house. In addition, the smelter paid to the Rio Grande \$1,522.80 on 564 cars for intraplant moves at \$2.70 per car and \$2,838 on 5,676 cars at 50 cents per car for weighting empty cars. The Bingham & Garfield paid \$118.80 on 33 cars on the \$3.60 basis above referred to.

Under the terms of the switching agreement between the Rio Grande and the Union Pacific, hereinbefore referred to, the expenses incurred and switching charges received by the former are apportioned between the two carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5(1) of the act is shown.

Due to the complex nature of ores produced in the intermountain district and shipped to Utah smelters, there has been in effect for many years a so-called sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters by allowing shipments of ores and concentrates to be sampled in transit at one or more of the Utah smelters or the independent sampler at Murray, Utah, and then move to the smelter selected by the shipper. During the representative period a total of 31 carloads of crude ore were sampled in transit at Garfield and reforwarded to other destinations without charge in addition to the line-haul rate for the weighing and switching service performed at the Garfield smelter. The sampling-in-transit provision published in D. & R. G. W. tariff I. C. C. No. 757, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Garfield without charge for the first stop at the sampler or for the out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 606.

The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on

the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it is stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry to which the shipment is consigned will be a reasonable rule to apply in the future. The applicable tariffs provide that such ores and concentrates shall be billed from point of origin at a rate based on approximate value and after the ore has been sampled the rate will be revised in accordance with the value determined and certified to the carrier as the basis for settlement between shipper and consignee.

Ex Parte No. 104—Sheet 9.

33 It is not deemed necessary to discuss the industry's contention that the charges published to apply beyond the plant yard do not apply to smelters, further than to say that the fact that the line-haul rates are based on value does not place smelters in a special class as to the quantum of service embraced in those rates. Where rates are based on value the obligation is generally on the consignor to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, due to the fact that there is considerable variation in the value of ores from the same region and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the industry to make settlement between the seller and buyer on basis of weights and value determined by the buyer. The smelters voluntarily agreed to furnish the necessary information and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised "in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry." There is no sound basis for the contention that such a concession increases respondents' common carrier obligations and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the sampling. The furnishing of the values is the obligation only of the smelters and not of the carriers.

A carrier is required to ascertain the weight of shipments and this is ordinarily done at origin stations or enroute

as near origin as practicable. When a car is so weighed and reweighed at destination at the request of the consignee or for his benefit or purpose, a charge should be made for switching to and from the scales as well as for the actual weighing unless the billed weight is found not to be within the tolerance limit. Carriers ordinarily use the weights stenciled on cars as the correct empty weight of those cars. A charge should therefore be made for weighing all empty cars at origin and destination unless on reweighing, the stenciled weights are found to be not within the allowed tolerance.

When shipments originate and terminate at stations where carriers do not have scales and do not pass track scales enroute, and when their tariffs do not provide for estimated weights, a carrier would be justified in weighing the cars at destination without charge therefor on private scales of the consignee instead of attempting to estimate the weight. The weighing of cars at destination as a step in ascertaining the moisture content and to ascertain invoice weights or for any other industrial purpose and the reweighing of cars after thawing and the weighing of empty cars at the smelter is for the benefit of the smelter and constitutes an interruption in switching, prevents the placement and removal of cars in a continuous movement, and are services not embraced in the line-haul rates.

The industry contends that any charges for the various services attending the weighing of the cars and switching to and from the thaw house and sampler would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act as no charges are made for identical services when the ore and concentrates are sampled and re-shipped out of the plant in many instances from one smelter owned by the American Smelting and Refining Company to another owned by the same company. That contention ignores the fact that even if the switching between the various points in the plant and the three weighings could be said to be embraced in the term "out-of-line or back haul service," the circumstances and conditions are not

Ex Parte No. 104—Sheet 10.

substantially similar, in that one instance the service is rendered at destination and in the other while the traffic is theoretically enroute to destination. Further, the proceeding here is not one to enforce section 2 but to determine whether section 6 (7) is being violated.

With respect to movement of all commodities, both inbound and outbound, the evidence is convincing that the switching at the plant must be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant area without interfering with one another and without encountering interference from intrastate traffic and from intraplant operations.

The Commission should find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Garfield, Utah, under the line-haul rates begin and end at the plant yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described, without adequate and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the act.

Murray, Utah.—This plant is engaged in processing lead ores and concentrates. Murray is 7.2 miles west of Salt Lake City on the line of the Union Pacific extending from the latter point to Lynndyl, Utah, and 6.7 miles from Salt Lake City on the Rio Grande. All shipments over the Union Pacific to or from the smelter move through that carrier's Pallas yard, about .5 mile south of the smelter property, and about one mile from the station at Murray.

The Union Pacific has two entrances to the property over parallel leads, hereinafter called respectively the east and west leads, connecting with the industry tracks at the southwest corner of the smelter property. The plant scale is on the east lead inside the property line but outside of the plant fence. The Rio Grande reaches the plant property with its own tracks but does not do any switching within the plant. It interchanges traffic with the Union Pacific on a transfer track at the latter's entrance to the plant.

From connections with the east and west leads, 33 standard-gauge tracks, aggregating about 6 miles in length, diverge to the north and east and reach buildings and smelter facilities throughout the plant enclosure. These tracks

are all stubbed and are owned and maintained by the industry. The plant trackage is in such poor condition that it causes frequent delays and interruptions in switching operations and makes it unsafe for line-haul or any engines except light switching engines to operate over it. The smelter yard is practically on one level and there are no severe curves.

The east lead continues northeastward with the industry's property line for about 1,000 feet from the plant scale

Ex Parte No. 104—Sheet 11.

34 and then, just inside the plant fence, curves eastward and diverges into two tracks which, in turn, diverge into six tracks. The northernmost of these six tracks is known as the Old Hand track. It is 700 feet in length⁷ and is used as a storage track for inbound loaded cars and for cars of finely ground ore moving from the plant mill to the roasters when in excess of the capacity of the roasters. The next track to the south, 600 feet long, is called the Pug Mill track and the last 325 feet thereof is used for the loading of flue dust. South of this track is the so-called middle belt track, 800 feet long, used for unloading finely ground ore for the roasters. The material is dumped into bins on this track and moved by conveyors to the roasters. Roast or sinter is loaded on a track south thereof, known as the roast track. It is the nearest track to the southern fence and is over 1,500 feet long. All roast or sinter moves from this track in intraplant service. Near the eastern end of the roast track are several short connecting tracks and cross-overs used for loading arsenic, calx, and baghouse dust, and for storing empty cars to be used for loading roast. Empty cars, called "idlers" have to be used between the engine and the loaded cars on the baghouse and one of the adjacent tracks because a fixed spout prevents passage of the engine. Between the middle belt track and the roast track is a track, 500 feet long, known as the old belt track, which terminates at a coke hopper south of the roasters and west of the D. & L. mixing building.

The west lead continues about 1,000 feet north of the scale and parallel to the east lead to a point just north of the plant fence, from where it diverges into 25 tracks which serve various loading and unloading points in the northern, central and western portions of the plant enclosure. Two

⁷ The distances shown are approximate and are computed from the point of connection with the respective leads.

tracks, designated 5 and 6, extend northeastward parallel with the western fence for about 1,100 feet. They are used as hold tracks for inbound and outbound loaded cars. A short track takes off of track 5 and divides into two tracks that run into the thaw house which is southeast of and adjacent to track 5. Each of the tracks within the thaw house has a capacity of six 40-foot cars.

A track, known as the bullion track, diverges from the west lead about 150 feet south of where that lead diverges into track 5 and 6. It is about 1,700 feet long and is used for loading bullion and sometimes for storing empty cars for bullion loading. Diverging from that track and extending parallel to it for a distance of 1,000 feet is the matte track on which cars are generally loaded for intraplant movement. This is the most northern track in the plant used for loading or unloading purposes. Track 4, 1,800 feet long, diverges from the west lead near the connection with the bullion track and is used for scrap iron storage and also serves Mill 4 and other smelter facilities. Idlers are used to reach Mill 4 due to interference caused by a stationary hoist. Track 3, 850 feet long south of and parallel to track 4, diverges therefrom and serves two scrap iron and three coke bins located on the east 300 feet thereof.

The next track to the south is known as the north trestle track. It is over 1,400 feet long and terminates over ore hoppers near the blast furnaces. This track is used for unloading sintered or roasted ore into bins on the 280 east feet thereof. Locomotives and box cars are not allowed to enter the shed over the bins and flat car idlers have to be used.

Ex Parte No. 104—Sheet 12.

Adjacent to the north trestle track on the south is the so-called north coke track, 1,300 feet long, and, connecting with the latter and extending parallel to it for a distance of 1,000 feet is the so-called south coke track. These two tracks are used for holding inbound loaded cars, and, with tracks 5 and 6, hereinbefore described, will be referred to collectively as hold tracks.

Track 1, over 1,500 feet in length, extends through the central part of the plant yard and over the hopper at Mill 2 building. This track, east of the mill building, is also used for scrap iron and ore storage. Diverging from it are two tracks designated the rock track and track 2, 1,100 and 900

feet in length, respectively. The rock track serves ore bins extending for about 300 feet to the east end of the track. In reaching these bins, idlers must be used to avoid damage to foot boards and cylinder cocks of the engine, by materials on or about the tracks at the bins. Track 2 reaches four concentrate and two coke bins and a scrap iron storage dump in the order named.

From a switch connection with track 1 a lead diverges into several tracks extending through the central part of the yard. These tracks range in length from 300 to 1,000 feet, and are used to reach car repair, carpenter, boiler, and machine shops, and for unloading less-carload traffic; also for brick and lumber storage. The southernmost of these tracks is called the low line track and reaches unloading bins for iron concentrates, as more particularly described hereinafter. Idlers have to be used to spot cars on one of these tracks, called the coarse house track, at three shops, because a fixed spout prohibits the engine passing Mill 2, which is about 100 feet west of the nearest shop and about 600 feet west of the end of the track.

The high line track is on a trestle and extends south of, and parallel to the low line track. From its connection with the west lead the high line track is 1,600 feet long and reaches, in the order named, bins into which ore is unloaded the wedge mixing building, and Mill 1. It passes through the mixing building and engines are not permitted to enter that building.

Tracks 1, 2, 3, and 4, and the rock track, are, in part, on trestles.

Under a joint arrangement between the Union Pacific and Rio Grande, the first-named carrier furnishes a switch engine and crew which performs all switching in the plant yard for account of both carriers. This engine is a small six-wheel shifter weighing about 70 tons and usually operates one 8-hour tour of duty beginning at 7 A. M., with overtime almost daily, and occasionally a second crew is used. The Union Pacific's road-haul engines cut loose from inbound trains and pick up outbound cars at the Pallas yard and they also switch cars received from and delivered to the Rio Grande to and from that yard. The switch engine referred to above handles the cars between that yard and points of loading and unloading in the plant. The industry operates locomotive cranes to an undisclosed extent over the same tracks over which the switch engine operates. An unspecified number of cars are leased from the Union Pacific for intraplant service exclusively.

Ex Parte No. 104—Sheet 13.

35 During the 12-months period ending March 31, 1944, the total number of inbound shipments of miscellaneous materials and supplies was 666 carloads. These shipments consisted of furnace coke, lime sand, coke breeze, coal, scrap iron, brick, clay, soda ash, lumber, structural steel, sulphuric acid, and track materials. Practically all of these shipments moved from intrastate origins, 374 carloads over the Rio Grande and 292 carloads over the Union Pacific. Raw materials received during the same period aggregated 1,943 carloads and consisted of lead and iron concentrates, crude ore, and miscellaneous commodities such as arsenic dust, Speiss, and matte. Of this traffic the Rio Grande transported 950 carloads and the Union Pacific 993 carloads. Of the total, 726 carloads, or about 38 per cent, moved from interstate origins.

The outbound movement during the same period aggregated 845 carloads, and consisted of 437 carloads of lead bullion, 282 carloads of Speiss calx, and 77 carloads of crude arsenic, the remaining 49 carloads consisting of baghouse dust, matte, dump slag, and miscellaneous ores. Of the total shipped, 554 carloads, or 66 percent, moved to interstate destinations. The preponderance of the intrastate shipments was Speiss calx. The outbound movement was divided 514 carloads over the Rio Grande and 331 carloads over the Union Pacific.

Written switching instructions are given to the switch crew by the industry and all cars are moved to meet the requirements of the plant.

A total of 351 carloads of lead concentrates were received at this plant during the representative period, constituting 18 percent of the total inbound shipments of raw materials received. The method of handling this traffic is to push the cars over the track scale, uncouple and weigh them. After each car is weighed it is said that it is rolled northward by momentum supplied by the next car placed on the scale. The switch engine then backs up over a switch a short distance south of the scale, passes the scale, couples the cars and pushes them to the hold tracks. The concentrates are moistured and pipe sampled on those tracks. The pipe samples are transported to the sampler, ground and screened and subsequently assayed for value of metal content. After their value is determined the concentrates are switched from the hold tracks to the middle belt track serving the so-called D. & I. bins, where the material is dumped

and thereafter carried by conveyor belts to the D. & L. mixing building southeast of the bins. From the mixing building the material is handled by conveyor belts to the adjacent sintering plant. Lead concentrates receive no further railroad handling after they have been spotted at the D. & L. unloading bins.

There were also received 421 carloads of iron concentrates which were handled in the identical manner as lead concentrates with respect to weighing, placement on hold tracks, moisturing, and sampling. Thereafter, about 75 percent of the cars were spotted alongside bins on the low line tracks just west of the wedge mixing building. The remainder, or 25 percent, were unloaded by smelter operated cranes into the D. & L. bins served by the middle belt track and thereafter carried by conveyor belts to the nearby arsenic roasters.

Godfrey dust, of which there were 159 carloads received during the same period, were handled in the same way as lead concentrates.

Ex Parte No. 104—Sheet 14.

A total of 696 carloads of crude ore were also switched to the hold tracks and sampled for moisture. Between 80 and 85 percent of these crude ores were unloaded in bins on the high line west of the wedge mixing building for crushing and screening in Mill 1 and sampling. There are two methods of handling this ore after milling and sampling. It may be carried by conveyor belts into the wedge mixing building where it is converted into calx. Approximately 96 of the total of 696 cars were handled in this manner. The remaining cars, after passing through Mill 1 and the sampling room, were reloaded into railroad cars. The practice is to place three loaded cars with one empty car in front of them. The ore is unloaded from the first loaded car, passed through the mill and loaded into the empty car. That process is followed with the other cars. The cars are then switched over the high line in reverse movement to reach the connection with the east lead and thence over the middle belt track to the sintering plant, an approximate distance of 3,400 feet. About 15 percent of the crude ore was switched from the hold tracks to Mill 2, served by track 1, or Mill 4, located on track 4. The ore spotted at Mill 2 is crushed and sampled, and then reloaded into railroad cars and switched in reverse movement over track 1 to reach the middle belt track and over the latter track to the sintering plant, approximately 3,300 feet. Exceedingly

hard ores are spotted at Mill 4 and after being ground are reloaded into railroad cars and switched about 2,600 feet to Mill 1 for further grinding or move to stock piles located along various tracks in the southern part of the plant yard. Only a very small proportion of the crude ore goes through Mill 4.

A total of 103 carloads of arsenic dust were switched to the hold tracks and were ordered spotted at unloading bins on the low line. The wooden covers on these cars were removed by locomotive cranes, the shipments moistured and pipe sampled, and unloaded into the bins by the cranes.

There were also received 94 carloads of Speiss which were moisture sampled on the hold tracks and then switched to Mill 4. The commodity was there coarse ground and sampled and then reloaded into railroad cars and switched either to stock piles or to Mill 1. If to the latter point the Speiss was reground and conveyed by hopper to the ball mill which is a part of Mill 1.

Shipments of matte, comprising 26 carloads, were set on the hold tracks by the switch engine and ordered to Mill 1 for grinding. Matte contains both lead and copper and since Murray is a lead smelter, copper is not a useful material there but is considered an impurity. The matte was fine ground and sampled at Mill 1 and was thereafter moved to track 4 and stock piled. From that point the matte was handled by smelter facilities to the reverberatory furnaces.

The remaining inbound raw materials consisted of 22 carloads of Selby dust, which is a fine dust containing a small proportion of arsenic. This traffic was switched from the hold tracks to the carpenter shop, where the wooden tops were removed from the cars and the shipments were sampled. Subsequently, the dust was stock piled.

As indicated, an aggregate total of 666 carloads of inbound material and supplies were received. The preponderance of this traffic consisted of 197 carloads of lime

Ex Parte No. 104—Sheet 15.

36 sand, 247 carloads of furnace coke, and 91 carloads of coke breeze. All of the inbound shipments were first switched to the hold tracks. Most of the lime sand was switched from there to the middle belt track for unloading at the D. & L. bins. The remainder was stock piled. The furnace coke was switched to the coke bins on track 3. The coke breeze was unloaded at the coke hopper on the old belt track.

Of the total of 845 carloads of outbound shipments during the representative period, 437 carloads consisted of lead bullion, all of which moved to interstate destinations. Box car empties for bullion shipments were weighed and set on either the bullion or matte track. After loading, the cars were switched to the hold tracks, made up into drags with other outbound loads and returned empties, and were taken to the scale, weighed, and delivered into the Pallas yard. There were 282 carloads of Speiss calx shipped during the same period over the roast track from the arsenic loading shed. These shipments were handled outbound in a similar manner to the bullion shipments, that is, they were switched to the hold tracks, made up into trains, weighed, and taken to the Pallas yard. All of the calx moved to intrastate destinations. The remaining outbound movements consisted of 77 carloads of crude arsenic, 13 carloads of bag-house dust, and 27 carloads of dump slag, all moved to interstate destinations, and 7 carloads of matte and 2 carloads of miscellaneous ores moved to intrastate destinations.

Concentrates and crude ore which arrived at the plant in a frozen condition were weighed and switched to the hold tracks and from that point to the thaw house. After thawing, the cars were returned to the scale for reweighing and then switched to the hold tracks and as soon as the industry was prepared to unload them, to unloading points. The necessity for weighing this traffic prior to and after thawing has been previously explained in connection with moisture sampling at the Garfield smelter.

The identical tariff provisions and switching charges of the Union Pacific and Rio Grande, hereinbefore set forth with respect to the Garfield smelter, are applicable at Murray.

For switching performed in connection with interstate line-haul traffic the smelter paid, during the representative period, \$450 on 448 carloads of crude ore, 1 carload of concentrates, and 1 carload of coal, based on the \$1 charge per car for additional moves within the plant; \$80.50 for switching 117 and 44 carloads of crude ore and concentrates, respectively, to and from the thaw house at 50 cents per car; and \$540 for weighing 1,080 empty cars, at 50 cents per car, or aggregate switching and weighing charges of \$1,070.50.

During the same period the smelter paid \$14,699.90 for switching intrastate line-haul traffic, or for intraplant switching, divided as follows: Intraplant moves of 5,002 cars at \$2.70 per car, \$13,505.40; weighing 1,366 empty cars

at 50 cents per car, \$683; additional moves within the plant of 383 cars at \$1 per car, \$383; and moves to and from thaw house of 257 cars at 50 cents per car, \$128.50.

As has been seen, all inbound and outbound shipments are switched to the hold tracks. Raw materials, constituting the bulk of the traffic, are held there for moisturing and sampling, and awaiting instructions from the smelter with respect to the further movement of the cars. The final point of delivery of sampled ore or concentrates depends upon the assay after sampling.

Ex Parte No. 104—Sheet 16.

Although a question was raised at the hearing and discussed in briefs as to the extent of the Commission's jurisdiction to determine the legality of terminal switching services rendered on intrastate traffic, it is not deemed necessary to determine that question here. It will suffice to say that all circumstances and conditions that cause interruptions to, or that interfere with, the switching of interstate traffic, whether they be due to insufficient track capacity or unsafe conditions of the tracks, restrictions in use of tracks either as to time or operations, obstructions to free movement of engines or cars, switching of intraplant, intrastate, or interstate traffic, whether performed by industry or carrier engines, and other such factors, are matters that should be considered. This is especially true when, as here, the movements of inbound and outbound interstate shipments are so intermingled with intrastate and intraplant switching and so integrated into the operations of the industry that they are inseparable. For all practical purposes, the industry controls the work, except as to the mechanical operations of the switching crews while they are operating in the plant. The switching is performed under the direction of a yardmaster employed by the industry, who specifies the particular cars and the time when, and places to or from which, they are to be moved. This is necessary because the time and place when cars are to be spotted or removed from loading points are controlled by variable factors as shown above and must be coordinated with the operating practices and needs of the industry. Even the industry does not know when or where cars are to be spotted upon arrival at the plant. It is, therefore, clear that the manner in which the industrial operations of this plant are conducted prevents the switch engine that operates solely within the plant from performing switching beyond the hold tracks in a continuous and uninterrupted movement.

The previous discussion deals with the situation where the Union Pacific does all of the switching under a pooling arrangement not shown to be authorized by the Commission as required by section 5 (1) of the act.

In *Kingan & Co. Terminal Services*, 255 I. C. C. 531, the carrier had instituted a pooled switching operation but it was there indicated that while it was impracticable and undesirable for each of the carriers serving the plant to perform its own switching, it would be possible for them to serve the plant by pooling operations and coordinating them to the plant's operations. Division 3 there said:

No duty devolves on a carrier to pool switching services in order to accommodate an industry when they could not individually perform the service with their own power at their own convenience and free from interference.

It follows as a matter of course that the fact that carriers have pooled services as they have done here does not create an obligation that did not previously exist and that if they can not individually serve the plant because of interference by one carrier's engine with another, there is no obligation on them to do so under a pooling arrangement.

Ex Parte No. 104—Sheet 17.

37 The actual switching operations as described above prove that it is impracticable, if not impossible, for each of the carriers serving the industry to perform its own switching without interference and at its convenience.

The Commission should find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the hold tracks as described herein; and that the service beyond the hold tracks is a service which it is not the duty of respondents to perform. It should further find that the performance of service beyond the tracks described at the line-haul rates, without adequate compensation, is a violation of section 6 (7) of the act.

Leadville, Colo.—The Leadville branch of the Rio Grande connects with the main line at Malta, Colo., and extends 4.8 miles to Leadville. The American Smelting & Refining Company's plant, known as the Arkansas Valley plant, is located about midway between Malta and Leadville. Its principal business is processing lead ores and concentrates.

The plant yard is on two levels. The Rio Grande enters the plant enclosure at the northwest corner of the property

on the upper level over a lead, herein called the main lead, diverging from the Leadville branch. This lead continues southward within the plant for a distance of about 1,400 feet from the point of entrance.

Just inside the plant entrance, a track diverges to the south from the main lead and serves 7 stubbed tracks, referred to in the evidence and hereinafter as the flat yard. These tracks run in a north-south direction, parallel to, and east of, the main lead. They range in length from 600 to 900 feet. Approximately 300 feet south of the connection referred to, another track, known as the scale track, diverges from the main lead and runs southwardly parallel to, and west of, that lead for a distance of over 800 feet. The scale track is stubbed but is connected with the main lead by a crossover a short distance south of the scale. Traffic to and from the plant may thus move over the scale without being handled through the flat yard, but as hereinafter explained, all inbound cars are placed in the flat yard before they are weighed. Outbound cars are weighed before being placed in that yard.

Immediately south of the flat yard a track takes off from the main lead to the west and connects with 6 stubbed tracks, numbered 12 to 17, inclusive, that enter the thaw house. These tracks each have a capacity for 4 cars. The thaw house is about 1,400 feet from the scale. Tracks 9, 10, and 11 diverge from the main lead south of the thaw house and serve crushing and roasting plants, conveyor shed, and other buildings and facilities. There is a conveyor shed over track 9 about 375 feet from the stubbed end, and sample bins under track 11. It is not clear from the evidence whether the engines are permitted to enter that shed or pass over the bins. The inference therefrom is that they are not but that it is not necessary for them to do so.

A continuation of the main lead, known as track 7, extends eastward through the approximate center of the plant property and facilities. This track is stubbed and towards its east end is on a sharply descending grade. Six tracks, numbered 1 to 6, south of and parallel to track 7 connect

Ex Parte No. 104—Sheet 18.

with that track on the west. Tracks 1, 2, 5, and 6 are stubbed on the east ends and apparently are used to reach stock piles of zinc and Blackwell residue and coke breeze. Tracks 3 and 4 are shown as passing through a building in which scrap iron and ore bins are under the tracks and connecting with track 7 on the east thereof. It is not shown whether the engines are permitted to enter that building. Farther

west, two other tracks, known as upper 6, south of, and upper 8, north of track 7 also diverge eastward therefrom. They connect with track 7 on both ends. Upper 6 serves Blackwell residue stock piles, and the diesel oil tank. Three principally the sampling building and upper 8 coal and tracks, known as the baghouse, bullion, and matte tracks, respectively, are reached by connections with track 7 and serve loading points for baghouse dust, lead bullion and matte, in the southern part of the plant.

Another lead, known as the American track, takes off from the Leadville branch at a point on the property line about 500 feet east of the switch leading to the flat yard, and extends southeastwardly 2,300 feet through the plant yard and by a switchback connects with track 7 near the eastern limits of the plant property. The American and connecting tracks serve the so-called Cottrell plant and also a dock used by the industry for transferring ore from trucks to cars for intraplant movement. This dock is known as the Upper or American dock and has a capacity for the simultaneous loading of about 7 cars.

The tracks on the lower level are reached over the switchback above referred to, by a reverse movement over track 7 and the tracks connecting therewith, including track upper 8, on which there is a loading dock, known as the lower dock, which is used by mines in the vicinity of Leadville to load ore from trucks into railroad cars for outbound movement over the Rio Grande.

There are 6.04 miles of standard-gauge trackage within the plant area, all owned and maintained in good condition by the Rio Grande. There is also an unspecified amount of narrow-gauge trackage, apparently owned by the industry. The plant owns and operates two locomotive cranes and 57 open-top and 2 flat cars, used solely for intra-plant moves.

The Rio Grande furnishes and maintains two switch engines which operate daily, except Sunday, between the flat yard and loading or unloading points within the plant. Occasionally it is necessary for one engine to perform some switching on Sundays. During cold weather, when the thaw house is in use, these engines leave Leadville at 6:30 A. M., arriving at the plant about 7 o'clock. In the summer months they begin their respective 8-hour tours of duty at 6:30 and 8:00 A.M. These engines interfere with each other when both are switching cars to and from the thaw house and to some undisclosed extent at other times but generally because of the small volume of traffic they are able to keep out of one another's way.

Traffic to and from the smelter is generally handled from and to Malta by another engine which operates between that point and Leadville, but on occasion, "by arrangement with the smelter, by them arranging their work," the switch engines make trips to Malta and to two processing plants near the smelter to bring shipments of ore bearing material to the smelter and, along therewith, shipments from those plants to the flat yard for weighing and line-haul movement beyond.

Ex Parte No. 104—Sheet 19.

38 The present practice is for the line-haul engine to set inbound cars and receive all outbound cars in the flat yard. The switching engines handle all cars both loaded and empty to and from the scales and between the flat yard and the loading and unloading points as well as most intra-plant movements.

All switching in the plant is done under the direction and control of a yardmaster employed by and acting for the industry. Written orders specifying the sequence in which, and the places to and from which, all cars are to be moved are given the switching crew by the yardmaster. Those orders are occasionally changed by oral supplemental orders. A great many of the moves made in accord therewith consist of one or two cars at a time.

The principal inbound traffic consists of materials and supplies, including coke, coke breeze, coal, scrap iron, brick, general merchandise, etc., and raw materials, including lime rock, crude ore, concentrates, and residue. During the 12-months period ending March 31, 1944, the total inbound movement was 2,260 carloads, of which 158 carloads, interstate destinations 62 carloads of matte and Speiss, or 7 percent, moved from interstate origins.

During the same period the smelter shipped outbound to and 489 carloads of lead bullion. In addition, 5 carloads of baghouse dust were shipped to intrastate points.

The average number of cars handled inbound and outbound both intrastate and interstate was 228 cars per month and, using 312 days to the year, 8.76 cars per day.

The switching performed in connection with the more important individual commodities moving inbound during the representative period may be generally described as follows:

Practically all shipments of lime rock were switched from the flat yard to the scale and, after weighing, moved over the main lead and track 7 and by a reverse move over

tracks 10 and 11 to the sulphide mill for crushing. Some lime rock moved to stock piles reached by track 7 and a reverse movement over track 3.

Coal, coke, and coke breeze were generally unloaded into bins adjacent to the blast furnaces and power house in the south-central part of the plant yard reached by track 7 and connecting tracks 3 and 4. A considerable amount of this traffic was also unloaded at stock piles or other unloading points throughout the plant yard.

Scrap iron, after weighing, was usually unloaded into bins adjacent to the coke bin on tracks 3 and 4 near the blast furnace, or moved to stock piles located in the eastern part of the yard and served by track 7 or the switchback leading to the American track.

Brick was not weighed. This traffic was taken directly from the flat yard to point of use or to the brick shed west of the lime rock unloading point served by track 10 from the west.

All shipments of concentrates, without exception, were switched from the flat yard to the scale and thence to the conveyor shed served by track 9. At that point the concentrates were moistured and pipe sampled before unloading. Residue was similarly handled but due to plant re-

Ex Parte No. 104—Sheet 20.

quirements it was occasionally necessary to stock pile this commodity at scattered points throughout the plant yard.

Crude ore moved from the flat yard over the scale to the sulphide mill on track 10 for crushing. Moisture sampling takes place after weighing. The ore was ground and sampled to determine assay value. All subsequent handling of this traffic after unloading at the mill was by smelter facilities. An insignificant percentage of crude ore was stock piled. In cold weather the ore was switched from the scale to the thaw house, where it remained from 2 to 4 days and was then reweighed and switched to the designated unloading point.

In all instances, after unloading concentrates, residue, or crude ore, the empty cars were returned to the scale for weighing and then switched to the flat yard for movement out of the plant by the transfer engine.

As indicated, the principal outbound movement was lead bullion, consisting of one or two carloads daily. Cars for loading this commodity were first weighed empty and set to the dressing plant on the bullion track, hereinbefore described. After loading, the cars were switched to the scale and then to the flat yard.

Matte is a furnace product similar to bullion but contains a certain percentage of copper. This material moves from the blast furnace in large cakes and is handled in intra-plant service to the sulphide mill. After crushing, the material is loaded into a previously weighed box car and is switched over the scale to the flat yard for movement out-bound, usually to the Garfield smelter.

Baghouse dust is loaded into open-top cars on the baghouse track previously described. The loaded cars are switched to the scale to determine whether they are properly loaded and, if so, then to the carpenter shop at the eastern end of track 7. If not, they are returned to the baghouse for further loading. This material contains arsenic and it is necessary to equip the cars with wooden covers. The moves to and from the scale are considered separate intraplant moves. After the covers are fitted, the car is switched again to the scale and from that point to the flat yard.

Ore produced at nearby mines in the vicinity of Leadville is trucked to the smelter and dumped directly into plant equipment for intraplant movement over the scale either to the sulphide mill or into stock piles. The volume of such traffic in March 1944 was equivalent to 29 carloads. In addition, about 6 carloads of trucked-in ore, and about 2 carloads of scrap iron per month, not belonging to the industry, moved from the lower dock on upper track 8 to the flat yard, were weighed and shipped in line-haul movements. Between 70 and 80 carloads per month are handled for about 2.25 miles over the scale and through the flat yard for account of one processor and 22 cars a month for a much shorter distance for another, together with cars from the same points for the smelter.

The testimony of the railroad witness is that one of the switch engines performs work outside the plant for as long as 5 hours on some days, very little on others, and that there might be days on which neither engine goes outside the plant. Neither engine went outside on any of the three

Ex Parte No. 104--Sheet 21.

39 days the Commission's employees observed the operations. A witness for the industry "judged" that "probably" about 25 percent of the time of both engines is spent outside of the plant.

Effective June 10, 1942, and presently in force, D. & R. G. W. tariff I.C.C. No. 736 provides, so far as here pertinent, that delivery of a line-haul carload shipment des-

tined to smelter at Leadville will include movement within smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the smelter company. For each additional movement of line-haul carload shipments, not provided for above, from track to track within smelter plant, (including weighing over scales within the plant), a charge of \$2.97 per car is provided.

Under this provision, no charges are assessed for switching interstate line-haul traffic to and from the thaw house, or to and from sampler, or for weighing empty cars after unloading. All intraplant movements, including movements from stock piles to various unloading points, are charged for at \$2.97 per car. For this service the smelter paid to the Rio Grande during the representative period \$240.57 on 81 cars for switching intra-state line-haul shipments, and \$11,006.82 on 3,706 cars handled in intraplant service. Empty cars belonging to the industry are switched without charge.

The previous discussion and conclusions relative to the carriers' duty to weigh cars loaded and empty, and to ascertain values of concentrates and ores in connection with the smelter at Garfield are equally applicable at the Murray and Leadville smelters.

In addition to the arguments there considered another is advanced by the Rio Grande in connection with the Leadville smelter which, as we understand it, is that because the large preponderance of the inbound traffic, 93 percent is intrastate and that traffic exceeds the outbound traffic, 2,102 to 476 cars, although 98.9 percent of the latter is interstate, and because the supply of ore at the Leadville smelter is precarious, the Commission should close its eyes to any and all violations of the Interstate Commerce Act and/or Elkins Act and leave the parties to continue the present practices subject only to such control as the State authority may choose to exercise over intrastate traffic. To state the contention is to demonstrate its unsoundness.

As stated the Rio Grande owns and maintains all standard-gauge tracks within the plant area. The Commission considered a similar situation in *Sioux City Ry. Co. Switching*, 241 I.C.C. 53 and 241 I.C.C. 623 and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of section 6 (7) of the act.

The industry argues that in the instant case the furnishing and maintaining of tracks for its private use without cost to it is not unlawful because the practice has been continued for a long period of time. Even if the practice did not violate the law prior to the enactment of section 6 (7) of the Interstate Commerce Act and the Elkins Act, those

Ex Parte No. 104—Sheet 22.

acts made the continued furnishing of the facilities unlawful and no right to violate a statute can be obtained by prescription. It is also contended that it should be presumed that the industry granted the Rio Grande an easement of way to build and maintain the plant tracks because a search of the industry's files back to 1880 disclosed no information as to the agreement, if any, between the industry and carrier. It is immaterial whether such an easement was or was not granted to the railroad and there is no presumption because the main line of the railroad and a spur therefrom crosses the property of the industry that the right of way for those tracks was the consideration for building the plant tracks and maintaining them for over 44 years. The questions of whether the carrier owns those right of ways or only has a right of usage for a continuing or other consideration are matters which may readily be proved and are not matters for speculation based on the testimony of the traffic manager of the industry. Considerable emphasis is laid on the fact that the flat yard and scales are used by the Rio Grande for the traffic of the two processors and for the ore and scrap iron which the industry permits others to load in its plant. The traffic for those processing plants is handled to and from the flat yard only when trips are made by the switch engines assigned to the industry to bring metal bearing materials to the smelter. It would seem that the normal method of switching of those processing plants would be by the engine that operates between Malta and Leadville. Such incidental usage for about 4 cars a day can not be accepted without better proof as adequate compensation for the building and maintaining of 6.04 miles of track over a mountainous terrain. Although it is not entirely clear, the industry also appears to argue that the circumstances enumerated change the flat yard from a private facility into a railroad or public one and somehow enlarges the obligations of the carrier under the line-haul rates. There is no basis for either view. The fact remains that the flat yard is on the property of the smelter, was built and is used primarily and principally for its traffic and that the only other use made thereof is

licensed by the industry and subject to its control. The fact that no charge is made against the railroad for the weighing of cars or the use of the flat yard can not be used as an offset for charges for common carrier transportation, including switching, which must be paid for only in money. *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467.

The Commission should conclude that the services performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; and that performance of said services by respondent without reasonable charge therefor results in the industry receiving a preferential service not accorded to shippers generally.

The Commission should find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the flat yard as described herein; and that the service beyond the flat yard is a service which it is not the duty of respondent to perform. It should further find that the performance of service beyond the tracks described at the line-haul rates, without compensation, is a violation of section 6 (7) of the act.

An appropriate order should be entered.

42

Appendix "A"

(I) THE BASIC REPORT, 209 I. C. C. 11, SHOWS ON ITS FACE THAT THE GENERAL CONCLUSIONS THEREIN STATES, THAT "the customary and reasonable services under line-haul rates is not in excess of that performed in simple switching or team track delivery, and the rendition of greater terminal services without adequate charge in addition to the line-haul rates violates Section 6(7) of the Act"

ARE INAPPLICABLE TO THE TERMINAL SERVICES INVOLVED IN THE INSTANT CASE.

(II) THE TERMINAL SERVICES INVOLVED IN ALL PRIOR SUPPLEMENTAL REPORTS UNDER EX PARTE 104, PART II, IN WHICH THE COMMISSION HAS FOUND VIOLATIONS OF SECTION 6 (7), BASED ON THE GENERAL CONCLUSIONS IN ITS BASIC REPORT, ARE FUNDAMENTALLY DISTINGUISHABLE IN FACT AND IN LAW FROM THE TERMINAL SERVICES INVOLVED IN THE INSTANT CASE.

I.

(A) The basic report in Ex Parte 104, Part II, was the result of an investigation instituted by the Commission on

* Matter in quotes is not a verbatim quotation, but a fair paraphrase from the basic report.

its own motion by an order dated July 6, 1931 in a proceeding entitled "*Ex parte, 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.*" A copy of such order is attached as Exhibit A-1 to this Appendix. The scope and procedure of this investigation underlying such basis report is shown at pages 14-15 thereof, where the Commission said:

"This is an investigation upon our own motion into practices of carriers affecting operating revenues or expenses, which for convenience was divided into different parts. Part II, being the instant part, relates to terminal service of Class I carriers by railroad subject to the Interstate Commerce Act. It does not deal with allowances or divisions to industrial common carriers. Hearings were held at convenient points throughout the country. The record comprises evidence presented by carriers and shippers, and data called for by questionnaires. A proposed report was prepared by the director of our Bureau of Service, to which exceptions were filed by numerous parties, and the case was argued orally. The proposed report dealt with the practices at many individual industries. We will herein deal only with the legal questions and general situations presented. Separate reports will be issued covering the industries either individually or by groups."

Our inquiry first extended to various phases of terminal services including those covered herein and the practices of respondent carriers in connection therewith. No industries were heard. Thereafter further hearings were had at which industries were invited to be present and advised of the information to be sought at such further hearings. The principal questions to be determined, as indicated in the later notices, are as follows:—

1. Whether such terminal services, in whole or in part, performed in placing cars at designated locations in positions accessible for loading and unloading, are services which the connection common carriers, by operation of law, are duty-bound to perform. This question relates to three distinct methods of rendering such services, including: Group A,

** Neither the proposed report or any "separate report" dealt with terminal services at the smelters of the plaintiff industry until the proposed report in the instant supplemental proceedings, served on or about January 6, 1945.

43 where the industries perform these services and receive compensation therefor from respondent carriers; group B, where the industries perform the services and themselves bear the expense without compensation from respondent carriers; and group C, where respondent carriers perform the services at the special convenience of the industries.

2. Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful; also why, in similar circumstances, no allowances are made to other industries for performing such services."

(B) The basic report, after discussing the scope of the evidence developed by the general investigation and the legal principles involved thereupon undertook to state certain general conclusions or principles for determining what is "customary and reasonable" terminal service under line-haul rates.

The basic report held in substance that the customary and reasonable terminal service under a line-haul rate is not "in excess of that performed in simple switching or team track delivery", and that the rendition of greater terminal services without adequate charge in addition to the line-haul rate, violates Section 6 (7) of the Act.

In this respect that report (p. 36) referred to certain procedure adopted by the Traffic Executive Association, Eastern Territory, at a meeting held July 18, 1929 (which procedure appears as Appendix A to the basic report), and stated:

"The first part of paragraph (3)2(c) of appendix A reads as follows:

The Interstate Commerce Commission has held that switching services by a plant facility for account of a carrier must not exceed the equivalent of team track or simple switch placement. If no unusual or marked difficulty of operation in a plant is presented, the service may be considered not in excess of a simple switch.

This part of the paragraph is included in the formula used in western trunk-line territory, but the formula of the latter also contains the following sentence: 'Any service in addition to that shall be at the expense of the industry.' *This rule coincides with our*

conception of a carrier's duty with respect to the delivery and receipt of freight."

The basic report then stated (pp. 44-45),

"When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is *in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act.*

44 Generally the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

(C) It clearly appears from the basic report that these conclusions were intended to state merely general principles for determining what are *customary and reasonable* terminal switching services under line-haul rates only ((1) *where, unlike in the instant case, the tariffs themselves do not define the terminal switching services included in the line-haul rates* and (2) *where, also unlike the instant case, line-haul rates do not include compensation for the terminal switching services actually performed by the carriers, or for the performance of which by the industry the carriers pay allowances.*)

* Italics here and elsewhere in quotations from the basic report are supplied.

That report states (p. 18):

"The tariffs publishing the line-haul and switching charges constituting the carriers holding out to all alike of service under such rates and charges, *do not in terms or by any reasonable construction provide for 'plant switching' or 'spotting of cars at unloading point' to be performed at plant's convenience.*"

That report, after quoting Section 6(7) of the Act, further states (p. 33):

"The statute prohibits every method of dealing by a carrier by which it directly or indirectly charges less than the published tariff rates. *In the absence of a tariff provision, for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates, is clearly in violation of Section 6 of the act, and necessarily preferential.*"

That report further states (p. 29):

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no further than is covered by the compensation it exacts for the services performed. In other words, *the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes.*"

Finally, in this connection, the report states (p. 44):

"*It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion.*"

(D) Not only, however, does it appear from the basic report that the general conclusions there stated, that the customary and reasonable terminal service under line-haul rates is not "in excess of that performed in simple switching or team track delivery", apply only *where there are no express tariff provisions for greater service and where the line-haul rates do not include compensation for any greater service*, but that report expressly holds that such conclusions present "no inflexible" formula for determining what terminal service is included in the line-haul rate and that this "*is a question of fact to be determined in each case*".

45 That report state (pp. 17-18):

"There is no dispute that delivery at various industries is covered by the published rate. The dif-

ficult thing is to ascertain when delivery at the plant is made. *In the nature of things no inflexible formula can furnish a solution for that problem.* The limitation of the place within which delivery is due will vary with varying conditions. All that we can safely say that there must be such a delivery as is customary and reasonable. * * * *We come then to the test, which vague as it is, is the only safe one, that is, whether in the light of all the circumstances such form of delivery is customary or reasonable."*

That report then states (p. 24):

"The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is merely a substitute service, which is substantially a like service included in that of the line-haul rate, is a question of fact to be determined in each case."

The basic report further states (p. 38):

"The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team track or simple switching placement by the carriers involved herein cannot be made. We are inclined to the belief that this argument has merit * * *."

II.

(A) Neither in its basic report nor in any of its supplemental reports in these proceedings, prior to its contemporaneous reports in the instant case and in the related cases of the *United States Smelting, Refining and Mining Company* and of the *Anaconda Copper Mining Company*, has the Commission considered any case where the line-haul rates were based on the actual valuation of the commodities handled under them, or where the tariffs expressly provided what specific terminal switching services were included in the line-haul rates.*

* Moreover, the Supreme Court in *United States v. American S & T Plate Co.*, 301 U. S. 402, 411, held, with reference to the Commission's basic report in this respect:

"The Commission properly held that each case must be decided upon the circumstances disclosed."

** The 31st Supplemental Report of the Commission entitled "*Iron Ore Mining Companies Stockpile Allowances*," 210 I. C. C. 254, might seem to be a case where there were specific tariff provisions as to what terminal services were included in the line-haul rates. It appears, however, from the Commission's report in that case, that the Commission, itself, did not so construe

Footnote continued on page 122

46 (B) Neither in the basic report nor in any of its supplemental reports, until those in the instant case and its two related cases, did the Commission find there would have been any violation of Section 6 (7) by the rendition of terminal switching services "in excess of simple switching or team-track delivery" *had*, as in the instant case, *the tariffs expressly provided that such greater terminal switching service were included in the line-haul rates, had*, in the instant case, *such terminal switching service been necessary to the determination of the value for the application of the carriers' rates, and had*, as in the instant case, *the line-haul rates contained compensation for such terminal switching services.*

(C) Not only the basic report but the vast majority of the individual supplemental reports made by the Commission prior to its contemporaneous reports in the instant case and in its two related cases, were primarily concerned with the legality of *allowances* paid by the carriers to industries for the performance by industries of their own terminal services, and not with the lawfulness of terminal services performed by the carriers themselves. No *allowances* are involved in the instant case. Out of 76 individual cases previously so determined, 69 dealt exclusively with "*allowances.*" None of the remaining 7 involved solely terminal services performed by the carriers, but involved in part also terminal services performed by the industries.

Footnote continued from page 121.

such tariff provisions, and that the finding there made of a violation of Section 6 was based on the Commission's express construction of the Great Northern tariff as not contemplating the stockpile services rendered by the Great Northern. As shown, page 256 of that report, the Great Northern Railway there published a tariff provision, the first paragraph of which read as follows:

"The rates named herein include assembling at originating points, weighing, and sorting."

At page 257 of that report the Commission states:

"It seems clear that under the first paragraph of the above quoted tariff provision, the line-haul rates did not contemplate, and do not include the service at the stockpiles now performed or paid for by the Great Northern."

Moreover, it is to be noted that in that case, the Commission had previously, after hearing, expressly determined that the line-haul rates did not include stockpile spotting over temporary tracks or the expense of moving such temporary tracks. Nevertheless, the Great Northern Railway Company, under the tariff provision quoted, had performed such stockpile spotting and moved such temporary tracks at its own expense.

Moreover, in all 76 cases there were recognized and established "interchange tracks" upon which inbound and outbound tracks were or had previously been customarily placed by the carrier or the industry, as the case might be. In all by the carrier or the industry, as the case might be. In all these cases the basic question was whether the switching services over industrial tracks beyond such recognized and established "interchange tracks" were included in the line-haul rates where the tariffs did not specify what terminal services were included in such rates.

In this connection, the basic report states (pp. 17-18):

"The respondents have not withheld service incidental to carriage between the railroad and the plant. Cars have been hauled from the main line to *agreed interchange tracks* either within the limits of the plant or on tracks in close proximity thereto. *These interchange tracks* correspond to spurs or sidings on which the practice of spotting had its origin. What many of the industries here insist upon is that the respondents must haul them farther over an intricate system of interlacing tracks and distribute them among the mills and warehouse not at the convenience of the respondents, but in order to meet the industrial needs of the plants."

The basic report further states in this connection (p. 44):

"Many of the industries which now receive allowances, or the performance by carriers of spotting service in lieu thereof, *performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers*, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."

As shown, pp. 7 and 8 of the complaint the plaintiff carriers during the approximate fifty years of operation of the respective smelters here involved, have at all times, under their line-haul rates received outbound cars from industry and delivered inbound cars to the industry at actual points of loading or unloading within the smelter area, and, therefore, there have never been any agreed "interchange tracks" as between the plaintiff carriers and the plaintiff industry, nor has there been any increase in the terminal services rendered under such line-haul rates.

47

Exhibit A-1

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of July, A. D. 1931

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

Sections 12 and 15(a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act will affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

It is ordered, That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

It is further ordered, That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

And it is further ordered, That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

By the Commission.

GEORGE B. MCGINTY
Secretary.

[SEAL]

48

Appendix B.

HISTORY OF SUPPLEMENTAL PROCEEDINGS HERE INVOLVED HAVING SPECIFIC REFERENCE TO TERMINAL SWITCHING SERVICES RENDERED BY THE PLAINTIFF CARRIERS AT THE SMELTERS OF THE PLAINTIFF INDUSTRY.

EVIDENCE AND ISSUES PRESENTED

(Note: Transcript references in this appendix are to certified transcripts of testimony, to be introduced in support of this complaint.)

I.

The supplementary proceedings with specific reference to terminal switching services at the smelters of the plaintiff industry originated with a notice issued by the Commission April 15, 1932, of a hearing to be held at Salt Lake City May 19, 1932, to determine with reference *solely* to the Garfield smelter—

(1) Whether such terminal switching services, as a whole or in part, performed in placing cars at designated locations of the industrial tracks in positions accessible for loading or unloading, were services which the connecting common carriers by operation of law were in duty bound to perform.

(2) Whether, in circumstances where such services were performed by the industry, any allowances made to the industry by connecting common carriers as compensation for that work, is lawful. A copy of such notice is attached to this Appendix as Exhibit B-1.

While the plaintiff carriers had been made respondents to *Ex Parte 104, Part II*, and as such respondents had been served with notice of such hearing, the plaintiff industry had not been made a party to such proceedings. However it was given informal notice of such hearing, but did not participate therein. The Commission was represented by counsel but offered no evidence. Evidence, however, was offered by the plaintiffs, Union Pacific and Denver & Rio Grande. A certified copy of the transcript of evidence upon such hearing will be offered in evidence on hearing of this complaint in support thereof, and the transcript references in this section of the complaint are to the pages of such transcript.

On that hearing, Mr. George Williams, the then Traffic Manager of plaintiff Denver & Rio Grande, testified on cross examination by the Commission's counsel, Mr. Gwynn, that the carriers line-haul rates included switching for the weighing of inbound cars; for movement of the sampler, including movement to and from the thaw house in winter; and for final unloading. Mr. Williams' testimony in this respect was as follows (Tr. B-44, B-45):

"Mr. WILLIAMS: Let me put it this way . . . When we bring a carload of ore or concentrates into the smelter yards we have to get the weight first, we have to get an assay certificate; we will perform switching service for the purpose of scaling the car, we will take it to the sampling plant for the purpose of the assay;

if it is in the winter then we will take it to the thaw house to have the ore thawed out.

Q. (Mr. GWYNN) You will do both services?

A. *All those are included in our line haul rate.*

Does that make a clear answer to your question?

49

Q. To complete the service you take it to the sampler and the thaw house as part of the line haul service—or part of the services under the line haul rate. Now, what else will you do with it?

A. We take it to the point they want it unloaded. Perhaps I haven't made it clear, Mr. Gwynn, but we regard the service for weight and the service for sampling in order that we may know the value of the ore—

. . .

EXAM. BARDWELL: I would like the witness to finish what he was going to say. I think he was going to say he considered that part of the common carrier service.

A. We consider the scaling of the car for the weight and the getting of the assay as part of our common carrier duty.

EXAM. BARDWELL: And the thawing?

A. That, and the thawing also, in the winter time."

On re-direct examination by his own counsel, Mr. Gallagher, Mr. Williams further testified as follows (Tr. B-47, B-48):

"Q. (By Mr. GALLAGHER) The line haul, Mr. Williams you consider absolutely as the duty of the company to deliver the car at the unloading point, do you not?

A. Yes, we have that obligation everywhere, not only at the Garfield smelting plant but at our freight houses and industries all over the system. There is, however, a difference, in my opinion, with respect to ore and concentrate traffic, which requires perhaps a little more additional so-called common carrier service than would be given to ordinary freight. That is by reason of the moisture in the concentrates and also in crude ore, and in the winter time the necessity of thawing it out before it can be unloaded. There is also, as I previously explained, the need of our getting the weights and the need of our getting assay certificates in order to compute our freight charges. We cannot do it without computing the weight and the valuation of the ore."

The Commission offered no evidence to contradict this testimony of Mr. Williams or to show that the line-haul rates did not contain compensation for such terminal switching services.

II.

Such hearing of May 19, 1932, as to terminal services at the Garfield smelter of the plaintiff industry, preceded the Commission's basic report in these proceedings, which was rendered May 14, 1935. As appears from the quotation made at page 1 of Appendix A to this complaint, from page 15 of such basic report, that report did not purport to deal with the practices at individual industries but "only with the legal questions and general situations presented". As there also appears, a proposed report had been prepared by the Director of the Commission's Bureau of Service, which proposed report did deal with the practices at many individual industries, based on hearings, specifically relating to such industries. Plaintiffs are informed, however, that such proposed report did not deal with the practices at the Garfield smelter. As further there stated, the Commission at, or about the time it issued its basic report, did issue certain separate reports and orders covering certain industries either individually or by groups.

The Commission, however, following the hearing of May 19, 1932, issued no such report or order covering the terminal services at the Garfield smelter of the plaintiff industry based on that hearing or otherwise. Following that hearing therefore, and until the service upon the plaintiff carriers and the plaintiff industry shortly after March 16, 1944, of a further order by the Commission, hereinafter referred to, neither the plaintiff carriers nor the plaintiff industry had any ground for believing that the Commission entertained any question as to the lawfulness and propriety of the terminal services rendered by the plaintiff carriers at the Garfield, Murray, and Leadville smelters of the plaintiff industry. Indeed, it would seem that both the carriers and the industries were fully warranted in their assumption to the contrary.

III.

On March 16, 1944 the Commission issued an order, which shortly thereafter was served upon the plaintiff carriers and the plaintiff industry, assigning a hearing before an Examiner of the Commission on May 8, 1944 at Denver, Colorado.

... with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plants of the American Smelting and Refining Company at Garfield, Murray and Midvale, Utah, and Leadville, Colorado, with a view of determining whether and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act."

A copy of said order is attached to this Appendix as Exhibit B-2.*

Subsequently such hearing was postponed by appropriate orders of the Commission to May 26, 1944.

IV.

In accordance with such orders, a hearing was held on May 26 and 27, 1944.

On such hearing extensive testimony and exhibits were introduced by the plaintiff carriers and by the plaintiff industry, as well as by the Commission. The Public Service Commission of Utah and the Public Utilities Commission of the State of Colorado appeared as interveners. A certified transcript of such testimony and certified copies of such exhibits will be offered on the hearing of this complaint in support thereof, and the transcript and exhibit references hereinafter in this complaint will be to such certified transcript and exhibits.

Certain of the evidence presented at such hearing on behalf of the plaintiff carriers and the plaintiff industry has been summarized under Section XIII of the complaint. In addition to the evidence thus summarized, reference is hereby made to the following specific evidence introduced at such hearing:

51 (A) The plaintiff Denver & Rio Grande, on behalf of itself and the plaintiff Union Pacific, as well as the plaintiff industry, introduced exhibits showing the tariff history covering the terminal services at the Garfield, Murray and Leadville smelters, these being Exhibits Nos.

* The reference in such order to a plant of the American Smelting and Refining Company at Midvale, Utah was obviously an inadvertence. The plant at Midvale, Utah is the smelter of the United States Smelting, Refining and Mining Company, as to which hearing likewise was set at Denver on the same date, such hearing being the subject of the contemporaneous and related supplemental report and order of the Commission heretofore referred to.

4, 10, 11, 12, 13 and 33. These exhibits were supported by the testimony of Mr. W. M. Carey, the present Freight Traffic Manager of the Denver & Rio Grande, and the testimony of Mr. O. W. Tuckwood, the present General Traffic Manager of the industry.

This testimony showed that the tariffs of the plaintiff carriers Denver & Rio Grande and Union Pacific from their initial publication in 1908 until February 25, 1920, carried the following provision: (Quotations are for convenience from the tariffs of the Denver & Rio Grande, the same provisions being carried in the tariffs of the Union Pacific.)

"Switching from track to track within smelter plants served by the Denver & Rio Grande Railroad of cars containing freight which has paid transportation charges to the plant—free."

Both witnesses testified that under this tariff provision the line-haul rates up to February 25, 1920, included not only switching for weighing, for thawing, for sampling and for final spotting, but also for purely intraplant movement (Tr. 128-129, 391).

Mr. Carey further testified (Tr. 76-77) that such tariff in providing prior to 1920, "Switching from track to track within smelter plants—free", did not mean that the carriers were not compensated for such switching but meant that compensation thereof was included within the line-haul rate. Mr. Tuckwood (Tr. 129-130) called attention to certain decisions of the Federal courts placing this same construction upon the word "free" in such tariffs.*

* In Mr. Tuckwood's testimony (Tr. 129-130) attention was called to the decision in this respect of Judge Johnson, of the United States District Court for the District of Utah, in the case of *Oregon Short Line Railroad v. American Smelting & Refining Company*, such decision being rendered August 9, 1918. A copy of this decision was introduced by Mr. Tuckwood as Exhibit 14 (Tr. 129-130). This decision is unreported but was affirmed by the Circuit Court of Appeals for the Eighth Circuit in *Oregon Short Line R. Co. v. American Smelting & Refining Co.*, 259 Fed. 898. A somewhat similar case is that of *American Smelting & Refining Company v. Union Pac. R. Co.*, 256 Fed. 737.

In the case decided by Judge Johnson, the Railroad Company was seeking to recover from the Smelting Company \$60,378.71 for terminal switching at the Murray smelter, on the ground that the word "free" in the tariffs made the tariff provision for such switching illegal. In rejecting this contention, Judge Johnson, in his opinion, stated (Ex. 14, p. 3):

"... the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate."

(B) Mr. Carey (Tr. 78) expressly confirmed the testimony of the former Freight Traffic Manager of the Denver & Rio Grande, Mr. Williams, given on cross examination at the 1932 hearing, quoted at pages 1 and 2 of this Appendix, that the carriers line-haul rates have at all times contemplated and included compensation for the terminal switching services necessary to determine the value of non-ferrous commodities moving under rates based on actual value, and to effect final delivery thereof. Mr. Carey's testimony in this respect was not subjected to any cross examination by counsel for the Commission, nor did the Commission introduce any contrary evidence, or any evidence to show that the line-haul rates did not include compensation for such terminal switching services.

52 (C) Both witnesses testified that, effective February 25, 1920, the tariffs were changed to provide as follows (Ex. 10, p. 1):

**"ITEM #15—INITIAL OR DELIVERY SWITCHING AT
SMELTERS IN COLORADO AND UTAH**

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah will include *one movement* of Commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company." (Italics supplied)

**"ITEM #20—INTRA-PLANT OR INTERNAL SWITCHING
AT SMELTERS IN COLORADO AND UTAH**

From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (see also Item No. 10)."

Both witnesses further testified that, effective November 27, 1920, the tariffs were corrected to read as follows (Ex. 10, p. 2):

**"ITEM #15-A—INITIAL OR DELIVERY SWITCHING AT
SMELTERS IN COLORADO AND UTAH**

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah, will include *movement* of a commodity within a smelter plant over track scales, *to and from thaw-house*, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading

point indicated by the sampling company." (Italics supplied.)*

(D) Mr. Tuckwood's Exhibit 13 shows that the foregoing provisions of Item 15-A for inclusion within the line-haul rate of the switching charges there specified, are still carried without change in the tariffs presently effective at the Leadville smelter. (See Item 1370, p. 19 of Ex. 13.)

(E) Effective July 5, 1928, the tariffs at Murray and Garfield were changed to read as follows (Ex. 10, p. 11; Ex. 11, p. 4; Ex. 12, p. 7):

"Item 2322

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), *from the road-haul point of delivery to the switching line.* Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew, with interruption, *resulting from orders from, or requirements of, the smelter.***

* It will be noted that neither this tariff provision nor the immediately preceding one of February 25, 1920, provided for any greater terminal switching services under the line-haul rates than were provided by the carriers' tariffs prior to 1920. On the contrary these tariff changes in 1920 imposed charges for intra-plant switching, which the tariffs from 1908 to 1920 had provided for without any charge in addition to the line-haul rates.

As shown in the footnote to p. 9 of the complaint the majority report (p. 353) misstates the changes from the provisions of the tariff of February 25, 1920, effected by the tariff of November 27, 1920.

** In connection with item 2322, Mr. Tuckwood testified as follows (Tr. 309-310):

"Mr. Tuckwood: * * * I think I would have to read it to make a proper explanation. The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement. The note gives the definition of uninterrupted movement and that is what that \$1.00 a car involves, although we don't agree with the assessment.

Exam. Way: *This represents an interrupted movement?*

The Witness: *A so-called interrupted movement, Mr. Examiner.*

Q. (By Mr. Fuerts): *In your opinion it does not represent an interrupted movement?*

A. *It does not.* (Italics supplied.)

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from the house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car. (Italics supplied.)
- (e) The line-haul rate will also include the outbound movement of loaded cars from the point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of the smelter."

In connection with these changes in the tariffs applicable at Garfield and Murray, Mr. Carey testified (Tr. 68-75):

"Mr. CAREY: I would like to elaborate on certain portions of these exhibits. As I stated before, prior to February 25, 1920, free switching was given within these plants on all freight which had paid transportation charges to the plant, and effective on that date a charge for intra-plant switching of \$2.50 per car was provided, and that up to June 25, 1938, on intrastate traffic and July 5, 1938, on interstate traffic, the tariff provisions remained the same, with the exceptions of the fluctuations made necessary by decisions of the Commission in various ex parte proceedings. Now, with respect to the change that was made in June and July, 1938, I would like to state that while it was felt at the time these changes were made, the findings of the Commission of May 14, 1935, in Ex Parte 104, Part II, Terminal Services, required these changes, it is my thought in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration. The railroads

now allow free movement over the scales on line-haul traffic.

Exam. WAY: In other words, it is your thought that the free service should be reinstated under the line-haul rates.

54 The WITNESS: For that portion of those services that are in order to assess their freight charges.

Exam. WAY: In other words, you mean the weighing of the cars and the movement for sampling.

The WITNESS: Yes, sir.

Mr. FINERTY: And thaw house if necessary.

The WITNESS: Yes, sir.

Mr. FINERTY: I then understand one spotting after those things have been accomplished.

The WITNESS: That is right."

(F) Mr. Carey then testified further as to the switching movements necessary to determine value of ores and concentrates, the necessity of determining such value both from the point of view of the carriers and the industry, and the necessity of rates based on actual value in order to permit the movement of low grade ore from marginal mines. He testified (Tr. 70-74):

"Mr. CAREY: By referring to pages 10, 11, and 16 of the exhibit (Exhibit 4), it will be noted that in addition to having the weights the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the smelters did not. In the latter event, in all probability after the railroad had performed for itself the operation over the scales, through the thaw house, and through the sampler, a free movement to a designated point of unloading would be accorded providing that movement could be accomplished without interruption, resulting from orders from or requirements of the smelter. So, as I say, it is my thought that because of the fact that the railroads have to have this information, in order to assess their freight charges, that the smelting company should be accord-

ed this free movement through the sampler and to the first designated point of unloading.

Exam. WAY: Now, I have noticed in some instances where the shipments are moved to the thaw house. For example, that is, they are weighed, they move to the thaw house, and then they are moved back over the scales. It is your thought that the plant should be accorded more than one scaling?

The WITNESS: Yes, for this reason, that it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. After it has gone through the thaw house—Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary, not only for the railroad to have the actual weight of that ore, but the smelters too, in their settlements with shippers.

Exam. WAY: But what you haul, you haul the wet weight?

The WITNESS: We assess our charges on the wet weight.

Mr. FINERTY: Based on a dry weight valuation?

The WITNESS: That is right.

Mr. FINERTY: Translated into a wet weight?

The WITNESS: Yes.

55 Exam. WAY: And that necessitates weighing twice?

The WITNESS: That is right.

Exam. WAY: That also necessitates placing the car to the sampler for sampling?

The WITNESS: Yes, sir.

Exam. WAY: I don't assume you are the proper witness to ask about that, the servicing, but in any event, it includes the sampling, whatever service is necessary in the sampling?

The WITNESS: That is right, in order to ascertain the correct value.

Q. (By Mr. CAMPBELL) Now, Mr. Carey, if the weighing facilities and the sampling facilities, the

thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

Q. So it would have to build them and maintain them for those purposes?

A. Yes.

Exam. WAY: Now, that contemplates the service that is satisfactory with the present method of making the rates. Is there any other way to make the rates so that the rates will cover the service?

The WITNESS: No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that there wouldn't be any movement to the low grade ore, and the same thing would result.

Exam. WAY: Why?

The WITNESS: Because the ore couldn't afford to pay the higher freight charge, the low grade ore.

Mr. FINERTY: In other words, the small miner and the small mine producing a fairly low grade ore could not afford to produce that ore if you had your rates on a single-rate basis?

The WITNESS: That is correct.

Mr. FINERTY: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

The WITNESS: That is right.

Mr. FINERTY: And a declared value would let the big miner get the same transportation as the low grade ore and at the same time put the low grade ore mine out of business?

The WITNESS: I say in connection with that it would result in the railroads not getting the higher rates on this high-valued ore.

Mr. FINERTY: Also it would mean there would be no inducement to the smelter to buy low-grade ore if it had to pay the same freight rate as on high-grade ore?

The WITNESS: That is right, only as a matter of getting trucks.

Mr. FINERTY: Yes.

In these same connections, Mr. Tuckwood, General Traffic Manager of the plaintiff industry, testified as follows (Tr. 132-136):

56 "Mr. TUCKWOOD: * * * it is very important to point out here, that the railroad will only accept such sampler weights on the condition that the smelter uses the same weight, and that the same weight, is used as the basis of settlement with shippers. Ores, concentrates, mill and smelter products all contain varying percentages of moisture, and since the smelter pays shipper on the basis of metal values on a dry weight basis the carriers cannot compute their freight charges until the moisture determination has been secured and the assay run on the dry weight basis. The carrier can then learn how much per ton, on a dry weight basis, the smelter pays the shipper. Using this smelter value the carrier can then convert the figure to a wet weight basis for the assessment of freight charges. For example, a shipment arrives at a sampler or smelter and when weighed there the net is 100,000 pounds, but there is 10 percent moisture in the material which means that the smelter will pay the shipper for 90,000 pounds of dry weight based on the metal values contained in that dry weight. Assume the assay shows the metal values to be \$50 per dry weight ton, or \$2,250 for the entire carload, and which is the basis of settlement with the shipper. The railroad will then compute its freight charges by converting the value to a wet ton basis of \$2,250 for the 100,000 pounds of wet material transported, which would give the railroad a value for freight purposes of \$45 per ton and the rate applicable to that value would be applied to the net wet destination weight to determine the freight charges due. An accurate destination tare weight is of as great importance to the carrier as is a correct net weight in all cases where freight rates are based on smelter values.

Q. (By Mr. FINERTY) Before you go into that, in other words, the railroad company receives the same rate on 10,000 pounds of water that it carries in that

shipment which you mention as it receives on the ore?

A. Correct.

Q. But it receives in place of the value of the dry sample, it receives a slightly lower value based on the wet weight of the car?

A. That is correct.

Q. Therefore, it is essential for the railroad, in order to know what freight charges it can legally charge the industry to have the dry weight first determined and then translate that back to a wet basis?

A. Absolutely. A metallurgical engineer will later testify that no smelter settlement with shipper can reflect the correct values of the metals contained in a shipment unless, among other things, an actual tare weight of the car is obtained. Carriers would be compelled to revise their entire rate structure on ores, concentrates and mill and smelter products if they discontinue securing actual tare weights. The railroads in their tariffs specifically say that the rate used for way billing, and I quote, 'and rate shall be revised in accordance with such certified value.' The railroads further reserve for themselves the right to verify the smelter valuation by special assay or otherwise. When a railroad publishes its rates based on destination weights and values it must be assumed that it implies correct value and no value based on weight is correct unless all weights, gross, tare and net, are actual and accurate, and not inflated or deflated, which would happen in the case of practically each and every shipment if the stencilled tare of the car was used.

Exam. Way: And that is, you mean by that, if the stencilled weight of the car was used?

Mr. FINERTY: If the weather were dry it might be the actual weight of the car would be less than the stencilled weight; if the weather were wet it would be greater than the stencilled weight.

The WITNESS: It would fluctuate greatly, especially with materials that contain considerable quantities of moisture.

Q. (By Mr. FINERTY) And you couldn't get your dry weight basis for assay?

A. You wouldn't have a correct dry weight unless you had actual weight. Therefore, the car is still in transit until all these determinations have been made.

57

As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course. The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built. Solid and convincing confirmation of those agreements have been carried down through the years in the tariff publication of the carriers and is today explained in the tariff quoted in these Exhibit 10, 11, 12 and 13 introduced in evidence.

The unusual nature of the non-ferrous mining, smelting and refining business requires these traditional transit privileges, and where they are provided in the line-haul rate there can be no interruptions in movement not already provided for in the orderly process of moistening, weighing, sampling and thawing when necessary and final spotting at the end of the line-haul at the stock pile or receiving bin."

(G) Mr. Tuckwood testified (Tr. 140-145) with reference to the sampling in transit privileges carried in the carriers' tariffs under which ores and concentrates may either be sampled in transit at public samplers before delivery at Garfield or Murray, or may be sampled at those smelters for reconsignment to points beyond, *without any charge for the switching services involved in such sampling*, though such services are identical with those involved when final delivery of such cars is made at Garfield and Murray. His testimony is as follows:

"Mr. Tuckwood: Pages 3 to 7, inclusive, of Exhibit No. 15 reproduce representative transit privileges available to shippers of ores and concentrates sending shipments to Utah and Colorado smelters as well as smelters in other states. Union Pacific Tariff No. 7020, I. C. C. 606 provides in Item 349-25-B for sampling in transit of ores.

Mr. CAMPBELL: What page are you on?

Mr. Tuckwood: That isn't on there. It is an item I inadvertently omitted, of ores and concentrates at Salt Lake City, Garfield, Midvale, Murray or International.

Utah. This item was inadvertently omitted from my Exhibit No. 15, and I wanted the tariff authority in the record. I do not believe it is necessary to analyze each item on pages 3 to 7 in detail.

Mr. COLLINS: What exhibit are you talking about?

Mr. TUCKWOOD: No. 15. But the published tariff items reproduced on those pages furnish the evidence in support of what I now say.

dependent samplers as well as at smelters without any

Sampling in transit privileges are applicable at extra railroad charge for the transit service for the first sampling. These sampling in transit services at times apply even through sampling, en route to a smelter, requires an out-of-line haul with no extra railroad charge for either the out-of-line haul or for the extra railroad service to and from the sampler. There is no diversion charge if a shipment is sent to one smelter, sampled there, and later diverted to another smelter. The omission of the diversion charge, as well as the provisions for sampling, either en route or at destination, clearly expresses the intent of the tariffs that the line-haul does not and cannot end until the delivery at final unloading point, either stock pile or receiving bin, has been made.

In other words, the carload is entitled to one spotting service after sampling has been completed. A shipment may move into the Garfield, Utah, sampler or smelter—

58 Q. (By Mr. FINERTY) Wait a second, are you getting these correct?

Mr. TUCKWOOD: A shipment may move into the Garfield, Utah smelter for sampling, and then reforwarded to Murray or other smelters without any charge for the transportation service into and out of the Garfield smelter, *including the weighing and other transportation services incident to sampling while at the Garfield smelter.* Such a shipment may either be consigned to the Garfield smelter and reforwarded to other destination smelter, or it may be sampled at some other smelter or independent sampler and forwarded to the Garfield smelter without extra charge.

For the twelve months ending with March 31, 1944, a total of 31 carloads of ore moved to the Garfield smelter where it was sampled and later moved to another smelter, and all without extra railroad charges for the

weighing and transportation services performed at the Garfield smelter.

Q. (By Mr. FINERTY) Now, Mr. Tuckwood, what you mean is that, taking one of those cars billed into the Garfield smelter, they come in on the road-haul train of some carrier, it was switched out of that train into a hold yard, a joint railroad terminal?

A. Correct.

Q. Before it was switched into the joint railroad terminal yard, it was moved over the scales and weighed?

A. It was moistured, moistured in the terminal yard.

Q. Moistured in the terminal yard, weighed. That is a movement over the scales. It was moved from the scales, if it was ore, to the unloading docks?

A. Yes, this was all ore.

Q. That car (ore) went through the sampler and came out of the sampler and was reloaded into either the same car or another car and moved on to Murray or some other smelter?

A. Correct.

Q. And there was no charge whatever for all those movements within the Garfield smelter tracks on that car?

A. It was all provided for by the tariffs free.

Q. By the transit tariff free?

A. Yes.

Q. In spite of the fact since 1938 if that car had ended at the Garfield smelter there would have been a charge for the handling of that car out of the sampler?

A. Correct. I am coming to that. Tariff rules which permit a farther line-haul and a final destination terminal service after sampling in transit has taken place en route to final destination and without any additional charge for the transit services, but which would impose additional charges if the sampling point actually becomes the final destination point, are, in my opinion, unsound. This provision that a shipment is entitled to lower transportation charges if it moves to a destination smelter via an intermediate or in some instances an out-of-line sampling smelter or independent sampler than if the sampling smelter becomes the destination smelter is, in my opinion, a violation of the spirit, if not an actual legal violation, of Section 4 of the Interstate Commerce Act.

What I have just said illustrates, I believe, the lack of comprehension that existed on the part of all concerned when the 1928 agreement was reached with respect to additional terminal charges at our Utah smelters as now expressed in the published terminal tariffs.

In concluding this part of my testimony—

Q. And I assume in that connection, as to the applicability of the general rules or observations expressed by the Commissions at that time they were under misapprehension as to the meaning of those rules that (when) applied to the Utah and Colorado smelters?

A. That would be my opinion, and hindsight is better than foresight. That would be my opinion.

59 In concluding this part of my testimony, I think it is important to point out that these transit services, whether performed at intermediate points or the destination smelter, have an important bearing on the final valuation on which freight charges will be assessed after settlement with the shipper has been determined by the destination smelter. Shippers of complex ores do not always know whether a copper smelter or lead smelter should be selected as the destination smelter as such shippers are generally unfamiliar with smelting practices. It might be that a copper smelter would pay more for the ore.

Exam. WAY: What has that got to do with it?

Mr. TUCKWOOD: It ties in with the freight valuation.

Mr. FINERTY: If you will just wait one moment, the material smeltered at Garfield is copper and the material smeltered at Murray is lead.

Mr. TUCKWOOD: It ties in with the valuation of freight rates.

Mr. FINERTY: Will you proceed?

Mr. TUCKWOOD: It might be that a copper smelter would pay more for the ore than would a lead smelter, or vice versa. As a result of such uncertainty such a shipper would send the shipment to a sampler, either smelter-owned or independently-owned, with instruction to hold pending sampling determinations, and based on these determinations the destination smelter giving the highest rate would be selected. This, of course, means that carriers receive freight based on the highest smelter rate obtainable, and since the rates are generally based on value, the carriers would receive the maximum rate from freight charges.

Q. (By Mr. FINERTY) *In other words, if a shipper would send a car of complex ores to the Garfield smelter and it should turn out the ore was a greater proportion or greater percentage of lead, that shipper would get a better price for that ore at the Murray smelter?*

A. It might be the Midvale.

Q. Or the Midvale smelter, and the railroad would get a higher valuation on the basis of the freight charges.

A. Yes, I understand the shipper has an interest in securing the maximum rate (value) as has also the railroad under these valuation rates."

(H) Mr. Carey testified (Tr. 294-399) as to the dependence of the Leadville smelter on Colorado ore, the great majority of which moves intrastate, but a portion of which moves interstate, and as to the precarious situation in which the Colorado mining industry and the Denver and Rio Grande would be placed by the imposition of additional switch charges at such smelter. He there testified:

"The Leadville Smelter is dependent entirely on Colorado ores, and because of the complex nature thereof and the fact that the smelter at Leadville cannot treat zinc and copper ores, it is extremely difficult for them to secure a sufficient volume to keep in operation. In fact, they have been forced, from time to time, to work their old slag dumps to accomplish this. At the present time they are using approximately 1,000 tons per month of this material for that purpose.

At one time some twenty-five smelters were located on the line of the D. & R. G. W. in Colorado; at Silverton, Ouray, Rico, Durango, Gunnison, Leadville, Denver, Pueblo, Florence, Salida, Minnequa, Grand Junction, and Buena Vista. Today there is but one. That is the Leadville smelter. Inability to secure proper assortment of ores, and the dwindling supply thereof, were mainly responsible for this situation.

The Denver & Rio Grande Western Railroad was primarily constructed for the purpose of serving the mining districts in Colorado and Utah, and in normal times the movement of products of mines has constituted the preponderance of tonnage handled by them. In the year 1922, products of mines constituted 75 per cent of the total tonnage, and this has gradually dwindled until in 1940 this tonnage amounted to but 51 percent of the total.

Exam. WAY: While there has been a dwindling of the percentage, has there been an actual increase in the volume? It is assumed in 1922 you did not do anywhere near as much business as in 1940.

The WITNESS: That is true. The movement of ores and concentrates has been dwindling right along.

Exam. WAY: That is taking the volume, you have a less volume of products from the mines now than you had in 1922?

The WITNESS: Yes, sir; that is true.

I desire to call the attention of the Examiner to Exhibit No. 4, page 19, showing the 1925 movement of ores and concentrates to the Leadville plant, which it will be noted, amounted to 257,185 tons. In the year 1943 this had dwindled to 96,125 tons, 41,789 tons of which moved into the plant by truck. In the year 1925, the gross earnings of the Denver and Rio Grande Western Railroad, obtained from the movement of ores, supplies, etc., moving to, from and within the Leadville plant, approximated \$1,000,000. In 1943, this had declined to approximately \$450,000.

The Durango, Colorado, plant of the American Smelting & Refining Company closed in 1930 because of the inability to secure proper supply and assortment of ores. This forced the movement of ores from mines operating in Southwestern Colorado to other smelting points, much of it to the Leadville plant. By reason of the longer haul to Leadville, it, of course, was not possible to maintain the same freight rate structures as these mines formerly enjoyed into Durango, and at that time and for that reason the increased transportation charges imposed on these ores amounted to from \$2.50 to \$3.50 per ton, and this condition placed many of the mines in the position of becoming so-called marginal operations, from what might have been termed profitable operations.

The situation at Leadville is precarious, and the imposition of the additional charges on the ore they now receive, most of which is marginal, is apt to result in the closing of mines and resultant loss of this important industry to us. In fact, many properties and dumps are being worked only because of the premium price now paid by the Government on copper, lead, and zinc, and with the termination of the present war, when undoubtedly not only these premium prices will be

cancelled, but also the returns on these commodities will slump below what might be considered normal, these marginal mines will close and the working of the dumps cease. In all probability reopening of the gold mines throughout the State may replace this loss to the extent necessary to justify continued operation of this plant, but it may take such mines a period of six months after the ban is lifted to again resume operations.

Our past experience as to the loss of this line of industry, and the precariousness of the situation as to the ore supply for the Leadville plant, leads us to emphatically express our opposition to the imposition of additional switch charges at this plant.

Exam. WAY: I merely want to make one remark about this statement, that is, while it is interesting, it is wholly immaterial in this case. We are not here dealing with rates. The only subject that appears to be before us is whether or not it is the duty of the carriers to switch these cars in the plant under the line-haul rates.

The WITNESS: I realize that, Mr. Examiner, but in view of the fact that the tonnage involved here is practically all intrastate, it is our feeling that this arrangement that we now have for switching at Leadville should not be disturbed. The fact of the matter is that if the charges are made because of the interstate movement, why then the tail is wagging the horse.

61 Exam. WAY: Well, in any event, your statement is in.

Mr. FINERTY: May I ask you one question there?

The WITNESS: Yes, sir.

Mr. FINERTY: At Leadville since 1920, the published interstate rates have all included the services of weighing, sampling, thaw house, and spotting after sampling?

The WITNESS: That is true.

Mr. FINERTY: Have they not?

The WITNESS: Yes, sir.

Mr. FINERTY: Now, if there is any purpose whatever to this investigation, it is to determine whether those line-haul charges shall now be plussed by switch charges?

The WITNESS: That is correct.

Mr. FINERTY: And can that be judged in an investigation addressed to whether or not the Commission considers this is a service that should or should not be performed by the carrier? Doesn't it have to be judged as to the effect of that service on the community?

The WITNESS: I would say so, yes. There is one further statement I wish to make in connection with this Exhibit 19. The movement in 1925 was—

Mr. CAMPBELL: You mean Exhibit 19?

The WITNESS: Page 19, pardon me.

Mr. CAMPBELL: Exhibit 4, page 19.

The WITNESS: Yes. The movement in 1925 was entirely intrastate. In 1935 I show that it started to have an interstate movement, and by referring to the Rio Grande Railroad map, a copy of which is, I believe in the record as an exhibit—

Mr. CAMPBELL: Yes, that is true.

The WITNESS: The tonnage of interstate traffic originated at Silverton, Colorado. Here is Silverton (indicating). The movement at that time was up over the Rio Grande Southern Railroad through Montrose and Grand Junction into Leadville. In the year 1928 the Rio Grande Southern encountered a slide here at Ames, and as a result of which— Now, let me go back. That movement, you will notice, was all intrastate. Because of this slide rates were established by the D. & R. G. W. through Antonito and Alamosa which made that movement interstate. The line of the D. & R. G. transgresses into New Mexico for a short distance here. So there has been no change in the source of supply, but because of that difficulty on the Rio Grande Southern, those ores became interstate ores.

Q. (By Mr. CAMPBELL.) The entire source of supply is from Colorado and not from any other state?

A. That is right. With the exception of here lately they have been getting some residue from Blackwell, Oklahoma, but none of that is in these exhibits."

V.

The sole evidence offered by the Commission on the hearing of May 26 and 27, 1944, was the testimony and exhibits of its witnesses Mr. McCormick of the Bureau of Safety Appliances (Tr. 81-89), Mr. Higgins of the Bureau of Services (Tr. 89-94), and Mr. McDonald, Chief of the Section of Safety Appliances (Tr. 94-115, 401-418).

The testimony of the Commission's witnesses was confined wholly to describing the trackage lay-out and condition at the respective smelters of the plaintiff industry, and to detailing the physical movements in terminal switching on selected days at the respective smelters of *all* freight cars and locomotives, without any attempt to segregate those movements made in line-haul service from those movements made in intra-plant switching service, or those made in interstate transportation from those made in intrastate transportation. These witnesses frankly admitted (Tr. 84-85, 93, 109, 115, 416) that they did not know the contents of the individual cars the movements of which they checked, or for what purposes the physical movements of such cars and of the carriers' engines handling them were made; that is, whether they were made merely for the carriers' operating convenience or because required by the industries, and if the latter, whether they were intra-plant movements independent of line-haul movements, for which, under the tariffs, separate intra-plant switching charges are admittedly paid by the industry.

The Commission offered not one word of evidence to show the carriers' line-haul valuation rates on non-ferrous ores and concentrates do not, as the witnesses for the carriers and the industry had testified, contain compensation for the terminal switching services necessary to determine value and to effect final delivery. Neither did the Commission offer any evidence whatever as to the cost of such terminal switching services, or any evidence that the Commission had attempted to investigate such costs, either in themselves or as part of the costs of the line-haul movements.

VI.

Following such hearing, the plaintiff carriers and the plaintiff industry filed extensive briefs. A copy of the brief of the plaintiff industry is attached as Exhibit B-3 to this Appendix.

Following the filing of such briefs, a proposed report by the Commission's Examiners Way and Diamondson was served on or about January 6, 1945. A copy of such proposed report is attached to the complaint as Exhibit C-5.

On or about March 27, 1945, the respondent carriers and the respondent industry filed exceptions to such proposed report. A copy of the exceptions of the respondent industry is attached as Exhibit B-4 to this Appendix.

On May 4, 1945, oral argument was had at Washington, D. C., before Division 3 of the Commission, consisting of Commissioners Miller (presiding), Patterson and Barnard. A certified copy of the transcript of such oral argument will be offered in evidence in support of this complaint.

On May 31, 1945, the plaintiff industry, in accordance with permission granted upon such oral argument, filed a supplemental memorandum in support of the following propositions:

1. Section 6(7) of the Interstate Commerce Act can be violated only by departure from the published tariffs, which, until lawfully changed, must be observed, although thereby violations of other sections of the Act or of the Commission's orders or rules, are involved.

2. Section 6(7) in itself confers no authority on the Commission to require any change in or departure from the published tariffs in any respect.

A copy of such supplemental memorandum is attached as Exhibit B-5 to this Appendix.

On October 1, 1945, Division 3 of the Commission issued the original supplemental report in these proceedings, 263 I. C. C. 719, together with the original order herein.* A copy of such supplemental report and a copy of said order are attached respectively as Exhibits C-3 and C-4 to the complaint.

Thereupon the plaintiff carriers and the plaintiff industry filed petitions with the Commission for reconsideration by and reargument before the entire Commission of the report and order of October 1, 1945 of Division 3, and for stay of such order pending final determination of such petitions. A copy of the petition of the plaintiff industry, dated December 14, 1945, is attached as Exhibit B-6 to this Appendix.

On March 22, 1946, the Commission entered an order denying such petitions. A copy of said order is attached as Exhibit B-7 to this Appendix.

It appearing from the Commission's published record of the vote on such order that a majority of the Commission, exclusive of the members of Division 3, had voted to grant such petition, the plaintiff carriers and the plaintiff indus-

* The effective date of such order was postponed from time to time by appropriate orders of the Commission. By order of June 3, 1946 the effective date was indefinitely postponed pending further order of the Commission.

try, on April 25, 1946, filed new petitions for reconsideration by and reargument before the entire Commission of the report and order of Division 3 of October 1, 1945, and for the granting of such reconsideration and reargument either on the basis of such petitions or on the Commission's own motion. In the petition of the plaintiff industry, in which the plaintiff carriers as well as the Public Utilities Commission of the State of Colorado and the Public Service Commission of Utah joined, the character of the vote denying the prior petition was specifically called to the attention of the Commission, and thereupon the members of Division 3 joined the majority of the remainder of the Commission in voting to grant such second petition. A copy of the petition of the plaintiff industry is attached as Exhibit B-8 to this Appendix. A copy of the Commission's order of June 3, 1946, reopening the proceeding for oral argument and reconsideration and postponing the effective date of the Commission's order of October 1, 1945 "until the further order of the Commission", is attached as Exhibit B-9 to this Appendix.

On June 27, 1946, oral argument was had at Washington, D. C., before the entire Commission. A certified transcript of such oral argument will be offered in support of this complaint.

On October 14, 1946, the Commission issued its supplemental report on reconsideration and its order here assailed, copies of such order and report being attached to the complaint as Exhibits C-1 and C-2.**

64

VII.

An analysis of the majority report (Exhibit C-2 to the complaint), of the preceding report of Division 3 (Exhibit C-3 to the complaint), and of the Examiners' proposed report (Exhibit C-5 to the complaint), and of the only evidence introduced by the Commission at the hearing of May 26 and May 27, 1944 (as set out under Section V of this Appendix), taken in connection with the evidence introduced by the plaintiffs and the issues presented in the plaintiffs' briefs, exceptions, oral argument before Division 3, supplemental memorandum following such oral argument, the two petitions for reconsideration and reargument following the report of Division 3, and the oral argu-

** The effective date of this order has been postponed from time to time by appropriate orders of the Commission, until such effective date is now July 31, 1947.

ment before the entire Commission following the granting of the second petition for reconsideration and reargument, will show the arbitrary and superficial character of the supplemental proceedings on which are based the Commission's order and findings here sought to be enjoined and set aside.

A. In the Examiners' report and in the report of Division 3, no reference whatever was made to the uncontradicted evidence of the plaintiff's witness Willis (set out at pp. 1-2 of this Appendix), of the plaintiff's witness Carey (referred to at p. 4 of this Appendix), and of the plaintiff's witness Tuckwood (referred to at p. 4 and in the footnote to p. 4 of this Appendix), that the line-haul valuation rates on non-ferrous ores and concentrates have always included compensation for the terminal switching services necessary to determine value. This uncontradicted evidence was wholly ignored in the Examiners' proposed report although set out at pp. 35-39 of the brief (Exhibit B-3 to this Appendix), filed preceding such proposed report. Such uncontradicted evidence was also wholly ignored in the report of Division 3 although the suppression of any reference to such evidence in the Examiners' report was emphatically excepted to at pp. 3 and 12-18 of the exceptions of the plaintiff industry (Exhibit B-4 to this Appendix) and stressed in the oral argument of counsel for the plaintiff industry on May 4, 1945, before Division 3 (see certified transcript of oral argument, Tr. 461, 499-504). The suppression of any reference to this uncontradicted evidence was further stressed in the first petition of the plaintiff industry for reconsideration and reargument (Exhibit B-6 to this Appendix, pp. 9-11) and in the plaintiff industry's second petition for reconsideration and reargument (Exhibit B-8 to this Appendix, pp. 5-8). Such suppression was again strongly stressed in the argument of counsel for the plaintiff industry before the entire Commission on June 27, 1946 (see certified transcript, pp. 555-560, 568-570, 617-620). Nevertheless, as shown in Sections XVI and XVII, pp. 12-14 of the complaint, the majority report, pp. 358-359, flagrantly misconstrues the record with reference to such evidence, rejects such evidence on the specious ground that the witnesses for the plaintiff Denver & Rio Grande, plaintiffs' briefs, exceptions, oral argument before Division 3, were not qualified to give such evidence and although such evidence was developed from the witness

Williams by the Commission's counsel and examiner, and the qualifications of the witness Carey were waived without objection by the Commission's counsel.

65 B. The Examiners' proposed report and the report of Division 3 ignore without mention and without attempt to refute the fundamental distinction between the terminal services at the smelters of the plaintiff industry and the terminal services considered by the Commission in its basic report, 209 I. C. C. 11, and in all supplemental proceedings prior to the instant proceeding, although these distinctions were stressed in the brief of the plaintiff industry (Exhibit B-3, pp. 2-28) preceding the Examiners' report, and in the exceptions of the plaintiff industry to the Examiners' report (Exhibit B-4, pp. 1-5), in the oral argument of counsel for the plaintiff industry before Division 3 on such exceptions (Tr. 457-460), in the two petitions of the plaintiff industry for reconsideration and reargument (Exhibit B-6, pp. 5-8; Exhibit B-8, pp. 4-5).

C. The majority report and the report of Division 3 ignore without mention and without attempt to refute the showing in the plaintiff industry's supplemental memorandum (Exhibit B-5 to this Appendix, filed May 31, 1945, by permission of Division 3 following oral argument before that Division, Tr. 469-470), that

1. Section 6 (7) of the Interstate Commerce Act can be violated only by departure from the published tariffs, which, until lawfully changed, must be observed, although thereby violations of other sections of the Act or of the Commission's orders or rules, are involved.

2. Section 6 (7) in itself confers no authority on the Commission to require any change in or departure from the published tariffs in any respect.

D. The report of Division 3, p. 728, and the majority report, pp. 356-357, both repeat verbatim the misrepresentation and distortion of the position of the plaintiff industry as set out at Sheet 9 of the Examiners' proposed report and reading as follows:

"It is not deemed necessary to discuss the industry's contention that the charges published to apply beyond the plant yard do not apply to smelters, further than to say that the fact that the line-haul rates are based on value does not place smelters in a special class as to the quantum of service embraced in those rates. Where rates are based on value the obligation is gen-

erally on the consignor to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, due to the fact that there is considerable variation in the value of ores from the same region and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the industry to make settlement between the seller and buyer on basis of weights and value determined by the buyer. The smelters voluntarily agreed to furnish the necessary information and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised 'in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry'. There is no sound basis for the contention that such a concession increases respondents' common carrier obligations and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the sampling. The furnishing of the values is the obligation only of the smelters and not of the carriers."

66 The persistent misrepresentation and distortion of the fundamental contention of the industry in these respects is made in the face of the fact that such misrepresentation and distortion was pointed out specifically in the exceptions of the plaintiff industry to the Examiners' report (Exhibit B-4, pp. 36-39) on which exceptions argument was had before Division 3. It was again pointed out in the plaintiff industry's first petition for reconsideration and reargument (Exhibit B-6, pp. 11-14), and emphasized at length in the argument before the entire Commission (Tr. 557-570). In all these instances the plaintiff industry pointed out that its contention was not that the plaintiff carriers were compelled to perform the switching services necessary to determine the value of non-ferrous ores and concentrates *free* merely because such commodities move under valuation rates; that on the contrary it was the position of the plaintiff industry that irrespective of whether under other circumstances the plaintiff industry or the carriers should bear the cost of the terminal switching necessary to determine such value, the Commission could not require the carriers to collect or the industry to pay charges for such switching services in addition to the line-haul rates, since the uncontradicted evi-

dence shows that the line-haul rates have always included compensation for such switching services. In other words the only contention of the plaintiff industry was that it could not be compelled to pay, or the plaintiff carriers compelled to collect, twice for the same services.

E. Although the plaintiff industry in its brief (Exhibit B-3, pp. 50-54) contended on the basis of the testimony of Mr. Carey and Mr. Tuckwood there set out, that the present tariffs at Garfield and Murray, in providing additional charges for "interrupted movements", do not, correctly construed, provide such charges for switching movements necessary to determine the values of ores and concentrates, neither the Examiners' report, the report of Division 3, nor the majority report passes on this question of tariff construction. Instead, as shown under Section XV, pp. 11-12 of the complaint, the majority report, p. 355, alleges that as a matter of "fair and reasonable inference" the plaintiff industry has not paid the charges as provided by the present tariffs at Garfield.

F. The Examiners' report, sheets 9-10, and the report of Division 3, p. 729, made deciding whether the charging of switching charges in addition to the line-haul rates at Garfield and Murray, for switching movements necessary to determine value of non-ferrous ores and concentrates, would violate Section 2 of the Act, since identical switching services are provided without charge in addition to the line-haul rates in the sampling-in-transit tariffs effective at those points. Both do so on the stated ground that "This proceeding is one to determine whether section 6 (7) of the act is being violated." This statement is made in the face of the fact that, as shown by the Commission's original order of July 6, 1931, instituting the general investigation under *Ex Parte 104, Part II* (see Exhibit A1 to Appendix A), as well as by the Commission's order of March 16, 1944, instituting the supplemental hearing concerning the terminal services at the smelters of the plaintiff industry (see Exhibit B-2 attached to this Appendix), there is no such limitation of the investigation to violations of Section 6 (7), but both orders extend to any "violations of the Interstate Commerce Act."

G. The majority report, p. 366, and the report of Division 3, p. 743, repeat verbatim the statement from sheet 21 of the Examiners' proposed report, reading as follows:

67 "A" stated, the Rio Grande owns and maintains all standard gauge tracks within the plant area. The Commission considered a similar situation in *Sioux City Ry. Co. Switching*, 241 I. C. C. 53, and 24 I. C. C. 623, and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of section 6 (7) of the act."

This was done in the face of the showing in the exceptions of the plaintiff industry (Exhibit B-4, pp. 55-61) that the Commission in the *Sioux City Switching* case expressly held that a carrier might own and maintain tracks on industrial properties except such as were used exclusively for loading and unloading of the industry's shipments. The Commission's attention was again called to these facts at pp. 18-19 of the plaintiff industry's first petition for reconsideration (Exhibit B-6), and reargument, and again at p. 9 of the plaintiff industry's second petition for reconsideration and reargument (Exhibit B-8), and was called to the attention of Division 3 (Tr. 481, 522) and to the attention of the entire Commission (Tr. 573) on argument before them respectively.

H. The majority report, pp. 355-356, and the report of Division 3, p. 727, repeat verbatim the statement from sheet 8 of the Examiners' proposed report that,

"Under the terms of the switching agreement between the Rio Grande and the Union Pacific, hereinbefore referred to, the expenses incurred and switching charges received by the former are apportioned between the two carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5 (1) of the act is shown."

This statement is repeated verbatim in the majority report and in the report of Division 3 in the face of the showing in the exceptions of the plaintiff industry (Exhibit B-4, pp. 65-74) that such switching agreements are expressly exempted by the last sentence of Section 1 (18) of the Act from all provisions of Section 5, and the repetition of this showing at pp. 19-20 of the plaintiff industry's first petition for reconsideration (Exhibit B-6) and reargument and at p. 10 of the plaintiff industry's second petition for reconsideration and reargument (Exhibit B-8).

I. Finally, it is instructive to note the statements with which the then chairman of the Commission, Commissioner Barnard, closed the argument before the entire Commission in response to the closing words of counsel for the plaintiff industry, Mr. Finerty, as shown in the certified transcript, pp. 621-622:

"Mr. Finerty: In conclusion, I hope that, whatever the Commission does, it will write a report which will not ignore some of these issues of law and fact, and I have specified at the end of my petition on which this reconsideration was granted the issues of law and fact on which I wish the Commission would pass.

Chairman Barnard: I am going to satisfy you about that, and that is the reason I voted the way I did, to permit you to argue this case. I will never sit here and have anybody charge that I didn't give them their day in court.

Now, we will write findings that you can take us into court with.

Mr. Finerty: *I hope I won't have to.*

Chairman Barnard. *I will assure you to that."*
(Italics supplied)

68

Exhibit B-1

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D. C.

April 15, 1932.

DOCKET EX-PARTE NO. 104, PART II,
TERMINAL SERVICES

NOTICE OF ASSIGNMENT FOR HEARINGS

It appearing, among other things, either from responses made to inquiries or from the evidence thus far adduced of record, that two questions are presented concerning the terminal switching services performed on industrial plant tracks in moving traffic between industries located on such tracks and the rails of respondent carriers, to-wit:

- 1—Whether such terminal services, in whole or in part—performed in placing cars at designated locations in positions accessible for loading and unloading—are services which the connecting common carriers, by operation of law, are duty-bound to perform; and,

2—Whether, in circumstances where such services are performed by the industries, any allowances made to the industries by connecting common carriers as compensation for such services, are lawful?

NOW, therefore, for the purpose of affording all interested parties a full hearing in the determination of these questions, the above entitled proceeding is assigned for further hearings at nine o'clock a. m. (standard time), at the places and on the dates hereinafter shown, viz.:

Dates, 1932		Places	HEARING Rooms	Before
May	2	Atlanta, Ga.	Atlanta Biltmore Hotel	W. P. Bartel, Director, Bu- reau of Service
May	9	New Orleans, La.	St. Charles Hotel	Do.
May	16	Galveston, Tex.	Hotel Galvez	Do.
May	23	Kansas City, Mo.	Chamber of Commerce Rooms	Do.
May	31	Minneapolis, Minn.	Hotel Nicollet	Do.
June	1	Duluth, Minn.	Duluth Hotel	Do.
May	19	Salt Lake City, Utah	United States Court Rooms	Examiner C. M. Bardwell
May	23	Los Angeles, Calif.	Rooms of California RR. Comm'n.—State Bldg.	Do.
May	26	San Francisco, Cal.	237 Merchants Exch.	Do.
May	31	Portland, Ore.	Multnomah County Court Rooms	Do.
June	3	Seattle, Wash.	Olympic Hotel	Do.
June	7	Spokane, Wash.	United States Court Rms.	Do.
June	13	Chicago, Ills.	Hotel Sherman	W. P. BARTEL Director, Bu- reau of Service, and Examiner C. M. BARDWELL
July	7	Detroit, Mich.	Hotel Statler	
July	25	Buffalo, New York	Hotel Buffalo	
August	1	Pittsburgh, Penna.	Chamber of Commerce Rms.	

69 The individual industrial companies and respondent rail carriers will receive special notices—in addition to the foregoing—designating more specifically, within the foregoing assignments, when and where each is to be heard, and informing them more particularly of the information desired. Any inquiries concerning this proceeding, or the assigned hearings, should be addressed to Wm. P. Bartel, Director, Bureau of Service, Interstate Commerce Commission, Washington, D. C.

By the Commission:

GEORGE B. MCGINTY,

Secretary.

A copy of the above entitled notice sent to the following by regular mail on April 5, 1932.

SEE NEXT PAGE.

70

*Exhibit B-2**Ex Parte* No. 104 PART II

BG:AW

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

March 16, 1944

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II, TERMINAL SERVICES

The above-entitled proceeding is assigned for hearing on May 8, 1944, at 9:30 o'clock a. m., at the Shirley Savoy Hotel, Denver, Colorado, before Examiner L. Way, with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plants of the American Smelting and Refining Company at Garfield, Murray and Midvale, Utah, and Leadville, Colorado, with a view of determining whether and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act.

By the Commission:

W. P. BARTEL
Secretary.

72

*Exhibit B-4*BEFORE THE
INTERSTATE COMMERCE COMMISSION

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES AND EXPENSES

PART II, TERMINAL SERVICES

AMERICAN SMELTING AND REFINING COMPANY SMELTERS AT
GARFIELD AND MURRAY, UTAH, AND LEADVILLE, COLORADO.EXCEPTIONS OF AMERICAN SMELTING AND REFINING COMPANY
TO THE REPORT PROPOSED BY EXAMINERS WAY AND
DIAMONDSON

Before setting out in detail the exceptions of the American Smelting and Refining Company to the proposed report in these proceedings, it is desired to take one basic exception to that report as a whole.

This basic exception is to that report's utter disregard of law, of evidence, and of plain ordinary common sense, in its fixed determination to fit this case within what that report chooses to consider an ironclad formula prescribed

(2)

by the Commission's basic report in these proceedings, 209 I. C. C. 11, in spite of the express language of the basic report itself.*

At page 24 of that report the Commission states:

"The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is mere

(3)

ly a substituted service, which is substantially a like service to that included in the line-haul rate, is a *question of fact to be determined in each case.*"

* So pervading is this obsession, that the proposed report even attempts to make it appear that this investigation under Part II of Ex Parte 104 is confined solely to determining whether Section 6(7) of the Act is being violated. At sheet 10 of the proposed report of this case it is stated that,

"* * * the proceeding here is * * * to determine whether Section 6(7) is being violated."

It is to be noted, moreover, that this statement in the proposed report is made in the face of the statement of the presiding Examiner himself upon the opening of the hearings in this proceedings (Tr. 4), that this investigation was set for hearing,

"* * * with a view of determining *whether and to what extent there may exist violations of the Interstate Commerce Act* and of making such findings of fact and order or orders as may be appropriate under the said Act."

The only excuse for this apparent misconception of the scope of this investigation under Part II of Ex Parte 104 would seem to be the possible misunderstanding of the meaning and significance of the showing made at page 3 of the brief of the Smelting Company, that all orders heretofore made under Part II have been based solely on findings of violations of Section 6(7), and that all such orders which have been affirmed by the Supreme Court have been affirmed solely under that section.

It is typical of the proposed report that while this apparent misconception of the scope of this investigation is given at sheet 10, as one excuse for refusing to recognize that the tariff changes made at Garfield, Murray and Midvale in 1938 violate Section 2 of the Act, the proposed report nevertheless does not hesitate at sheets 8 and 16 to find that the so-called "pooling agreements" between the Rio Grande and the Union Pacific at those points violate Section 5(1) of the Act.

In *United States v. American S. & T. Plate Co.*, 301 U. S. 402, 411, the Supreme Court states, with reference to the Commission's basic report:

"The Commission properly held that each case must be decided upon the circumstances disclosed."

Only the *idée fixe* of the proposed report to the contrary can account for, if not excuse, the frankly incredible distortions of law and distortions and suppressions of fact in which it indulges, and to which the Smelting Company takes the following specific exceptions:

(1) To the total suppression or complete disregard of uncontradicted evidence, which evidence wholly invalidates the recommended findings of the proposed report as to the extent of the common carrier obligations of the respective respondent carriers under their line-haul rates, in the receipt and delivery of freight at the respective smelters of the Smelting Company.*

(a) The incredible but significant suppression in the proposed report of any reference whatever to the uncontradicted evidence that the line-haul valuation

(4)

rates on the principal inbound commodities, non-ferrous ores and concentrates, have always contemplated, and have included compensation for, all the terminal switching services performed by the carriers in determining the value of such commodities and in spotting them for final delivery at designated unloading points within the smelter areas.

(b) The similar suppression or disregard in the proposed report of the uncontradicted evidence that what are termed in the respective recommended findings, "the plant yard" at Garfield, "the hold tracks" at Murray, and "the flat yards" at Leadville, are in reality carrier terminals, and not plant facilities.

(2) To the consequent basic errors of the proposed report in the following respects:

(a) The failure of the proposed report to consider and give effect to those decisions of the Com-

* These recommended findings appear in the proposed report as follows:

as to Garfield, paragraph 3, sheet 10.

as to Murray, paragraph 2, sheet 17.

as to Leadville, last two paragraphs, sheet 22.

For convenient reference these respective findings are set out in an appendix heret.

mission under Part II cited in the footnote,* showing that whenever the Commission has found that the terminal switching services performed within the plant area of an industry are contemplated in the line-haul rate, the Commission has invariably found that the performance of such terminal switching services without compensation in addition to the

(5)

line-haul rates, does not constitute a violation of Section 6(7), even though in those cases the tariffs did not, as do the present tariffs at Leadville, expressly provide that the line-haul rates include such specific terminal switching services.

(b) The failure of the proposed report to recognize that the tariff changes in 1938, by which the present tariffs at Garfield and Murray now superimpose switching charges in addition to the line-haul rates for the performance of the very terminal switching services already compensated for in those rates, thereby necessarily violate Section 1 of the Act and entitle the Smelting Company to the restoration of the prior tariff provisions for the performance of such terminal switching services under the line-haul rates.**

(c) The failure of the proposed report to recognize that it is wholly immaterial under the evidence in this case whether, as the proposed report finds (sheet 9), it is the duty of the Smelting Company and not of the carriers to determine the value of non-ferrous ores and concentrates moving under line-haul valuation rates, since wherever that duty might otherwise lie, the carriers' own uncontradicted evidence shows that such line-haul valuation rates themselves contain compensation to the carriers for the cost of performing all terminal switching services necessary to determine such value and

* *Pittsburgh Steel Company case*, 241 I. C. C. 562; *Celotex Co. Terminal Allowance case*, 245 I. C. C. 105; *Interlake Iron Corp. case*, 245 I. C. C. 437; *Pacolet Manufacturing Co. case*, 210 I. C. C. 475; *Chiloquin Lbr. Co. Terminal Allowances*, 241 I. C. C. 495; *Snoqualmie Falls Lbr. Co. case*, 245 I. C. C. 112; *Lamm Lumber Co. case*, 245 I. C. C. 575; *Silver Falls Timber Co. case*, 245 I. C. C. 509; *Switching at Walco, Ark.*, 235 I. C. C. 697; *J. Neels Lbr. Co.*, 248 I. C. C. 283; *Red River Lbr. Co. Terminal Allowances*, 256 I. C. C. 379.

** This invalidity of the present tariff provisions at Garfield and Murray under Section 1 is independent of the additional invalidity of those tariff provisions under Section 2, to which reference will subsequently be made.

(6)

to spot such shipments for final delivery, including the so-called "interruptions" inevitably incident thereto.

(d) The failure of the proposed report to recognize that since what the recommended findings in that report term, "the plant yard" at Garfield, "the hold tracks" at Murray, and "the flat yard" at Leadville, are in reality railroad terminals and not plant facilities, the common carrier obligations of the respective carriers under their line-haul rates are no more ended by merely receiving and delivering the cars of the Smelting Company at those points, than they would be ended at any other terminal yards of those carriers, by the mere receipt and delivery of cars within such other terminal yards without, in addition, the switching of such cars to or from public team tracks, or to or from industrial sidings.

(3) To the legal absurdity of the recommended findings, sheet 22, that the Rio Grande violates Section 6(7) by performing at the Leadville smelter of the Smelting Company, without charge in addition to the line-haul rates, the very terminal switching services which the tariffs of that carrier now specifically provide, and for over thirty years have provided, are included within the line-haul rates.

In other words, the Smelting Company submits that it would be a legal absurdity to find that the Rio Grande, by its very compliance with the specific provisions of its published tariffs at Leadville violates Section 6 (7) of the Act.*

(7)

(4) To the meaningless and factually inapplicable recommended finding, sheet 10, in connection with the Garfield smelter of the Smelting Company that,

"The Commission should further find that the performance of service beyond the yard as described, without adequate and compensatory charges in addition to the line-haul rates, is a violation of Section 6(7) of the act."

since the record shows that the carriers' tariffs at Garfield have since 1938 expressly provided charges in addition to

* It is to be noted that this proposed finding has no reference to, to the separate and distinct from finding, sheet 21, that Section 6(7) is violated by the ownership and maintenance by the Denver & Rio Grande of the tracks within the Leadville smelter area.

the line-haul rates for the terminal switching services there performed, and that such charges have been paid by the Smelting Company.

(5) To the similarly meaningless and factually inapplicable recommended finding, sheet 17, in connection with the Murray smelter of the Smelting Company that,

"It should further find that the performance of services beyond the tracks described at the line-haul rates, without adequate compensation, is a violation of Section 6 (7) of the act."

(6) To the refusal of the proposed report, sheets 9 and 10, to find that the present tariffs at Garfield and Murray, in so far as they purport to authorize charges in addition to the line-haul rates for the terminal switching services performed at those smelters on inbound shipments of non-ferrous ores and concentrates, violates Section 2 of the Act, in view of the specific tariff provisions permitting such ores and concentrates to be sampled in transit at those same smelters for re-consignment *under blanketed rates* to points beyond, without any additional charge for the switching which is involved in such sampling in transit, and which

(8)

switching is identical with that performed in the sampling of shipments on which final delivery is made at those smelters.

(7) To the recommended finding, sheet 21, that the ownership and maintenance by the Rio Grande at Leadville of those tracks within the smelter area used by it wholly for railroad terminal purposes, and of other tracks within the smelter area used by it for the handling of traffic of independent shippers as well as of the Smelting Company, violates Section 6(7) of the Act under the decision of this Commission in *Sioux City Switching*, 241 I. C. C. 53, 241 I. C. C. 623.

(8) To the failure of the proposed report to consider whether even if a finding of a violation of Section 6(7) at Leadville might be technically justified, were it confined solely to the ownership and maintenance by the Rio Grande of the tracks within the smelter area used exclusively for the loading and unloading of the Smelting Company traffic, there is any sound basis for such a finding from a practical viewpoint, or any practical manner in which that situation can equitably be changed.*

* Cf. *Loom Lumber Company Case*, *supra*; *Silver Falls Lumber Company case*, *supra*; *Red River Lumber Company Terminal Allowances*, *supra*.

(9) To the failure of the proposed report to recognize that, in determining whether the ownership and maintenance by the Rio Grande of the tracks within the smelter area at Leadville, is, within the meaning of Section 6(7), a device to refund or remit to the Smelting Company any portion of the published rates and charges, considera-

(9)

tion should be given to the fact that not only does the Smelting Company permit that carrier to maintain its own main line within the Leadville smelter area without compensation to the Smelting Company, but the Smelting Company, without charge to the carriers (including the Rio Grande), provides and maintains extensive trackage within the smelter areas at Garfield and Murray, which trackage constitute the only railroad terminal facilities of the carriers serving those smelters.

(10) To the unjustifiable lengths to which the proposed report goes in attempting to spell out at the Garfield, Murray, and Leadville smelters of the Smelting Company, industrial interference with, and industrial control of, the terminal switching services of the carriers, including:

(a) The absurd effort, sheets 10, 16, to treat as industrial interference by the Smelting Company, the so-called "interference" of intrastate traffic with interstate traffic.*

(b) The similarly absurd effort, sheets 10, 16, to treat as industrial interference by the Smelting Company, the so-called "interference" of intraplant switching, which the carriers are obligated to perform by their published tariffs and for which the Smelting Company pays the additional intrastate plant switching charges specified by those tariffs.

(10)

(c) The studied effort to make it appear that the Smelting Company controls the movements of the switch engines of the carriers at its respective smelters, by confining the references in the proposed report in this connection to the evidence showing that the employees of the Smelting Company desig-

* This absurdity is the greater because the record shows that at Garfield and Leadville, respectively, only approximately 7%, and at Murray only approximately 33%, of all inbound traffic is interstate. Consequently, if there otherwise could be any justification for this novel interpretation of the meaning of "industrial interference", the boot would seem to be on the other foot. The interloper would seem to be the interstate and not the intrastate traffic.

nate the order in which inbound cars shall be spotted for loading, and by omitting all reference to the evidence (Tr. 47-51, 166, 167, 200, 367) showing that at each such smelters the actual movements of such switch engines are wholly controlled by the yardmasters of the respective carriers.*

(d) The attempt, sheet 11, to make it appear that the tracks of the Smelting Company at its Murray smelter are so unsafe for operation as to constitute industrial interference with the terminal switching services performed by the Rio Grande, without the slightest support in the evidence other than a mere general statement of a witness for the Commission that such tracks are in poor condition (Tr. 223, 235), and reference to two instances where a slight delay was occasioned to the carrier's

(11)

switching engine while minor track repairs were made by the Smelting Company (Tr. 236).

(11) To the refusal of the proposed report to recognize that what constitutes at a particular industry reasonable and ordinary terminal switching services under the line-haul rates, necessarily depends upon, among other things, the character of the principal commodities handled by such industry, and on the terminal switching services usually performed under the line-haul rates on such commodities at like industries.

(12) To the lack of any legal basis for the recommended findings, sheets 8 and 16, that Section 5(1) of the Act is violated by the agreements between the Rio Grande and the Union Pacific, whereby at Garfield the former, and at Murray the latter, performs all terminal switching services for both companies, the expense of which is distributed between them on a per car basis, since the record shows that such agreements do not include any pooling of the traffic or revenues of those companies. Moreover, the last sentence of Section 4(18) would appear to exempt such agreements

* This is only one of the numerous instances in which the proposed report displays either a basic ignorance of, or a fixed determination to ignore the nature of ordinary and customary railroad terminal practices and operations. Assuming that what the report terms the "plant yard" at Garfield, the "hold tracks" at Murray, and the "flat yard" at Leadville, in reality constitute railroad terminals, the Smelting Company, like any other industry, clearly has the right to require spotting of cars in any desired order, and the holding of such cars by the carrier subject only to resulting demurrage and track storage charges if any.

certainly in spirit and probably in letter from the provisions of Section 5(1).

It is both impracticable and unnecessary to discuss separately and in detail the foregoing exceptions. The errors of the proposed report are basic and the individual exceptions can best be considered in their relation to such basic errors.

(12)

ARGUMENT

I.

THE RECOMMENDED FINDINGS OF THE PROPOSED REPORT AS TO THE EXTENT OF THE COMMON CARRIER OBLIGATIONS OF THE RESPONDENT CARRIERS UNDER THEIR LINE-HAUL RATES IN THE RECEIPT AND DELIVERY OF FREIGHT AT THE RESPECTIVE SMELTERS OF THE SMELTING COMPANY ARE WHOLLY INVALIDATED BY TWO BASIC ERRORS:

(A) THE INCREDIBLE SUPPRESSION IN THE PROPOSED REPORT OF ANY REFERENCE WHATEVER TO THE UNCONTRADICTED EVIDENCE THAT THE LINE-HAUL VALUATION RATES ON THE PRINCIPAL INBOUND COMMODITIES, NON-FERROUS ORES AND CONCENTRATES, HAVE ALWAYS CONTEMPLATED, AND HAVE INCLUDED COMPENSATION FOR, ALL THE TERMINAL SWITCHING SERVICES PERFORMED BY THE CARRIERS WHICH ARE NECESSARY IN DETERMINING THE VALUE OF SUCH COMMODITIES AND IN SPOTTING THEM FOR FINAL DELIVERY, INCLUDING THE SO-CALLED "INTERRUPTIONS" INEVITABLY INCIDENT THERETO.

(B) THE SIMILAR SUPPRESSION OR DISREGARD IN THE PROPOSED REPORT OF THE UNCONTRADICTED EVIDENCE THAT WHAT ARE TERMED IN SUCH RESPECTIVE FINDINGS, "THE PLANT YARD" AT GARFIELD, "THE HOLD TRACKS" AT MURRAY, AND "THE FLAT YARD" AT LEADVILLE, ARE IN REALITY THE RAILROAD TERMINALS OF THE RESPECTIVE RESPONDENT CARRIERS AND NOT PLANT FACILITIES, AND THEREFORE DO NOT CONSTITUTE REASONABLE POINTS FOR THE DELIVERY AND RECEIPT BY THE RESPONDENT CARRIERS OF CARS OF THE SMELTING COMPANY.

(13)

It is difficult to imagine any excuse for the total suppression or complete disregard in the proposed report of the uncontradicted evidence in the above respects

which is contained in the record of this case. It is significant, however, that had that evidence not been totally ignored, the recommended findings of that report, as to the extent of the common carrier obligations of the respondent carriers under their line-haul rates in the receipts and delivery of freight at the respective smelters of the Smelting Company, could not have been made.

A. THE EVIDENCE ESTABLISHES BEYOND QUESTION THAT THE LINE-HAUL RATES ON NON-FERROUS ORES AND CONCENTRATES HAVE ALWAYS CONTEMPLATED, AND HAVE INCLUDED COMPENSATION FOR, ALL THE TERMINAL SWITCHING SERVICES PERFORMED BY THE CARRIERS WHICH ARE NECESSARY IN DETERMINING THE VALUE OF SUCH COMMODITIES AND IN SPOTTING THEM FOR FINAL DELIVERY, INCLUDING THE SO-CALLED "INTERRUPTIONS" INEVITABLY INCIDENT THERETO.

On the hearing of the present proceedings Mr. Carey, Freight Traffic Manager of the Rio Grande, and Mr. Tuckwood, General Traffic Manager of the Smelting Company, testified at length to the history of the switching services contemplated by and compensated for in the line-haul rates of the respondent carriers.* Mr. Carey's testimony covered the rates of the Rio Grande at the Garfield and Leadville smelters of the Smelting Company from 1920 to the
(14)

present time. Mr. Tuckwood's testimony covered that same history, starting, however, in 1908, and in addition covered the history of the rates of the Union Pacific from the same date to the present time at the Murray smelter of the Smelting Company. The Union Pacific itself introduced no evidence as to such history either at Murray or Garfield, but its counsel, Mr. Collins, stated (Tr. 244-245) that his company adopted Mr. Carey's testimony in this respect. Mr. Carey's and Mr. Tuckwood's testimony and the exhibits introduced in evidence in connection therewith, are discussed at length at pages 33-65 of the Smelting Company's brief. It is both impracticable and unnecessary to repeat that detailed discussion here. It will be sufficient to refer briefly to certain salient features of that testimony.

In the footnote to pages 38 and 39 of the brief, is set out the testimony at the original hearing of these proceed-

* It is symptomatic of the recommended report that the last paragraph on sheet 6 and the footnote thereto, would make it appear that only the tariffs of the Rio Grande have contained provisions for terminal switching under the line-haul rates, either prior or subsequent to February 25, 1920. Even the first paragraph on sheet 7, referring to the tariff changes in this respect at July 5, 1938, makes no reference to the tariffs of the Union Pacific.

ings on May 19, 1932,* of Mr. Williams, the then Freight Traffic Manager of the Rio Grande. As there appears, Mr. Williams, in reply to questions of his own counsel and of the examiner, testified as follows:

"Mr. Williams: Let me put it this way. * * * When we bring a carload of ore or concentrates into the smelter yards we have to get the weight first, we have to get an assay certificate; we will perform switching service for the purpose of sealing the car; we will take it to the sampling plant for the purpose of the assay; if it is in the winter then we will take it to the thaw house to have the ore thawed out.

(15)

Q. You will do both services?

A. *All those are included in our line-haul rate.* Does that make a clear answer to your question?

Q. To complete the service you take it to the sampler and thaw house as part of the line-haul service—or *part of the service under the line-haul rate.* Now, what else will you do with it?

A. We take it to the point where they want it unloaded. Perhaps I haven't made it clear, Mr. Gwynn, but we regard the service for weight and the service for sampling in order that we may know the value of the ore—

. . .

Examiner BARDWELL: I would like the witness to finish what he was going to say. I think he was going to say he considered that part of the common carrier service.

A. We consider the sealing of the car for the weight and the getting of the assay as part of our common carrier duty.

Examiner BARDWELL: And the thawing?

A. That, and the thawing also, in the winter time." (Tr. 77-78 of present hearing; Tr. B-44, hearing of May 19, 1932.)

As further shown in same footnote to the Smelting Company's brief, Mr. Carey confirmed Mr. Williams' testimony in these respects (Tr. 48).

Furthermore, it is to be noted that Mr. Carey testified (Tr. 76-77) that the use of the word "free" in certain of

* This hearing was confined to the lawfulness of the terminal switching services at the Garfield smelter, and did not include the Murray or Leadville smelters, though, as will later be noted, exactly the same tariff provisions then applied at all three smelters.

the early tariffs providing ~~for such~~ switching services under the line-haul rate, did not mean that the carriers were not compensated for such switching services, but meant that compensation for such services was included within the line-haul rate. Mr. Carey there testified:

(16)

"Q. After 1920, and until the publication of the tariffs applicable to the Utah smelters in 1938, the tariffs all specifically covered provision that the line-haul rate included movement to the thaw house, weighing, sampling and one spotting.

A. That is correct.

Q. Now, some of those tariffs, early tariffs especially, referred to that switching as 'free switching', it wasn't free in the sense that it was something the carriers weren't compensated for, it was included in the line-haul rate?

A. It was switching included in the line-haul rate."

Mr. Tuckwood, in his testimony, called attention to certain decisions of the federal court's placing a similar construction upon the word "free" in such tariffs. These decisions are cited and discussed in the footnote to pages 35 and 36 of the Smelting Company's brief. It there appears that Judge Johnson, of the United States District Court for the District of Utah, in rejecting the contention of the Union Pacific that the word "free" in such tariff provisions made such switching illegal, said:

"* * * the fair and reasonable inference is that the tariff contemplated, in fact included, the reasonable value of the switching charges in the transportation rates."

Judge Johnson's decision appears of record in these proceedings as Exhibit 14, and the quotation is from page 3 of that exhibit."

* In connection with the testimony of Mr. Carey, Mr. Williams and Mr. Tuckwood, showing that the line-haul tariffs on non-ferrous ores and concentrates have always included compensation for the terminal switching services performed on those commodities, it should be noted that the tariff changes made at Garfield, Murray, and Midvale on July 5, 1938, imposing charges in addition to the line-haul rates for the performance of such terminal switching service, were made, not only as Mr. Carey testified (Tr. 69-70) under a misconception of the Commission's basic report in these proceedings, but were super-imposed on the line-haul rates at the very time that the line-haul rates, which already included compensation for such switching services, were themselves increased under the order of this Commission in *Ex parte* 115.

(17)

In considering the foregoing evidence, it is important to have in mind that exactly the same tariff provisions, and in fact exactly the same tariffs, which have applied to terminal switching services at the Garfield and Murray smelters of the Smelting Company, have likewise applied at the Midvale smelter of the United States Smelting, Refining and Mining Company at Midvale, Utah (see Exhibits 4, 10 and 11). Moreover, Mr. Carey, who was the witness for the Rio Grande in this case, was likewise the witness for that company in the related case applying to the Midvale smelter, and testified in that case to exactly the same tariffs here involved.

This is significant because the recommended report in the Midvale case was made by the same examiners as the proposed report in this case, and in that report there was a similar suppression of any reference whatever to Mr. Carey's testimony in the foregoing respects. The recommended report, however, in the Midvale case at least states, at sheet 8:

"On brief, the respondents differ with respect to the propriety of the switching charges presently in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles an-

(18)

nounced by the Commission in the original report in this proceeding. *The Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from thaw house.*"

This statement, of course, might well imply that this position was taken by the Rio Grande *only in its brief*, particularly since the proposed report suppresses any reference whatever to the evidence on which the Rio Grande's position in its brief was based. The recommended report in this case, however, fails even to make this misleading reference to exactly the same position taken by the Rio Grande in its joint brief with the Union Pacific, relating to the Murray and Garfield smelters, and in its separate brief, relating to the Leadville smelter.

B. THE EVIDENCE ESTABLISHES BEYOND QUESTION THAT WHAT ARE TERMED IN THE RESPECTIVE RECOMMENDED FINDINGS, "THE PLANT YARD" AT GARFIELD, "THE HOLD TRACKS" AT MURRAY, AND "THE FLAT YARD" AT LEADVILLE, ARE IN REALITY THE RAILROAD TERMINALS OF THE RESPECTIVE RESPONDENT CARRIERS AND NOT PLANT FACILITIES AND, THEREFORE, DO NOT CONSTITUTE REASONABLE POINTS FOR THE DELIVERY AND RECEIPT BY THE RESPONDENT CARRIERS OF CARS OF THE SMELTING COMPANY.

Garfield

What is termed "the plant yard" in the recommended findings as to the Garfield Smelter at Sheet 10 of the proposed report, consists not only, as stated at Sheet 2 of that report, of tracks Nos. 1-10 on the upper level of the smelter area, but also of the Main Line track within the plant

(19)

area leading in from the left hand side of Exhibit 3, and used by the Union-Pacific road-haul trains in approaching tracks Nos. 1-10 from the west; and of the Main Line and Old Main Line tracks on the upper level leading in from the right hand side of Exhibit 3, and used by the road-haul trains of the Rio Grande and of the Bingham & Garfield to reach tracks Nos. 1-10 from the east (Tr. 14, 25).

On hearing of these proceedings, both Mr. Moriarty (Tr. 45, 46, 52), Superintendent of the Salt Lake Division of the Rio Grande, and Mr. McDonald (Tr. 97), Chief of Section of Safety Appliances of the Interstate Commerce Commission, expressly conceded that tracks Nos. 1-10 are nothing more nor less than the joint railroad terminals and storage yard of the three railroads serving Garfield Smelter and are not "interchange tracks" as between those railroads and the Smelting Company.

Moreover, the evidence shows that those three railroads, in addition to using yard tracks Nos. 1-10 as their joint railroad terminals, also have exclusive use of Rip tracks Nos. 1 and 2 for repair of their bad order cars, and of that portion of No. 9 yard track adjacent to Rip track No. 1 as a storage track for their bad order cars awaiting repair (Tr. 46). Further, that each of the three railroads maintains its own repair shop alongside such Rip tracks (Tr. 266-267).

Mr. Moriarty further testified that none of the three railroads has any other hold tracks or other terminal facilities within a reasonable distance of Garfield Smelter on which those railroads could make up or break up their

respective road-haul trains or hold cars for spotting orders or other purposes, other than these joint railroad terminal tracks owned and maintained by the Smelter Company for (20)

them without charge, and that the principal use of those tracks is for the making up and breaking up of the road-haul trains of the three railroads (Tr. 45, 46).

Mr. Moriarty likewise testified (Tr. 43) that while the Rio Grande has a station called Garfield Station 1.9 miles east of the Garfield Smelter, that station has no sidetracks "to speak of", no scales and no sampler; that, while the Union Pacific has a station at the town of Garfield, the nearest station on the Union Pacific to Garfield Smelter is at Lake Point, Utah, which is about two miles west of the Garfield Smelter and which, so far as Mr. Moriarty was advised, has no train yards, scales or sampler (Tr. 44); that the Bingham & Garfield has no station at Garfield other than the joint railroad terminal at the Garfield Smelter, its nearest station otherwise being at Magna, Utah, 4.2 miles east of the Smelter (Tr. 44-45). Magna, it should be noted, is one of the two stations on the Bingham & Garfield from which Utah copper concentrates are shipped to the Garfield Smelter *under line-haul rates* from the copper concentrating mills of the Utah Copper Company at Magna (See Smelting Company's brief, page 63).

Mr. Moriarty further testified that nowhere in the vicinity of Garfield Smelter or, indeed, of Salt Lake City, have any of the three railroads any terminal tracks facilities for handling either individually or jointly the approximately 23,000 inbound cars, or the approximately 7,000 outbound cars, shipped annually from that Smelter (Tr. 45).

Mr. Moriarty, in testifying that it would be impracticable even if the union rules permitted, to have the road-haul engines of each of the three railroads break up and make up road-haul trains and perform other terminal switching services at the Garfield Smelter, said (Tr. 52):

(21)

"No. That is evident, that we don't do it in our own terminals, and *this switching at Garfield, your weighing and all that stuff, and lining all the cars for spotting at various points and various sequence wanted is very similar to any industrial switching at any large city where your cuts must be made up in the order in which they are going to be spotted, and so on, in advance of the spotting engine's arrival, for*

working. This is practically the same as that. The only difference is this is one industry and the other may be twenty or thirty industries.

Q. (Mr. FINERTY) In other words, Mr. Moriarty, it happens there are no other industries out there to use those joint facilities used by the three railroads?

A. That is right.

Q. But that is no different than any joint terminal any joint railroads might maintain in any terminal district?

A. Or you might say a terminal used by any other railroad. (Italics supplied.)

Mr. McDonald testified for the Commission (Tr. 96-97):

"Examiner WAY: Now, these tracks, at the bottom of the map here, which you have just referred to, the ten storage tracks, those were the ones that were designated the receiving yard, and they are the storage tracks?"

Mr. McDONALD: Been designated as a receiving yard, joint railroad terminal and the storage yard. That might possibly be referred to as the interchange yard somewhere in our reports.

Mr. FINERTY: But if so, Mr. McDonald, it would be interchange between the three railroads?

Mr. McDONALD: That, of course, would be the reason for calling it interchange." (Italics supplied.)

(22)

Nowhere in the proposed report is the slightest reference to any of the foregoing testimony, and that report is wholly silent as to these significant admissions not only of the carriers' witness, Mr. Moriarty, but of the Commission's own witness, Mr. McDonald.

Murray

What are termed the "hold tracks" in the recommended findings as to Murray at sheet 17 of the proposed report consist, as stated at sheet 11 of that report, of two tracks designated numbers 5 and 6. It is there also stated,

"They are used as hold tracks for inbound and outbound loaded cars."

The evidence, however, shows (Tr. 359), and even the proposed report itself recognizes (Sheet 15), that these tracks are also used by the Union Pacific switch engines for making up outbound trains of cars handled by that company for itself and the Rio Grande under the joint switching contract between those companies.

As stated in the Smelting Company's brief (p. 90), the testimony introduced by the Union Pacific as to the terminal switching services performed by it both on its own behalf and for the Rio Grande, is so confused as to be practically unintelligible. It does appear from that testimony, however, that the interchange track between the Union Pacific and the Rio Grande connects with the Pallas yards of the Union Pacific at a point which Mr. Kelly marked "X" on the original Exhibit 17 filed with the Commission (Tr. 157); that after it shows that it has taken cars from this interchange track with the Rio Grande (Tr. 217-
(23)

218), it holds those cars at a point in the Pallas yards marked "B-2" on Exhibit 18. That so far as the Union Pacific's own cars are concerned its road haul engine cuts off at the point marked "B-1" on Exhibit 18; that eventually the Union Pacific switch engine brings the cars of both companies down to one of the two entrances into the smelter trackage; that the ordinary point of entry is approximately at the 1919 scale house shown at the extreme left-hand corner of Exhibit 17 (Tr. 154). The second point of entry is just to the west of the "Pond" shown in the lower left-hand corner of that exhibit where a track bearing the legend "A. S. & R. Co." connects with a track bearing the legend, "O. S. L. R. R." (Tr. 155).

The testimony of Mr. Perry, General Superintendent of the Murray smelter, as to the terminal switching and delivery services on inbound shipments and on outbound shipments is fully abstracted at pages 91 to 101 of the Smelting Company's brief. It will suffice to say here that that testimony shows that all inbound cars after being weighed at the entrance to the plant are set out by the Union Pacific switch engine on tracks Nos. 5 and 6,* where they are held for spotting orders from the Smelting Company and where they are also moistured, and concentrates but not ore, are pipe sampled (Tr. 329); that all loaded outbound cars and returned empties are likewise taken by the Union Pacific switch engine to tracks numbers 5 and 6 where they are held for convenience of the Union Pacific in the making up
(24)

of drags conveniently classified for delivery into the Pallas yard of that company and the Rio Grande respectively (Tr. 358, 359). Mr. Kelly admitted that both loaded and

* Sometimes, entirely for the carriers' convenience, cars are held on the two Coke Tracks, instead of on tracks Nos. 5 and 6, (Tr. 328).

empty cars were held by the Union Pacific at various other places within the smelter area as more convenient than holding them on either its own tracks in its Pallas yard, or tracks Nos. 5 and 6 (Tr. 168, 177, 184).

It thus appears that the so-called "hold tracks," Nos. 5 and 6, are nothing more nor less than the joint railroad terminal tracks used by the Union Pacific and the Rio Grande under their joint switching agreement for the making up of drags of outbound empty and loaded cars conveniently classified by the Rio Grande for the placing of such cars in road-haul trains of those companies in their respective Pallas yards instead of classifying such cars for this purpose after arrival in those yards, and for the holding of inbound loads and empties for spotting rather than holding them in the respective yards of such carriers. The only possible advantage to the Smelting Company by having such inbound loads held on tracks Nos. 5 and 6 rather than in the respective Pallas yards of the Rio Grande and Union Pacific is the greater availability of such cars for moisturing and pipe sampling. This benefit to the Smelting Company is wholly incidental to the operating convenience to the carriers of holding inbound cars for spotting orders on tracks Nos. 5 and 6, after performing their duty in weighing such inbound cars, instead of hauling such cars after such weighing back into their own yards to await spotting orders.

While the proposed report does not wholly suppress any reference to the foregoing evidence, it does wholly disregard its significance.

(25)

Leadville

What is termed "the flat yard" in the recommended findings as to the Garfield smelter at sheet 22 of the proposed report, is defined at sheet 17 as follows:

"Just inside the plant entrance, a track diverges to the south from the main line lead and serves 7 stubbed tracks, referred to in the evidence and hereinafter as the flat yard."

In this connection it should be noted that these seven tracks constituting the so-called "flat yard", unlike the tracks constituting the so-called "plant yard" at Garfield and the so-called "hold tracks" at Murray, are owned and maintained by the Rio Grande itself, and not by the Smelting Company, although the property on which they are located is owned by the latter (Tr. 446-447).

It should also be noted that not only are such tracks owned by the Rio Grande, but they and certain other tracks owned and maintained by the carrier within the smelter area, unlike either the so-called "plant yard" at Garfield or the so-called "hold tracks" at Murray, are used by that carrier not only for cars received or shipped by the Smelting Company but for cars received and shipped by two independent industries, the Ore & Chemical Company and the Resurrection Company, as well as certain other independent shippers.

The Ore & Chemical Company is located a mile and a half north of the Leadville Branch of the Rio Grande and is reached by the O. & C. spur shown on Exhibit 32, which exhibit also shows that the greater portion of the main line of such Leadville Branch and of the O. & C. spur is also located on property owned by the Smelting Company (Tr. 378).

(26)

The Resurrection Company the record shows (Tr. 441) is a concentrate mill in California Gulch at Leadville.

The record shows (Tr. 440, 441) that the outbound cars of concentrates of the Ore & Chemical Company and of the Resurrection Company are handled by the same switch engines as the Rio Grande uses in serving the Smelting Company, which engines take such cars from the plants of those two independent companies into the flat yard where they are held for assembling in trains to be moved out by the road-haul engines of the Rio Grande, and that prior to moving out, the Smelting Company permits the railroad company to weigh them free over the Smelting Company scales. The record also shows, (Tr. 442, 443) that the Smelting Company permits independent shippers of ore and of scrap iron to load such commodities at a dock or platform owned by the Smelting Company located on the so-called American tracks in the plant area, Coordinate 12-G on Exhibit 32. It also shows (Tr. 442, 443) that the cars of ore and scrap iron so loaded must be hauled by the Rio Grande over other tracks in the smelter area to reach the flat yard, where they are likewise held by the Rio Grande for making up into the road-haul trains of that carrier, and that the Smelting Company permits the Rio Grande without charge to weigh such cars over the scales of the Smelting Company. Finally, the record shows (Tr. 369) that the flat yard is the point where the branch line engines of the Rio Grande cut off inbound cars and pick

up outbound cars, and where the road-haul trains of that carrier are broken up and made up by its switch engines serving the Smelting Company.

Again, while, as at Murray, the proposed report does not entirely suppress all references to this evidence, it en-
(27)

tirely distorts its significance and misrepresents it in at least two important respects. That report states, Sheet 22:

"Traffic for those processing plants (the Ore and Chemical Company and the Resurrection Company) is handled to and from the flat yard only when trips are made by the switch engines assigned to the industry to bring metal bearing materials to the Smelter. It would seem that the normal method of switching those processing plants would be by the engine that operates between Malta and Leadville."

This is typical of the manner in which the proposed report distorts or misstates evidence to support its own preconceptions.

There is not a word of evidence to justify the first sentence in the above quotation. Neither is there a word of evidence to justify the second sentence in that quotation which, on careful reading, it is significant to note does not state that the normal method of switching the Ore and Chemical Company and the Resurrection Company is *in fact* by the engine that operates between Malta and Leadville *but* that this "*would seem to be the normal method*".

On the same sheet, it is stated, referring again to the shipments of such independent industries as well as shipments of ore and scrap iron by other independent shippers, that

"Such incidental usage averaging about four cars a day cannot be accepted without better proof as adequate compensation for the building and maintaining of 6.4 miles of track over a mountainous terrain."

That evidence, of course, was offered for no such purpose. It was offered to show that the flat yard, the tracks
(28)

of which are owned and maintained by the Rio Grande, is not a plant facility but a railroad terminal, being used not only for the making up and breaking up of the branch line road-haul trains of the Rio Grande, but for the handling of cars for independent industries and shippers.

Moreover, in this connection, the proposed report fails to note that such average of 4 cars a day of outbound cars

of independent shippers actually exceeds outbound shipments of the Smelting Company itself which, for the year ending March 31, 1944, totalled 476 cars. See Exhibit 36.

C. THE FOREGOING EVIDENCE SPECIFIED UNDER SUBHEADINGS A AND B HEREOF, WHICH THE PROPOSED REPORT HAS EITHER SUPPRESSED, DISREGARDED OR DISTORTED, WHOLLY INVALIDATES THE RECOMMENDED FINDINGS OF THAT REPORT AS TO THE EXTENT OF THE COMMON CARRIER OBLIGATIONS OF THE RESPECTIVE RESPONDENT CARRIERS UNDER THEIR LINE-HAUL RATES IN THE RECEIPT AND DELIVERY OF FREIGHT AT THE RESPECTIVE SMELTERS OF THE SMELTING COMPANY.

SUCH RECOMMENDED FINDINGS ARE FURTHERMORE IN DIRECT CONFLICT WITH THE PRINCIPLES OF THE COMMISSION'S DECISIONS IN THE CELOTEX CASE AND OTHER CASES CITED IN THE FOOTNOTE TO PAGE 5 OF THESE EXCEPTIONS.

The recommended findings² of the proposed report in the above respects are, as already stated, set out in the appendix hereto. Reference to them will show that they are regrettably lacking not only in the parity of language which obviously would have been desirable in dealing with the same subject matter, but even more regrettably lacking in indicating that the same factors have been considered in reaching the same conclusions.

It would seem obvious that, in reaching an intelligent conclusion as to the extent of the common carrier obligations

(29)

of the respective respondent carriers under their line-haul rates in the receipt and delivery of freight at the respective smelters of the Smelting Company, consideration should in every instance have been given to the same factors, and that among these factors would be; (1) what terminal services are expressly provided for or contemplated by the tariffs effective at the respective smelters; (2) what terminal services are compensated for in the line-haul rates effective at the respective smelters and (3) what points constitute reasonable points for the delivery and receipt of cars by the respondent carriers at the respective smelters.

It will be observed that, so far as the express language of the respective recommended findings is concerned, that in none of them apparently have all three of these factors been considered, nor have the same factors been considered in any two of them.

In none of such recommended findings is there any express finding as to what the tariffs expressly provide or

contemplate under the line-haul rates. In only one of them, that dealing with Leadville, is it expressly found that the line-haul rates do not contain compensation for movements beyond the point at which it is found the carriers' common carrier obligations begin and end, i. e., the "flat yard".*

(30)

In only one of them, that referring to Garfield, is it expressly found that the point at which it is alleged the carriers' common-carrier services begin and end is a reasonable point for the receipt and delivery of cars to the Smelting Company by the carriers.

Disregarding this apparently slipshod drafting of the respective recommended findings, it seems fair to assume that, in substance, they are intended collectively to recommend that the Commission find (a) that under their line-haul rates, the common carrier obligations of the respective carriers in the receipt and delivery of cars of the Smelting Company begin and end at what is termed at Garfield, "the plant yard", at Murray, "the hold tracks", and at Leadville, "the flat yard"; (b) that the tariffs of the respective carriers neither inferentially contemplate nor expressly provide under the line-haul rates for the movement of cars beyond such designated points; and (c) that the line-haul rates contain no compensation for such movement beyond such points.

Such findings, it will be observed, would be in direct conflict with the undisputed evidence just discussed under subheadings A and B hereof.

* It is frankly incredible that such a finding should be recommended as to any of the three smelters here involved in the face of the uncontradicted evidence of the carriers themselves that the line-haul rates have always included compensation for such terminal services. It is, if possible, more incredible that Leadville should be singled out for such an express finding since the present tariffs at Leadville, unlike the present tariffs at Garfield and Murray, expressly provide that the line-haul rates include all terminal switching services here in question. These express tariff provisions at Leadville are recognized even in the proposed report itself. That report states, sheet 21, that the present tariff at Leadville provides that:

"Delivery of a line-haul carload shipment destined to smelters at Leadville will include movement within the smelting plant over track scales, to and from thaw house, to and from smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicating by the Smelter Company".

It is characteristic of the proposed report that, in stating that these are the present tariff provisions at Leadville, that report would make it appear that they only became "effective June 10, 1942". As shown by Exhibits 4 and 10, these tariff provisions have been in effect since 1920, and even more liberal ones were in effect prior to that date.

(31)

Under subheading A, it is shown that the evidence establishes beyond question that the line-haul valuation rates on non-ferrous ores and concentrates have always included compensation for all terminal switching services performed by the carriers necessary in determining the value of such commodities and in spotting them for final delivery at the designated unloading points within the respective smelting areas. Exhibits 4 and 10, and, as already noted, sheet 21 of the proposed report itself, show that the present tariffs at Leadville still expressly provide for the performance of such terminal switching services under the line-haul rates. The testimony of Mr. Carey (Tr. 69-70) shows that while because of the changes made in the tariffs at Murray and Garfield in 1938, the present tariffs at those points no longer expressly providing for such terminal switching services under the line-haul rates, those changes were made because of a misconstruction of the Commission's basic report in these proceedings. Those changes, therefore, in no way effect the testimony of Mr. Carey and Mr. Williams, discussed under subheading A, that the line-haul rates still contain compensation for such terminal switching services, and still essentially contemplate such services.

Under subheading "B" it has been seen that the evidence establishes beyond question that what are termed in the respective recommended findings "the plant yard" at Garfield, "the hold tracks" at Murray, and "the flat yard" at Leadville, are in reality the railroad terminals of the respective respondent carriers and not plant facilities. It follows that mere delivery or receipt by the respondent carriers of cars of the Smelting Company at those points neither begins nor ends the transportation services of those carriers under their line-haul rates, any more than would

(32)

such services be begun or ended by the mere receipt and delivery of cars at any other terminal yards of those carriers, without in addition the switching of such cars to or from public team tracks or to or from industrial sidings.

The recommended findings of the proposed report to the contrary, are obviously based on a false analogy to the Commission's findings under its basic report in so-called "allowance cases". In those cases the Commission condemned allowances to industries for performing terminal switching services beyond established "interchange

tracks", where the Commission expressly found the line-haul rates of the carriers there involved either did not contemplate or did not contain compensation for any terminal switching beyond such established interchange tracks.

These "allowance cases" are considered at-length and distinguished from the terminal switching services involved in the instant case, in the Smelting Company's brief, pp. 6 to 28. As there shown, in all those cases there were established "interchange tracks" on which by custom or specific agreement the cars of the industry were received or delivered by the carriers. Moreover, in all those cases the Commission found that the line-haul rates under the carriers' published tariffs neither expressly provided for, nor contemplated switching services beyond such established interchange tracks, nor contained compensation therefor.

In the instant case the evidence discussed under sub-heading "B" hereof clearly establishes that neither the so-called "plant yard" at Garfield, the so-called "hold tracks" at Murray, or the so-called "flat yard" at Leadville, are "interchange tracks" within the meaning of the Commission's decisions in such allowance cases. It shows, moreover, that the Commission's own witness, Mr. McDonald, expressly so admitted in connection with the so-called "plant yard" at Garfield.

(33)

On the other hand, the *Celotex* case and the other cases cited in the footnote to page 5 of these exceptions, show that the Commission even in "allowance cases" has invariably held that a carrier's common carrier obligations under its line-haul rates do not begin or end with the receipt or delivery of cars even on established "interchange tracks" where, as in the *Celotex* case and the other cases cited in that footnote, the Commission expressly found that the carriers' line-haul rates contemplated, or contained compensation for, switching services beyond such established interchange tracks.*

* It is particularly to be noted that in the *Celotex* case, *supra*, the Commission, in finding that such terminal services were there included within the line-haul rate, gave specific consideration (p. 109) to the fact that similar terminal services were performed without additional charge under the line-haul rates at competitive plants. See also to the same effect *Pacolet Mfg. Co. Operating Allowances*, *supra*, p. 477; *Snoqualmie Falls Lumber Company Terminal Allowances*, *supra*, p. 114.

Moreover, that the so-called "plant yard" at Garfield, the so-called "hold tracks" at Murray, and the so-called "flat yard" at Leadville, are property to be considered railroad terminals and not plant facilities, is clear from the Commission's opinion in *Car Spotting Charges*, 34 I. C. C. 609. Quotation is made at length from that report at pages 28 to 30 of the Smelting Company's brief. Here it will suffice to re-quote the following from page 29 of the Commission's report:

"Especially ought the tracks of the industrial plant to the extent that they are used by the carrier for a public service be treated as a part of its terminal facilities where the carrier does not show that it would be possible for it to provide the necessary terminal facilities in any other way."

(34)

cilities where the carrier does not show that it would be possible for it to provide the necessary terminal facilities in any other way.

"The public interest is served in many ways by permitting the carriers to use the tracks of industrial plants as a part of their terminal facilities. The exclusively owned terminals of the carriers are thereby relieved of a heavy burden under which they would either break down completely or be so congested as to greatly inconvenience shippers who are compelled to receive and deliver their freight in those terminals. The distribution of terminals also tends to prevent the undue concentration of industries and consequent concentration of population, thus aiding the solution of one of our social problems." (Italics supplied.)

The application in the instant case of the above language of the Commission is obvious. At Garfield the so-called "plant yard" and at Murray the so-called "hold tracks" constitute the only railroad terminal facilities of the carriers serving the smelters which are available for such service. They are used not only for the holding of cars as in any railroad terminal to await spotting orders from industries, but they are used, as at Garfield, for the making up and breaking up of the line-haul trains of all three carriers serving that smelter, and, as at Murray, for the making up and breaking up of the joint switching drags of the two carriers serving that smelter. At Leadville not only is the so-called "flat yard" used by the Rio Grande for similar purposes, but it is used in addition for the holding and storage of cars for wholly independent industries and shippers, and for the making up of such cars, along with cars of the industry, into the road-haul trains of that

(35)

carrier. Finally, at Leadville the tracks in the so-called "flat yard" are not even owned or maintained by the Smelting Company, but are owned and maintained by the carrier itself for these very purposes.

It is submitted, therefore, that the recommended findings in the proposed report as to the extent of the common carrier obligations under their line-haul rates of the respective respondent carriers are not only in direct conflict with the evidence discussed under sub-headings "A" and "B", but are in direct conflict with the principles of the Commission's own decisions in the cited cases.

II.

IT IS WHOLLY IMMATERIAL UNDER THE EVIDENCE IN THIS CASE WHETHER, AS THE PROPOSED REPORT FINDS (SHEET 9), IT IS THE DUTY OF THE SMELTING COMPANY AND NOT OF THE CARRIERS TO DETERMINE THE VALUE OF NON-FERROUS ORES AND CONCENTRATES MOVING UNDER LINE-HAUL VALUATION RATES, SINCE WHEREVER THAT DUTY MIGHT OTHERWISE LIE, THE CARRIER'S OWN UNCONTRADICTED EVIDENCE SHOWS THAT SUCH LINE-HAUL VALUATION RATES THEMSELVES CONTAIN COMPENSATION TO THE CARRIERS FOR THE COST OF PERFORMING ALL TERMINAL SWITCHING SERVICES TO DETERMINE SUCH VALUE AND TO SPOT SUCH SHIPMENTS FOR FINAL DELIVERY, INCLUDING THE SO-CALLED "INTERRUPTIONS" INEVITABLY INCIDENT THERETO.

Nothing better illustrates the unsoundness of the proposed report than its conclusion that because it finds it is the duty of the Smelting Company and not of the carriers to determine the value of non-ferrous ores and concentrates moving under valuation rates, it necessarily follows that the respondent carriers may not perform the terminal switching services necessary to determine such value without charge in addition to the line-haul rates.

(36)

The proposed report, sheet 9, states in this connection:

"It is not deemed necessary to discuss the industry's contention that the charges published to apply beyond the plant yard do not apply to smelters, further than to say that the fact that the line-haul rates are based on value does not place smelters in a special class as to the quantum of service embraced in those rates. Where rates are based on value the obligation is generally on the consignor to furnish the true value. An exception to this general prac-

tice is made on ore and concentrates to meet the needs of the smelters and mines, due to the fact that there is considerable variation in the value of ores from the same region and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the industry to make settlement between the seller and buyer on basis of weights and value determined by the buyer. The smelters voluntarily agreed to furnish the necessary information and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised 'in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry.' There is no sound basis for the contention that such a concession increases respondents' common carrier obligations and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the sampling. *The furnishing of the values is the obligation only of the smelters and not of the carriers.* (Italics supplied).

In the first place, it is again characteristic of the proposed report that the above statement not only completely misrepresents the contentions of the Smelting Company,

(37)

but that statement would make it appear that it is only the Smelting Company which contends that it is the duty of the carriers under their line-haul valuation rates to perform the terminal switching services necessary to determine the values of non-ferrous metals and ores for the purpose of determining the rates legally applicable to particular shipments of such commodities.

On the contrary, the evidence shows that the respondent carriers themselves have testified unequivocally that they have always recognized that under their line-haul valuation rates on such commodities the duty lies with them to perform the switching services necessary to determine the value thereof, without charges in addition to such line-haul rates.

The express testimony of the carriers to this effect is contained in the testimony of Mr. Williams and Mr. Carey

* On sheet 17, these conclusions are made applicable to the terminal switching services at the Murray smelter, and on sheet 21, to the terminal switching services at the Garfield smelter.

of the Rio Grande, and is adopted by the Union Pacific** through the statement of its counsel (TR 244, 245). Mr. Williams' testimony, given at the original hearing concerning the Garfield smelter, held May 19, 1932, is set out under heading "I-A" of this argument, as is the confirmation of that testimony by Mr. Carey. Moreover, Mr. Carey's independent testimony to the same effect (Tr. 65-75) is set

(38)

out in full at pages 44 to 48 of the Smelting Company's brief.

Not only, however, does the proposed report suppress any reference to the carriers' own testimony in this respect, but in the quoted statement that report shows a complete inability to comprehend the reason why that testimony makes it plainly the duty of the carriers to perform such terminal switching services without charge in addition to line-haul rates.

That reason does not, as the proposed report would make it appear, rest on any assumption that it is the duty of the carriers to perform such terminal switching services at their own cost and without compensation from the Smelting Company. On the contrary, that reason lies in the undeniable fact that since the line-haul rates already include compensation for the cost of performing such terminal switching services, the Smelting Company by paying such line-haul rates has already compensated the carriers for the performance of such services, and therefore it is the duty of the carriers to perform them without any charge in addition to such line-haul rates.

Furthermore, even in the absence of the carriers' express testimony that such line-haul rates include compensation to them for the cost of performing such terminal switching services, it would only be reasonable to assume this to be the fact. It certainly would not be reasonable to assume that the carriers, who have unequivocally recognized that it is their duty under such line-haul valuation rates to perform without any charge in addition to those rates the terminal switching services necessary to determine values under those rates, would have voluntarily established, and for over thirty years would have main-

** The only qualification by the Union Pacific in its adoption of Mr. Carey's testimony is that it excepts that portion of Mr. Carey's testimony in which he states that the tariff changes in 1938 at Garfield and Murray were the result of a misconstruction of the Commission's basic report in these proceedings, and that in the opinion of the Rio Grande the prior tariff provisions at those points should be restored.

(39)

tained such line-haul rates, if they did not include compensation for such terminal switching services.

The carrier's unequivocal testimony in this respect has, moreover, a further significance. It follows that since the line-haul valuation rates include compensation for the cost of performing the terminal switching services necessary to determine values under those rates, those rates must likewise include compensation for the so-called "interruptions" in the spotting of such commodities for final delivery, since such "interruptions" are inevitably incident to the performance of the terminal switching services.

III.

THE RECOMMENDED FINDING (SHEET 22) THAT THE RIO GRANDE VIOLATES SECTION 6(7) BY PERFORMING AT THE LEADVILLE SMELTER OF THE SMELTING COMPANY, WITHOUT CHARGE IN ADDITION TO THE LINE-HAUL RATES, THE VERY TERMINAL SWITCHING SERVICES WHICH SHEET 21 OF THAT REPORT SHOWS CARRIER'S PRESENTLY EFFECTIVE TARIFFS EXPRESSLY PROVIDE ARE INCLUDED WITHIN THE LINE-HAUL RATES, IS A LEGAL ABSURDITY.

THE PERFORMANCE OF SUCH TERMINAL SWITCHING SERVICES AT LEADVILLE WITHOUT CHARGE IN ADDITION TO THE LINE-HAUL RATES VIOLATES NEITHER SECTION 6(7) NOR ANY OTHER SECTION OF THE ACT.

At sheet 22 the proposed report recommends that the Commission find:

"The Commission should conclude that the services performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent is not obligated to perform and

(40)

for which it is not compensated under its line-haul rates. . . . It should further find that the performance of services beyond the tracks described at the line-haul rates, without compensation, is a violation of Section 6(7) of the Act" (italics supplied).

These recommended findings are not only legally absurd but factually untrue.

It would be categorically untrue to find that the Rio Grande is not compensated under its line-haul rates for the performance of the terminal switching services in question beyond the so-called "flat yard" at Leadville. The uncontradicted evidence to the contrary has just been discussed

under heading I-A of this argument, but, as there shown, the proposed report suppresses any reference whatever to this evidence. Even, however, were there evidence that such line-haul rates do not include compensation for such terminal switching services, it would still be legally absurd to find that the Rio Grande would violate Section 6(7) by performing such terminal switching services without compensation in addition to its line-haul rates, so long as its tariffs, as set out at sheet 21 of the proposed report itself, continue expressly to provide that such terminal switching services are included under those rates.

On the contrary, the Rio Grande would directly violate Section 6(7) if, in the face of such express tariff provisions, that carrier should collect any charge in addition to its line-haul rates for the performance of such terminal switching services, whether or not those rates contain compensation for the performance of those services.

Section 6(7) expressly provides:

" . . . nor shall any carrier charge or demand or collect or receive a greater or less or different
(41)

compensation for such transportation of passengers or property, or for any services in connection therewith between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time . . ." (Italics supplied.)

There would seem to be only one possible explanation, if not excuse, for the proposed report's recommendation of such factually untrue and legally absurd findings at Leadville.

At pages 20/21 of the Smelting Company's brief, it has been pointed out that Commissioner Mahaffie, in his partial dissent from the basic report of the majority under Part II, seems inadvertently to have construed the basic report of the majority as holding that a carrier may not lawfully, even by express tariff provisions, include under line-haul rates "terminal switching service in excess of that performed in simple switching or team track delivery". As that brief points out, the majority report is not properly open to such construction. The majority, in that basic report, merely held that, where the carriers' tariffs do not specify what terminal switching services are included in the line-haul rates, it must be assumed that such line-haul rates include no terminal switching service "in

excess of that performed in simple switching or team track delivery."

Had the majority gone as far as Commissioner Mahaffie assumed, the basic report in these proceedings would have been in conflict, as Commissioner Mahaffie points out, with the recognition by the Commission and the courts of the validity of tariffs providing, among other things, for pick-up and delivery, for lighterage, and for elevation services, without charge in addition to the line-haul rates. All

(42)

these terminal services obviously are "in excess of that performed in simple switching or team track delivery".

It might, however, be urged that the pick-up and delivery tariffs which have been approved by the Commission or by the courts have either applied only to l.c.l. freight, or that where such tariffs have included pick-up and delivery on carload freight, they have provided charges in addition to the line-haul rates for such carload pick-up and delivery service. *Pick-up and Delivery in Official Territory*, 218 I. C. C. 41; *American Trucking Association v. U. S.*, 17 Fed. Supp. 655.

Such an argument, however, would ignore the fact that the Commission in approving so-called off-track or inland stations, including so-called construction stations, has specifically approved tariffs providing under the line-haul rates, and without charge in addition thereto, terminal services far "in excess of that performed in simple switching or team track delivery;". *Transfer of Freight Within St. Louis and East St. Louis by Dray and Truck*, 160 I. C. C. 128 *Off-Track Stations in St. Louis*, 186 I. C. C. 578.

Indeed, it must be clear that the Commission would be without authority under any section of the Act to hold it unlawful for a carrier to provide expressly in its tariffs for the inclusion under line-haul rates of terminal services "in excess of that performed in simple switching or team track delivery" where, as at Leadville, such line-haul rates themselves include compensation for the additional terminal services specified in the tariffs. Section 6(1) obviously contemplates the publication of just such tariff provisions in that portion of the section which provides:

"The schedule printed as aforesaid by any such common carrier * * * shall also state separately all

(43)

terminal charges * * * all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the

aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

Finally, it must be clear that the Commission would only have authority to prevent a carrier from publishing tariffs expressly including under the line-haul rates terminal services "in excess of that performed in simple switching or team track delivery" if such line-haul rates did not contain compensation for the additional switching services there specified. Even then the Commission would have no power to condemn such tariff provisions under Section 6(7), but could do so only if the evidence showed that they resulted in undue prejudice or discrimination under Section 3, or if the evidence justified a finding under Section 15 (1) that the line-haul rates, including such services were, because of such inclusion, less than minimum reasonable rates.

The Smelting Company accordingly submits that the recommended finding that the Rio Grande violates Section 6(7) by performing at Leadville without charge in addition to the line-haul rates, the terminal switching services which that carrier's tariff expressly provides are included within such line-haul rates, is a legal absurdity; further that neither do the tariffs so providing, nor the terminal switching services so performed, violate any other section of the Act.

(44)

IV.

THE RECOMMENDED FINDING, SHEET 10, IN CONNECTION WITH THE GARFIELD SMELTER THAT

"THE COMMISSION SHOULD FURTHER FIND THAT THE PERFORMANCE OF SERVICES BEYOND THE YARD AS DESCRIBED, WITHOUT ADEQUATE AND COMPENSATORY CHARGES IN ADDITION TO THE LINE-HAUL RATES, IS A VIOLATION OF SECTION 6 (7) OF THE ACT."

AND THE RECOMMENDED FINDING, SHEET 17, IN CONNECTION WITH THE MURRAY SMELTER THAT

"IT SHOULD FURTHER FIND THAT THE PERFORMANCE OF THE SERVICES BEYOND THE TRACKS DESCRIBED IN THE LINE-HAUL RATES, WITHOUT COMPENSATION, IS A VIOLATION OF SECTION 6 (7) OF THE ACT."

ARE MEANINGLESS AND FACTUALLY INAPPLICABLE UNDER THE EVIDENCE IN THIS CASE.

THAT EVIDENCE SHOWS THAT THERE IS NO VIOLATION OF SECTION 6 (7) AT EITHER SMELTER.

Exhibits 4 and 90 show that at the Garfield smelter, and Exhibits 10 and 12 show that at the Murray smelter, the

tariffs have contained the following specific provisions (see pp. 8 and 9, Ex. 4 of Brief; p. 11, Ex. 10; p. 4, Ex. 11):

- "(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), *from the road-haul point of delivery to the switching line.* Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

(45)

NOTE—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, *resulting from orders from, or requirements of, the smelter.*

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car." (Italics supplied.)

Exhibits 23 and 24 at Garfield, and 29 and 30 at Murray, show that the Smelting Company has paid the switching charges as provided in such tariff-provisions.

It is true that at pages 50 to 54 of the Smelting Company's brief the question is raised whether correctly interpreted, these tariff provisions in reality require the payment of such charges. This question is raised on the following bases: (a) The undisputed evidence that the carriers' line-haul valuation rates on non-ferrous ores and concentrates both at Garfield and Murray have always in-

(46)

cluded in themselves compensation for the cost of performing such switching services; and (b) the carriers' own testimony that under such line-haul rates, it is their duty to determine the value of those commodities for the purpose of determining the rates lawfully applicable. In the Smelting Company's brief it is therefore argued that under the definition of an "uninterrupted movement" in the "Note" contained in the above tariff provisions, the "interruptions" inevitably incident to the terminal switching services necessary to determine such values are not interruptions "resulting from orders from, or requirements of, the smelter."

Whatever may be the validity of the Smelting Company's position in this respect, the fact nevertheless remains that the Smelting Company had paid the terminal switching charges specified in the tariffs just as if such terminal switching had resulted from its orders or requirements.

Obviously, therefore, there is no factual basis in the evidence for findings either at Garfield or Murray that there are actual violations of Section 6(7), such as the recommended findings would seem to imply.

It is possible, and in view of the general inaccuracy of the language of the proposed report it would not be surprising, if the recommended findings are either intended to mean that the switching charges so paid by the Smelting Company at Garfield and Murray are not adequate and compensatory for the terminal switching services in question, or are intended to mean that it would violate Section 6(7) to restore at those points the former tariff provisions, which until 1938 expressly provided that such terminal switching services were included within the line-haul rates.

(47)

If the first possibility is the correct explanation of the recommended finding, it should suffice to point out that there is not a word of evidence in this record to show that the terminal switching charges now provided in the present tariffs at Garfield and Murray are not adequate and compensatory, entirely aside from the fact that the record shows that the line-haul rates already contain compensation for the performance of such terminal switching services.

If on the other hand the second of these possibilities is the correct explanation of the recommended findings, those findings should be changed to read "would be a violation of

Section 6(7) of the act." In that event it will suffice to say that while such a change would at least render those findings intelligible, the Commission, in view of the evidence in this case, as just shown under heading III of this argument, would have no authority either under Section 6 (7) or any other section of the Act, to prevent the restoration at Garfield and Murray of such prior tariff provisions expressly providing for the inclusion under the line-haul rates of such terminal switching services. Furthermore, as ~~will now be shown~~, the Smelting Company is entitled under Sections 1 and 2 of the Act to the restoration of such former tariff provisions both at Garfield and at Murray.

(48)

V.

THE PRESENT TARIFFS AT GARFIELD AND MURRAY IN SO FAR AS THEY SUPERIMPOSED SWITCHING CHARGES IN ADDITION TO THE LINE-HAUL VALUATION RATES ON NON-FERROUS ORES AND CONCENTRATES FOR THE TERMINAL SWITCHING SERVICES NECESSARY TO DETERMINE THE VALUE OF SUCH COMMODITIES AND TO SPOT THEM FOR FINAL DELIVERY, VIOLATE SECTIONS 1 AND 2 OF THE ACT.

THE SMELTING COMPANY, THEREFORE, IS ENTITLED TO THE RESTORATION OF THE PRIOR TARIFF PROVISIONS, WHICH UNTIL THEIR CHANGE IN 1938 EXPRESSLY PROVIDED THAT SUCH TERMINAL SWITCHING SERVICES WERE INCLUDED UNDER SUCH LINE-HAUL RATES.

In view of the uncontradicted evidence of the carriers themselves discussed under heading I-A hereof, that the line-haul valuation rates on non-ferrous ores and concentrates have always included compensation to the carriers for performing all terminal switching services necessary to determine the value of such commodities and to spot them for final delivery, it is self-evident that the tariff changes in 1938 and presently in effect at those points, violate Section 1 of the Act, in so far as they undertake to superimpose switching charges in addition to such line-haul rates for the performance of terminal switching necessary for the foregoing purposes.

It is, however, pertinent to remark, in this connection, that the misconstruction of the Commission's basic report in these proceedings, referred to by Mr. Carey in his testimony (Tr. 69, 70), under which it was assumed that that basic report required such changes in the prior tariff provisions, which had expressly provided that such terminal

(49)

switching services were included under the line-haul rates, must have been based on the same misconstruction of that basic report, in which, as has been seen under heading III hereof, Commissioner Mahaffie apparently indulged in his partial dissent from such basic report. As there also shown, the restoration of such prior tariff provisions at Garfield and Murray could no more violate either Section 6(7), or any other section of the Act, than does the present maintenance of those very tariff provisions at Leadville. On the contrary, the change from such prior tariff provisions at Garfield and Murray to the present tariff provisions at those points, indisputably results in violating Section 1 of the Act.

Moreover, it is submitted that such present tariff provisions at Garfield and Murray violate Section 2 of the Act as well, and that the examiner's findings to the contrary at sheets 9 and 10 of the proposed report, completely ignore the decision in *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, 493, 494. The proposed report, in holding, sheets 9 and 10, that the present tariffs at Garfield and Murray do not violate Section 2, states:

"The industry contends that any charges for the various services attending the weighing of the cars and switching to and from the throw house and sampler would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act as no charges are made for identical services when the ore and concentrates are sampled and re-shipped out of the plant in many instances from one smelter owned by the American Smelting and Refining Company to another owned by the same company. That contention ignores the fact that even if the switching between the various points in the plant and the three weighings could be said to be embraced

(50)

in the term "out-of-line or back haul service," the circumstances and conditions are not substantially similar, in that one instance the service is rendered at destination and in the other while the traffic is theoretically enroute to destination. Further the proceeding here is not to enforce section 2 but to determine whether section 6 (7) is being violated."

The misconstruction of the scope of these proceedings, as reflected in the last sentence of the above quotation, as

well as its inconsistency with the subsequent findings of the proposed report at sheets 8 and 16, that the so-called "pooling agreements" between the Rio Grande and the Union Pacific violate Section 5 (1), has already been noted in the footnote to page 2 of these exceptions. Discussion here will be confined therefore to the other specious ground stated in the above quotation from the proposed report for refusing to recognize that the present tariff at Garfield and Murray violates Section 2 of the Act. That alleged ground is,

"That contention ignores the fact that even if the switching between the various points in the plant and the three weighings could be said to be embraced in the term 'out-of-line or back-haul services,' *the circumstances and conditions are not substantially similar, in that in one instance the service is rendered at destination, and in the other, while the traffic is theoretically en route to destination.*" (Italics supplied.)

The services there referred to are the switching services involved in the sampling of the 31 cars, designated on Exhibit 22 as "Ore Diversions," to determine their respective values.

(51)

Mr. Tuckwood's testimony (Tr. 140-145), quoted at pages 55-60 of the Smelting Company's brief, shows that these 31 cars were originally consigned to the Garfield smelter of the Smelting Company, but instead of final delivery being made there, such cars were re-consigned by the shippers either to the Murray smelter of the Smelting Company or to the Midvale smelter of the United States Smelting, Refining and Mining Company, under the sampling in transit privileges published in the carriers' tariffs and specified in Mr. Tuckwood's testimony. As there shown, the carriers' tariffs permit sampling in transit either before arrival at the destination smelter, or sampling at the original destination smelter and the re-consigning thereafter to another smelter, without any charge in addition to the line-haul rates, for any out-of-line haul, for any back-haul, for any switching services involved in such sampling, or for the additional haul involved in such diversion.

Mr. Tuckwood's testimony shows, and the quoted statement from the proposed report recognizes, that exactly the same switching services were performed on these 31 cars in sampling them at Garfield to determine their value as

were performed on similar cars on which final delivery was contemporaneously made at Garfield. Mr. Tuckwood's testimony however, shows what the proposed report fails to mention, that in addition the ore in these 31 cars, unlike the ore finally delivered at Garfield, had to be reloaded into railroad cars after passing through the sampling mill, and such cars had then to be switched to the so-called "plant yard" and held awaiting diversion orders from the shippers.

The proposed report in holding that "the circumstances and conditions are not substantially similar" on these 31
(52)

cars to those cars on which final delivery was made at Garfield,

" * * * in that one instance the services rendered is at destination and in the other while the traffic is theoretically en route to destination",

completely ignores the decision in *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, 493-493. In that case it was held that where shipments of the same commodities move either from blanketed points of origin to the same destination or from the same points or origin to blanketed destinations, all such cars, although not in fact actually transported between the same points, move under substantially similar circumstances and conditions, and that the performance of greater service at the same charge on certain of such movements than is performed on other movements, is a violation of Section 2.

A reference to the published tariffs on file with the Commission will show that from virtually all points of origin in Colorado, Idaho, Montana, California and Arizona, the same rates on ore and concentrates are blanketed to Garfield, Murray and Midvale, Utah. (See *D. & R. G. Tariff*, 6000-F, I. C. C. 641, providing rates on ores, concentrates, etc. from Colorado points to Garfield, Murray and Midvale; *U. P. Tariff*, 2047-I, I. C. C. 4956, providing rates on the same commodities from Idaho and Montana points to Garfield, Murray and Midvale; *Pacific Bureau Tariff*, 33-Q, I. C. C. 1386, publishing rates on the same commodities from California and Arizona to Garfield, Murray and Midvale.)

Moreover, it is to be noted that the Commission has condemned *tariffs* as being in violation of Section 2 where undue discrimination is inherent in their provisions, even

(53)

though there was no showing of actual undue discrimination by any evidence of actual contemporaneous shipments under them. (See *Memphis Freight Bureau v. Fort Smith & W. R. Co.*, 413 I. C. C. 1; *Smith & Co. v. Baltimore & O. R. Co.*, 21 I. C. C. 241; *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47; *Propriety of Operating Practices—New York Warehousing*, 214 I. C. C. 291). In other words, it is submitted that proof of actual contemporaneous movement is necessary only where civil damages are sought for violation of Section 2 or criminal prosecution is brought thereunder.*

It is submitted, therefore, that under the *Langdon* case, *supra*, it is clear that the present tariffs at Garfield and Murray inherently violate Section 2 by imposing charges in addition to the line-haul valuation rates for the switching services involved in sampling to determine the value of ores and concentrates where final delivery is made at either of those smelters, while permitting exactly the same

(54)

switching services to be performed for the same purposes on the same commodities at those respective smelters without charge in addition to the line-haul rates, where such commodities are subsequently re-consigned under blanket rates, for instance, to the Midvale smelter of the United States Smelting, Refining and Mining Company.

Accordingly, it is submitted that such present tariff provisions at Garfield and Murray violate both Sections 1 and 2 of the Act and, therefore, that the Smelting Company is entitled to the restoration of the tariff provisions in effect prior to July 5, 1938, under which such switching services

* In *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403, the Court held that even in a civil suit for damages under Section 2 "contemporaneous service" did not require proof that favored shipments actually moved at the same moment of time, or even a week or a month apart. The Court said:

"In my opinion the well-known evil aimed at in section 2 requires the court to hold that the implied term in the comparison is the offending rates, making the word to mean, 'at the same time with the offending rates,' and that, as long as these rates remain in force, the services rendered to a complaining and to a favored shipper are contemporaneous within the meaning of the statute." (Italics supplied.)

It will be noted that the subsequent decision of the Supreme Court of the United States in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, in no way affects the validity of the opinion of the District Court in this respect.

to determine value and to accomplish final spotting were included under the line-haul rates without additional charge.

VI.

THE PROPOSED REPORT WHOLLY MISCONSTRUES THE REPORTS OF THIS COMMISSION IN *SIoux CITY SWITCHING*, 241 I. C. C. 53, 241 I. C. C. 623, IN ASSUMING THAT THOSE REPORTS WOULD WARRANT A FINDING THAT THE RIO GRANDE VIOLATES SECTION 6(7) OF THE ACT BY ITS OWNERSHIP AND MAINTENANCE AT LEADVILLE OF THOSE TRACKS WITHIN THE SMELTER AREA USED BY IT WHOLLY FOR RAILROAD TERMINAL PURPOSES, AND OF THOSE TRACKS WITHIN THE SMELTER AREA USED BY IT FOR THE HANDLING OF TRAFFIC OF INDEPENDENT SHIPPERS AS WELL AS OF THE SMELTING COMPANY.

EVEN IF TECHNICALLY SUCH A FINDING COULD BE JUSTIFIED AS TO THOSE TRACKS WITHIN THE SMELTER AREA USED EXCLUSIVELY FOR THE LOADING AND UNLOADING OF SMELTING COMPANY TRAFFIC, THERE IS NO SOUND BASIS FOR SUCH A FINDING FROM A PRACTICAL VIEWPOINT, OR ANY PRACTICAL MANNER IN WHICH THAT SITUATION CAN EQUITABLY BE CHANGED.

(55)

The proposed report states with reference to the Leadville smelter sheets 21 and 22:*

"As stated, the Rio Grande owns and maintains all standard-gauge tracks within the smelter area. The Commission considered a similar situation in *Sioux City Ry. Co. Switching*, 241 I. C. C. 53 and 241 I. C. C. 623, and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of Section 6(7) of the act.

* * * * *

"Even if the practice did not violate the law prior to the enactment of Section 6(7) of the Interstate Commerce Act and the Elkins Act, those acts made the continued furnishing of the facilities unlawful and no right to violate a statute can be obtained by a prescription."

* Space unfortunately does not permit discussion of the direct and indirect misrepresentations and distortions in which the proposed report indulges in the last paragraph of sheet 21 and the first paragraph of sheet 22, as to the position of the Smelting Company with reference to the ownership and maintenance by the Rio Grande of the tracks within the smelter area. Moreover, they become essentially immaterial under a correct consideration of the Commission's reports in the *Sioux City* case *supra*.

Presumably these statements in the proposed report are intended as a basis for recommending a finding that the Rio Grande violates Section 6 (7) by its ownership and maintenance of any tracks whatever within the smelter area at Leadville, though no such finding is specifically recommended. Assuming, however, that it is the intention of that report to recommend such a finding on the ground that it is warranted by the Commission's reports in the *Sioux City* case, it can only be said that it is almost unbelievable that

(56)

the reports in that case could actually have been read, and so wholly misconstrued.

Any intelligent reading of the Commission's two reports in the *Sioux City* case must preclude a finding that the Rio Grande violates Section 6(7) either by its ownership and maintenance of those tracks within the smelter area at Leadville constituting the so-called "flat yard", or by its ownership and maintenance of those additional tracks within the smelter area used by that carrier in transporting cars of independent industries and shippers to and from such "flat yard".

The Commission's original report in the *Sioux City* case dealt with questions arising from the publication by the *Sioux City Terminal Railway Company* of increased terminal switching charges in connection with traffic of the *Cudahy Packing Company*, of *Armour & Company* and of *Swift & Company*. The line-haul carriers which served those plants through the switching services of the Terminal Company, had theretofore absorbed the published switching charges of the Terminal Company. The line-haul carriers applied for suspension of the Terminal Company's proposed increased switching charges but failed themselves to provide for the absorption in the meantime of such increases. Thereupon, the three packing companies brought a complaint, asking that the line-haul carriers be compelled to absorb the full increased switching charges of the Terminal Company. The suspension and complaint proceedings were heard and decided together.

The entire stock of the Terminal Company was owned by the *Sioux City Stockyards Company*. The Terminal Company in seeking to justify such increased switching charges offered certain cost studies of costs which it con-

(57)

tended should be considered in fixing the rate base. These costs included the costs of operation over, as well as the maintenance of, and investment in, certain tracks within the

plant area of the respective packing companies and of the Stockyards Company.

All of these tracks were owned and maintained by the Terminal Company. Those serving the Stockyards Company were on land owned by that company. Those serving Cudahy and Armour were on land owned by those companies. Those serving Swift were on land owned by that company or by the Stockyards Company.

While the Terminal Company both owned and maintained the tracks within the plant area of Cudahy and Armour used solely for loading and unloading the traffic of those companies, it did not own or maintain the tracks within the plant area of Swift & Company used solely for the same purposes.

It is only the ownership and maintenance by the Terminal Company of the tracks within the plant area of Cudahy and Armour used solely for loading and unloading the traffic of those companies, which either the original report or the report on reconsideration in the Sioux City case condemns as a violation of Section 6 (7). (See pages 59 and 60, original report; and page 626 of report on reconsideration.)

As to the ownership and maintenance by the Terminal Company of all other tracks within the plant areas of the packing companies and of the Stockyards Company, neither the original report nor the report on reconsideration found any violation of Section 6 (7), although the original report tentatively disapproved the inclusion in the rate base of the

(58)

cost of ownership and maintenance of certain tracks within the plant areas for other reasons.

The original report (pages 61-63) expressly recognized the right of the Terminal Company to include in its rate base the costs of ownership and maintenance of tracks within the plant areas used for storing loaded and empty cars for the line-haul carriers, as long as the line-haul carriers elected so to store such cars.

The original report (pp. 64-66) expressly recognized the right of the Terminal Company to include in its rate base the costs of providing, maintaining and switching the tracks within the plant areas used for storing, inspecting and repairing cars.*

* That report noted (p. 68) that it appeared, however, that the line-haul carriers had already paid Cudahy and Swift such costs in the private car mileage allowances to those companies, and provided that if this were so such costs, as to those companies, should be excluded from the Terminal Company's rate base.

The original report (pp. 66 to 68) expressly approved the inclusion in the rate base of the Terminal Company the costs of providing, maintaining and switching tracks within the plant areas used for the cleaning of cars.

In each of these instances the original report approved the inclusion in the costs of the Terminal Company of providing, maintaining and switching such tracks in the plant areas expressly on the ground that the tracks were used by the Terminal Company in performing for the line-haul carriers services included within the line-haul rates.

At pages 68 to 70 the original report excludes from the Terminal Company's *transportation* costs the cost of providing, maintaining and switching tracks within the plant areas used for icing, but expressly held that such costs should be allocated by the Terminal Company to "switching (59)

for icing". The basis for this distinction is essentially irrelevant here and is too complicated to be set out. It will suffice merely to point out that the Commission found no violation of Section 6 (7) to result from the Terminal Company's ownership and maintenance of tracks for this purpose.

It would seem indisputable, therefore, that nothing in either of the Commission's reports in the *Sioux City* case could possibly warrant a finding here that the Rio Grande in any way violates Section 6 (7) by its ownership and maintenance at Leadville of those tracks within the smelter area used by it wholly for railroad terminal purposes, or of those tracks within the smelter area used by it for the handling of traffic of independent shippers as well as of the Smelting Company. On the contrary, the original report in that case, which in this respect is in no way modified by the report on reconsideration, must be taken as recognizing that such ownership and maintenance by the Rio Grande would involve no violation of Section 6 (7).

On the other hand, it may be conceded that under both the original report and the report on reconsideration in the *Sioux City* case there may be a technical violation of Section 6 (7) by the Rio Grande's ownership and maintenance of those tracks within the smelter area used exclusively for the loading and the unloading of the traffic of the Smelting Company.

It would, however, be utterly absurd to suggest that the Commission would be justified in this case in making any such finding as it made at page 626 of its report on recon-

sideration in the *Sioux City* case in connection with the ownership and maintenance within the Cudahy and Armour plant areas of private sidings used solely for the loading and unloading of the traffic of those shippers. There the Commission said:

(60)

"We further find that under efficient and economical management respondent would not provide and maintain within the plant areas of Cudahy and Armour private sidings for the loading and unloading of the traffic of those shippers; that to do so is a device for refunding or remitting a portion of the tariff charges and an extension of privileges or facilities not authorized in the line-haul tariffs and for which no compensation is included in the line-haul rates, in contravention of section 6 (7) of the Interstate Commerce Act."

Obviously in this case the ownership and maintenance by the Rio Grande of those tracks within the smelter area at Leadville used exclusively for the loading and unloading of the traffic of the Smelting Company was neither conceived nor continued as

"a device for refunding or remitting a portion of the tariff charges".

Furthermore, the ownership and maintenance of those tracks by the Rio Grande is, under the evidence in this case, patently in the interest of the "efficient and economical management" of that carrier, since the slight cost to that carrier of owning and maintaining those tracks is vastly outweighed by the savings otherwise effected by that carrier at the expense of the Smelting Company not only at Leadville, but at Garfield and Murray.

The evidence here shows that while the Rio Grande owns the tracks comprising its railroad terminals in the so-called "Flat Yard", and the tracks used by it in the smelter area for the handling to and from the "Flat Yard" of the

(61)

traffic of independent shippers, the land on which those tracks is laid is owned by the Smelting Company, which permits the Rio Grande to use such land without charge. Furthermore, it appears that a considerable portion of the main line of the Rio Grande's Leadville Branch, as well as of its spur to the Ore and Chemical Company, is likewise on land owned by the Smelting Company and used free of charge by the Rio Grande.

This alone should be sufficient to preclude any finding that the maintenance and ownership by the Rio Grande of

the comparatively minor trackage in the smelter area at Leadville used exclusively for the loading and unloading of the traffic of the Smelting Company, is a "device" for refunding or remitting to the Smelting Company any portion of the tariff charges. Any such finding, however, becomes obviously impossible when consideration is given to the fact that the Smelting Company owns and maintains free of charge to the carriers the far more extensive trackage comprising the entire upper level at the Garfield smelter, used by the Rio Grande as well as the Union Pacific and Bingham & Garfield exclusively as their joint railroad terminals, and also owns and maintains at Murray free of charge to the Rio Grande and the Union Pacific, the so-called "hold tracks" at that smelter likewise used as the joint railroad terminal yard of those carriers.

Under such circumstances, it is submitted that even if there may be a technical violation of Section 6 (7) at Leadville by the ownership and maintenance by the Rio Grande of those tracks within the smelter area used exclusively for the loading and unloading of the Smelting Company's traffic, there is in reality no practical violation of that sec-

(62)

tion, nor is there any practical way in which the situation can now equitably be changed.

It would be extremely difficult and probably impossible to reach any fair determination of what, on the one hand, the Smelting Company should be required to pay the Rio Grande for the purchase of those tracks on the Smelting Company's land used exclusively for the loading and unloading of the Smelting Company's traffic, and what, on the other hand, the Rio Grande should be required to pay the Smelting Company for the purchase or rental of the land upon which are laid the Rio Grande's own Leadville Branch, its spur to the Ore and Chemical Company, its terminal yard tracks known as the "Flat Yard", and its tracks used in hauling cars of independent shippers to and from that terminal yard.

Even could these complexities be solved, they do not present the whole problem. It would, in addition, be necessary to work out some fair determination of what the Rio Grande, the Union Pacific and the Bingham and Garfield should pay the Smelting Company for the tracks, and for the use of the land upon which they are laid, comprising the entire upper level at the Garfield smelter, and what the Rio Grande and the Union Pacific should pay the Smelting

Company for the tracks, and for the land upon which they are laid, comprising the so-called "hold tracks" at Murray.

In such a situation, it is submitted that the Commission should take in this case the same realistic view it took of the situations involved in the *Lamm Lumber Company* case, *supra*, the *Silver Falls Timber Company* case, *supra*, and the *Red River Lumber Company* case, *supra*.

In those three cases the Commission was faced with a situation in which, from a purely doctrinaire point of view,

(63)

the Commission might have been justified in finding technical violations of Section 6 (7). All three cases were "allowance cases" in which the carriers serving the respective industries paid the industries allowances for terminal switching of the industries' cars over the industries' tracks, between established "interchange tracks" and points of loading and unloading within the respective industries. In all three cases the evidence showed that the tracks of the respective industries between the "interchange tracks" and the points of loading and unloading were of such character or in such condition that the carriers' locomotives could not operate over them. Under such circumstances, had the Commission inflexibly followed the general formula of its basic report under Part II, the Commission would have condemned such allowances as covering terminal switching services not included within the line-haul rates, and, therefore, in violation of Section 6 (7). However, while it appeared in each of those cases that the respective industries were willing to put their tracks in such condition that the carriers' locomotives could operate over them, it also appeared that even if this were done, the carriers would prefer to have the industries themselves continue to perform such switching services under the existing allowances. In all three cases the Commission therefore held that it would be "economically unsound and contrary to good business practice" to require the industries to go to the useless expense of putting their tracks into the condition necessary for operation of the carriers' locomotives over them, since the carriers did not, in any event, intend to operate their locomotives over such tracks. In all three cases the Commission approved the continuance of the allowances, citing in the other two cases what it said in this respect in the *Lamm* case, at page 578:

(64)

"Therefor any finding by us that would have the effect of requiring the Lumber Company to rehabilitate its tracks to accommodate line-haul locomotives which

would be neither required nor used in such service *would be economically unsound and contrary to good business practice.*" (Italics supplied)

It is submitted that for the Commission to make any finding here which would require the Smelting Company to purchase and maintain those tracks of the Rio Grande within the smelter area at Leadville, used by the Rio Grande solely for the loading and unloading of the traffic of the Smelting Company, likewise "would be economically unsound and contrary to good business practice". Moreover, it is obvious that the present arrangement at Leadville is in reality in the interest of the "efficient and economical management" of the Rio Grande, and that, particularly in view of the related situations at Garfield and Murray, it is not "a device for refunding or remitting a portion of the tariff charges" to the Smelting Company. Furthermore, it is obvious that any attempt to change this situation at Leadville would of necessity require complementary changes at Garfield and Murray, thereby involving practically insoluble difficulties.

It is submitted, therefore, that the Commission should find that neither under the *Sioux City* case, nor otherwise, does the ownership and maintenance by the Rio Grande of the tracks within the smelter area at Leadville, comprising the so-called "Flat Yard", or of those tracks within the smelter area used by that carrier in handling cars of independent shippers to and from the "Flat Yard", involve any violation of Section 6 (7); and that even if the Rio Grande's ownership and maintenance of those tracks within the

(65)

smelter area, used wholly for the loading and unloading of the Smelter Company's traffic, may involve a technical violation of Section 6 (7), there is no violation in fact of that section, nor any practical way in which the situation can now be changed.

VII.

SECTION 5 (1) OF THE ACT HAS NO APPLICATION TO THE JOINT SWITCHING CONTRACTS OF THE RIO GRANDE AND THE UNION PACIFIC AT THE GARFIELD AND MURRAY SMELTERS OF THE SMELTING COMPANY. SUCH CONTRACTS DO NOT, THEREFORE, REQUIRE THE COMMISSION'S APPROVAL, NOR DOES THE PERFORMANCE OF SUCH JOINT SWITCHING WITHOUT SUCH APPROVAL VIOLATE SECTION 5 (1).

The proposed report (Sheet 8) states with reference to joint switching agreements between the Rio Grande and

the Union Pacific at the Garfield smelter of the Smelting Company:

"Under the terms of the switching agreement between the Rio Grande and the Union Pacific, herein before referred to, the expenses incurred and the switching charges received by the smelter are apportioned between the two carriers in the ratio that the number of revenue car-loads handled under the joint switching service for each carrier bears to the total number of such revenue car-loads. This is a pooling of traffic for which no authorization under section 5(1) of the act is shown."

With reference to the joint switching agreement between the Rio Grande and the Union Pacific at the Murray smelter, the proposed report states (Sheet 16):

(66)

"The previous discussion deals with a situation where the Union Pacific does all of the switching under a pooling arrangement not shown to be authorized by the Commission as required by section 5 (1) of the act."

These *ex cathedra* conclusions that the switching agreements between the Rio Grande and the Union Pacific at Garfield and Murray constitute a "pooling of traffic" for which authorization from the Commission is necessary under Section 5(1), are characteristic of the superficiality with which the report as a whole disposes of vitally important and difficult questions.*

No question in connection with Section 5(1) was raised at the hearing in these proceedings nor was any evidence offered on that issue. Moreover, the contracts covering such joint switching arrangements were not filed of record until after the hearing, when in accordance with the request of the Examiners on hearing, counsel for the Union Pacific, Mr. Collins, filed such contracts under cover of a letter dated June 3, 1944, addressed to the secretary of the Commission.

* It is further characteristic of the proposed report that no similar conclusions are suggested in the proposed report of the same Examiners in connection with the case of United States Smelting, Refining & Mining Company, although similar joint switching services are performed at the Midvale smelter of that company under exactly the same contract between the Rio Grande and the Union Pacific as covers the joint switching services of those companies at Murray. Likewise, no similar conclusions are suggested in the proposed report of Examiner Way in connection with the Anaconda Copper Mining Company, where similar joint switching agreements are in effect between the Great Northern and the Milwaukee to the Black Eagle Smelter, Black Eagle, Montana.

(67)

The joint switching arrangements at Garfield are covered by a contract of February 1, 1927, between the Rio Grande and the Los Angeles & Salt Lake Railway Company, now part of the Union Pacific. The contract covering the joint switching services at Murray is of October 1, 1926, between the Oregon Short-Line Railroad Company (now the Union Pacific) and the Rio Grande, and covers joint switching services not only at the Murray smelter but also at the *Midvale smelter of the United States Smelting, Refining & Mining Company.*

While it is true that both these contracts provide, as the proposed report states with reference to the Garfield contract, for the apportionment between the two carriers of the expenses of the respective joint switching services in the ratio that the number of revenue carloads handled under the joint switching services for each carrier bears to the total number of such revenue carloads so handled, it is not clear that the revenues for the joint switching services are apportioned on the same basis. (See Sections 5, 7 and 13 of the Garfield contract, and Article IV (1) and (2) of the Murray contract. There it would appear that any provisions for the apportionment of revenues, on the ratio of revenue carloads handled, applies only to intraplant switching and that all other revenues are completely segregated. In any event it is clear that this provision for the apportionment of revenues on intraplant switching is merely a convenient bookkeeping or accounting method for segregating to each company its intraplant switching charges in the exact proportion in which they are earned. In other words, these contracts do not provide for any "pooling" of revenues since there is inherent in the meaning of that term a distribution of revenues *not* in the proportion in which they are earned.

(68)

Moreover, the word "pooling" as used in Section 5(1) has been judicially determined. See *In re Pooling Freights*, 115 Fed. 388, and *Interstate Commerce Commission v. Southern Pac. Co.*, 132 Fed. 829. Both those cases quote with approval the definition of the word "pooling" given by the Century Dictionary, and the Commission in its recent decision in *Application of Pullman Co., under Sec. 7 of I. C. C. Act*, 259 I. C. C. 41, set out this same definition and referred to its approval in the *Southern Pacific* case, *supra*. That definition is as follows:

"Pool (noun): A combination intended by concert of action to make or control changes in market rates. * * * A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests *and of obviating competition*, by which the several competing parties or companies throw their revenues into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentage or proportions previously agreed upon or determined by arbitration.

"Pool (verb): To put into one common fund or stock for the purpose of dividing or redistributing in certain proportions; make into a common fund; as to pool interests.

"(Ex.) The common method of accomplishing this [dividing the tariff between competing lines] is to pool the receipts, and to redistribute them on percentages based upon experience and decided by an arbitrator." (Italics supplied.)

(69)

It is to be noted that two elements in this definition are (a) obviating competition, and (b) the throwing into a common pool of revenues for the purpose of dividing or redistributing them among the members of the pool *on some basis other than the proportion in which they are actually earned*.

It is also to be noted that the *Southern Pacific case* makes clear that the use in Section 1 of the words "pooling or division" was not meant to designate acts of a different character but acts of the same character in relation to different types of traffic. It is there shown that the word "pooling" would not be an apt word in connection with passenger traffic because, as there said (p. 838):

"Such traffic, in the nature of things, cannot be pooled because its routing depends ultimately upon the will of the passenger."

As there further shown, the word "division" as well as the word "pooling" is therefore used in order that the provisions of Section 511 might aptly cover passenger as well as freight traffic. Otherwise, it is clear, the word

"division" means exactly the same thing as the word "pooling".

Obviously, therefore, the joint switching contracts here in question at Garfield and Murray do not provide for the "pooling of revenues" within the definition of the word "pooling", since while those revenues are paid into a joint account, they are thereafter apportioned on exactly the same basis upon which they are earned. Furthermore, those contracts, far from "obviating competition" have exactly the opposite result, particularly at Murray, where, except for its contract with the Union Pacific, the Rio Grande could

(70)

not directly serve that plant. Likewise, at Garfield the joint contract in no way obviates competition, but permits both the Union Pacific and the Rio Grande to compete on an equal basis where, because of the impossibility of either carrier providing its own terminal facilities, one carrier, except for that contract, might be frozen out by agreement between the other carrier and the Smelting Company.

The only contention that can possibly be made for the application of Section 5(1) to such joint switching contracts arises in connection with the 1940 amendments to that section. In the Commission's report in the *Pullman Company* case, *supra*, it had occasion to refer to the changes effected in Section 5(1) by the 1940 amendments. After quoting that section as amended, the Commission there said (pp. 44 and 45):

"Two things are to be noted in the present law. First, that the word 'service' has been included in the prohibition against pooling and secondly, that the limitation with respect to different and competing railroads has been eliminated. The question naturally arises whether this change of language has broadened the applicability of the present statute so as to include contracts, agreements, or combinations where no competitive conditions are involved."

There the Commission was concerned only with the second change effected by the amendment of 1940, that is the elimination of the previous limitations with respect to "different and competing railroads." The Commission held that in spite of the elimination of these words, Section 5(1) did not apply except as between actually competing carriers. The report states (p. 47):

"We conclude that the provisions of Section 5(1) which were primarily designed to protect com-

(71)

petition in the transportation field are still so designed and are thus limited". (Italics supplied)

While the Commission had no occasion to consider the effect of the first change, the inclusion of the word "service", the principle which the Commission applies to the elimination of the words "different and competing railroads", is clearly applicable likewise to the first change.

A careful study of the legislative history discloses no specific reason for the inclusion or addition of the word "service", but it must be assumed to have been "*designed to protect competition*". It therefore can have no reference to contracts for joint switching services where, as here, such contracts promote, instead of limit, competition. Only where a contract for joint switching services would have the effect of limiting competition, could application be necessary under Section 5(1) for the Commission's approval of such a contract, which under that section the Commission might then approve only upon a specific finding that such contract "*will not unduly restrain competition*".

Any other construction of Section 5(1) would, moreover, put the Commission in an impossible situation from a practical point of view. The Commission must know, if the Examiners do not, that similar joint switching agreements throughout the country are literally innumerable. Not only is there nothing in the legislative history of the amendment of 1940 to Section 5(1) to indicate that the word "service" was added to that section for the purpose of invalidating these innumerable joint switching contracts, or in the alternative, of putting the Commission under the impossible burden of investigating and approving or disapproving

(72)

each of them, but no such construction of Section 5(1) as thus amended is possible if regard be had, as it must be, to other provisions of the Act.

In Sharfman, "The Interstate Commerce Commission", Vol. III-A, pp. 410 to 430, consideration is given to the history of amendments to Section 1 of the Act designed to give the Commission the right to require by mandatory order the joint use of terminals by two or more carriers. As Sharfman there shows, the Commission repeatedly has sought that right, but up to date has been successful in obtaining it only under the present emergency provisions of Section 1 of the Act. Moreover, it is interesting to note that

Sharfman there recognizes that the question of the joint use of terminals is distinct from the question of "pooling". Sharfman says (p. 410):

"Somewhat allied to the cooperative arrangements in the movement both of persons and of property, *although not concerned with the pooling of traffic or revenues*, are the situations involving the common use of terminals." (italics supplied)

It would certainly be paradoxical, therefore, to construe the addition of the word "service" to Section 5(1) by the amendment of 1940, as intended to prevent carriers from voluntarily doing what the Commission has long sought authority to require them to do, or as requiring them to obtain the Commission's permission before doing it.

Finally, it is submitted that the last sentence of Section 1(18) would appear, certainly in spirit, and probably in letter, to exempt such contracts from the provisions of Section 5(1).

The last sentence of Section 1(18) reads as follows:

"Nothing in this paragraph or in section 5 shall be
(73)

considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership of joint use of spur, industrial, team, switching or side tracks".

The only question which possibly could arise here as to the application in terms of this exemption provision of Section 1(18), would be as to whether the term "joint use" comprehends joint switching by one joint user of the traffic or other joint users along with its own. In at least one case in which the Commission has considered this question, it would appear to have applied such exemption provisions of Section 1(18) to a contract providing for such joint switching by one joint user on behalf of other joint users. *Missouri Pac. R. Corp. in Nebraska Trustee Operation*, 247 I. C. C. 653, 656, 657. In only three other cases does the Commission seem to have had occasion to consider such exemption provisions of Section 1(18), and in none of such cases would any such joint switching by one joint user on behalf of other joint users seem to have been involved. *Texas & Pac. Ry. Co. Operation*, 245 I. C. C. 285, 291; *Kansas City S. Ry. Co. Purchase*, 252 I. C. C. 113, 116; *Central Railroad of New Jersey Trustees Acquisition*, 254 I. C. C. 344, 348.

It would appear, however, that the Commission was clearly right in the *Missouri Pacific* case, *supra*, in construing such exemption provisions of Section 1(18) as exempting contracts providing for joint switching by one joint user of the traffic of other joint users along with its own, from the provisions of Section 5(1). Such exemption provisions contain no limitation on the term "joint use" as used therein. It would seem, therefore, that such term would apply not only to individual joint use by each joint

(74)

user, but to joint use by any joint user through the agency of another joint user.

However this may be, it seems clear from the foregoing discussion that Section 5(1) has in any event no application to the joint switching contracts of the Rio Grande and the Union Pacific at the Garfield and Murray smelters of the Smelting Company.*

CONCLUSION

The Smelting Company submits in conclusion:

(1) The commission should entirely revise the proposed report so that any final report may do what the proposed report fails to do, that is, fairly, intelligently and intelligibly present the essential facts shown by the evidence and the questions of law arising in connection therewith.

(2) Thereupon, the Commission should find:

(a) That no violation of Section 6(7), or of any other section of the Act, is involved in the performance at the Leadville Smelter, without charge in addition to the line-haul rates, of the terminal switching services now so performed under the tariffs, presently effective at such smelter.

(75)

(b) That no violation of Section 6(7), or of any other section of the Act, results from the ownership and maintenance by the Rio Grande of any of the trackage within the smelter area at the Leadville Smelter.

* The inapplicability of *Kingan & Co. Terminal Services* 255 I. C. C. 531, cited at sheet 17 of the proposed report, to these joint switching contracts of the Rio Grande and the Union Pacific is made clear at pages 21-25 of the Smelting Company's brief, in the discussion of the similar cases of *Standard Oil Co. v. Director General*, 89 I. C. C. 620, the *Staley* case 215 I. C. C. 650, and *Ford Motor Co. Terminal Illinois*, 209 I. C. C. 77. In order not further to protract these exceptions, the Commission respectfully referred in this report to that portion of the Smelting Company's brief.

(c) That no violation of Section 6(7) of the Acts results under the present tariffs at either the Murray Smelter or the Garfield Smelter from the terminal switching services as now performed.

(d) That the present tariffs at the Garfield Smelter and the Murray smelter, however, violate both Section 1 and Section 2 of the Act, in superimposing, in addition to the line-haul rates, switching charges for the terminal switching there performed;

(e) That, therefore, the Smelting Company is entitled to the restoration of the tariff provisions at those smelters in effect prior to July 5, 1938, under which provisions such switching services would be performed at those smelters without charge in addition to the line-haul rates.

(f) That the joint switching contracts between the Rio Grande and the Union Pacific at the Garfield Smelter and the Murray Smelter of the Smelting Company do not come within the provisions of Section 5(1) of the Act and, therefore, the lack of approval by the Commission of such contracts does not render them invalid.

Respectfully submitted,

JOHN F. FINERTY,
Attorney for
American Smelting and Refining Company
120 Broadway,
New York, N. Y.

Dated, March 27, 1945.

(76)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing exceptions have been duly served on all parties.

JOHN F. FINERTY.

(i)

Appendix

RECOMMENDED FINDINGS AT THE GARFIELD SMELTER, SHEET 10:

"The Commission should find that respondents' interstate line-haul rates cover the delivery and receipt of car-load shipments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respond-

ents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Garfield, Utah, under the line-haul rates begin and end at the plant yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described, without adequate and compensatory charges in addition to the line-haul rates, is a violation of section 6(7) of the act."

RECOMMENDED FINDINGS AT THE MURRAY SMELTER, SHEET 17:

"The Commission should find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the hold tracks as described herein; and that the service beyond the hold tracks is a service which it is not the duty of respondents to perform. It should further find that the performance of service beyond the tracks described at the line-haul rates, without adequate compensation, is a violation of section 6(7) of the act."

RECOMMENDED FINDINGS AT THE LEADVILLE SMELTER, SHEET 22:

"The Commission should conclude that the services performed within the plant area beyond the flat yard, as de-

(ii)

scribed herein, is an industrial service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; and that performance of said services by respondent without reasonable charge therefor results in the industry receiving a preferential service not accorded to shippers generally.

The Commission should find that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the flat yard as described herein; and that the service beyond the flat yard is a service which it is not the duty of respondent to perform. It should further find that the performance of service beyond the tracks described at the line-haul rates, without compensation, is a violation of section 6(7) of the act."

Exhibit B-6

Before the Interstate Commerce Commission

AMERICAN SMELTING & REFINING COMPANY

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

PETITION OF AMERICAN SMELTING & REFINING COMPANY FOR
(A) RECONSIDERATION BY AND REARGUMENT BEFORE THE
ENTIRE COMMISSION OF THE REPORT AND ORDER OF OCTOBER
1, 1945, OF DIVISION 3, AND (B) THE STAY OF SUCH ORDER
PENDING FINAL DETERMINATION UNDER THIS PETITION

INDEX

	PAGE
I. Petitioner has not been given a full and fair hearing in the making of the Report and Order herein.	
Such report, moreover, does not comply with the Commission's duties under Section 14 of the Interstate Commerce Act.....	1
II. The Majority Report of Division 3 ignores not only without discussion but without mention and, so far as appears, without consideration, the basic issue in these proceedings, and the fundamental distinction between them and all other proceedings heretofore decided by the Commission under Part II of Ex Parte 104....	5
III. The Majority Report of Division 3 suppresses any reference whatever to the uncontradicted evidence that the line-haul valuation rates on the principal inbound commodities, non-ferrous ores and concentrates, now and always have included compensation for the terminal switching and weighing services necessary to the determination of values governing the application of such rates, and undertakes to decide these proceedings as if such evidence did not exist. This cannot be justified even though such evidence be considered irrelevant, incorrect or inadequate.	

Thereby, moreover, the Majority Report and Order of Division 3 would require the industry to pay twice for the same terminal switching and weighing services..... 9

- IV. The Majority Report of Division 3 wholly misrepresents the real position of the industry as to the obligation of the respondent carriers to perform terminal switching and weighing services necessary to determine the value of commodities moving under valuation rates.

ii

PAGE

That Report moreover inferentially misrepresents the real position of the respondent carriers in this respect..... 11

- V. The Majority Report of Division 3 suppresses any reference whatever to the uncontradicted evidence, including the admission of the Commission's own witness, that the so-called "Plant Yard" tracks at Garfield are in fact joint railroad terminal tracks and not mere industrial tracks of petitioner.

That Report also suppresses any reference to the uncontradicted evidence that the so-called "Hold" tracks at Murray are in fact joint railroad terminals and not mere industrial tracks of petitioner.

While that Report does not wholly suppress reference to the uncontradicted evidence that the so-called "Flat Yard" tracks at Leadville are in fact railroad terminal tracks and not mere industrial tracks of petitioner, it completely distorts such evidence.

These constitute vital suppressions and distortions of evidence since, only on the basis of them, could the Majority Report find that the foregoing designated tracks constitute reasonable points for the delivery and receipt of cars by the respondent carriers..... 15

- VI. The Majority Report of Division 3, in holding that the Denver & Rio Grande's ownership and maintenance of tracks within the smelting area at Leadville violates Section 6(7) repeats, without any attempt to justify, the demonstrated misconstruction by the Examiner's proposed report in this respect of the Sioux City Switching Case, 241 I. C. C. 53, 241 I. C. C. 623..... 18

- VII. The Majority Report of Division 3, in finding that Section 5(1) of the Act requires the Commission's approval of the joint switching contracts of the Denver & Rio Grande and of the Union Pacific at the petitioner's Garfield and

iii

PAGE/

Murray smelters, ignores without mention or explanation the showing in petitioner's exceptions that Section 1 (18) of the Act expressly exempts such contracts from the application of Section 5(1).....

19

- VIII. The Majority Report of Division 3, with complete irresponsibility, suggests the cancelling of the long established sampling-in-transit privileges at Garfield and Murray, Utah, which are an integral part of the non-ferrous rate structure.

It does, so rather than to take the proper responsibility of determining (a) whether correctly construed, the tariff provisions in effect of Garfield and Murray since 1938, do or do not authorize the collection of switching charges in addition to the line-haul rates for the terminal switching necessary to determine values of ores and concentrates, and (b) if they do, whether such tariff provisions violate Section 2 of the Act.

Moreover, it evades deciding these questions on the specious and paradoxical ground that these proceedings are limited solely to determining whether Section 6(7) of the Act has been violated

20

- IX. The cease and desist order of Division 3 in these proceedings is void and unenforceable because the findings on which it is based either are meaningless when applied to the evidence of record, or would require the carriers to charge and petitioner to pay twice for the same services

26

- X. The cease and desist order in these proceedings would, as a practical matter, be unenforceable unless (a) the state commissions acquiesce therein or (b) 13th Section proceedings can be sustained, both of which seem improbable

- XI. While Commissioner Miller's partial dissent expressly recognizes that the record does not con-

X

tradict the evidence that valuation rates on ores and concentrates already contain compensation for the terminal switching services necessary to determine value, he, apparently inadvertently, terms such evidence merely a "contention".

Furthermore, Commissioner Miller's suggestion that separate terminal switching charges might be made if the line-haul rates should be adjusted so as to eliminate that part now providing compensation for such terminal switching, is wholly impracticable 32

XII. It would seem that this investigation, so far as it relates to the non-ferrous smelting and mining industries and to the carriers serving them, got off on the wrong foot and has remained on the wrong foot, and can serve no useful purpose until the Commission as a whole places it upon a sound and reasonable footing 35

TABLE OF CASES CITED

	PAGE
<i>A. T. & S. F. Ry. Co. v. U. S.</i> , 295 U. S. 193.	4
<i>B. & O. R. Co. v. U. S.</i> , 305 U. S. 507.	7
<i>Beaumont S. L. & W. R. Co. v. U. S.</i> , 282 U. S. 74.	4
<i>Florida v. U. S.</i> , 282 U. S. 194.	4
<i>Non-ferrous Metals Investigation</i> , 204 I. C. C. 317.	30
<i>Sioux City Ry. Co. Switching</i> , 241 I. C. C. 53, 241 I. C. C. 623	18, 19
<i>U. S. v. American S. & T. Plate Co.</i> , 301 U. S. 402.	3
<i>U. S. v. Chi. M., St. P. & P. R. Co.</i> , 294 U. S. 499.	4

Before the Interstate Commerce Commission

AMERICAN SMELTING & REFINING COMPANY

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

PETITION OF AMERICAN SMELTING & REFINING COMPANY FOR (a) RECONSIDERATION BY AND REARGUMENT BEFORE THE ENTIRE COMMISSION OF THE REPORT AND ORDER OF OCTOBER 1, 1945, OF DIVISION 3, AND (b) THE STAY OF SUCH ORDER PENDING FINAL DETERMINATION UNDER THIS PETITION

American Smelting & Refining Company, the respondent industry in the above proceedings respectfully petitions the Commission for (a) reconsideration by and reargument

before the entire Commission of the report and order of October 1, 1945, of Division 3 in the above proceedings, and (b) the stay of such order pending final determination under this petition.

The grounds of said petition are the following:

I

PETITIONER HAS NOT BEEN GIVEN A FULL AND FAIR HEARING IN THE MAKING OF THE REPORT AND ORDER HEREIN.

SUCH REPORT, MOREOVER, DOES NOT COMPLY WITH THE COMMISSION'S DUTIES UNDER SECTION 14 OF THE INTERSTATE COMMERCE ACT.

The principal and basic ground for this petition, and from which all other grounds flow, is one which counsel for

(2)

petitioner is most reluctant to advance. That is, that in the making of the report and order herein, petitioner has not been given a full and fair hearing in that, so far as appears from that report and order, there might as well have been no hearing, no evidence, no briefs, no exceptions, and no argument, either on behalf of petitioner or of respondent carriers.

Counsel's reluctance has at least two bases:

First, counsel's recognition that such a contention, unless supported to the full, is bound to react against the party making it. This is a risk, however, which counsel feels bound to accept. Indeed, as will be shown, the report of Division 3 leaves counsel no choice, since that report, which is substantially identical with the examiner's proposed report, ignores without the slightest mention, and as if they had never been taken, petitioner's drastic exceptions to the proposed report, based essentially on the same grounds as this petition.*

* Petitioner's exceptions to the proposed report are the most drastic that counsel has ever had occasion to file in his entire experience before the Commission. They charged the suppression and ignoring of all material evidence presented either by petitioner or the respondent carriers, the ignoring, without mention, much less discussion, of every basic legal issue raised by either, and the distortion of the contentions of both. If such serious charges were unjustified, it would seem clear that Division 3 should have refuted and condemned them. This would seem particularly required, since otherwise the Division's own report, being substantially identical with the proposed report, obviously becomes, subject to the same charges, unless petitioner's counsel should be willing to concede that such charges were originally unjustified. Counsel would not hesitate to do this, did the report of Division 3 afford any reasonable ground for so doing. Patently, however, the mere ignoring of such charges affords no ground for withdrawing them.

The second and more serious deterrent to such a contention is that it may well seem to involve an implication that Division 3 has been consciously and deliberately unfair. Counsel totally disclaims any such implication.

On the contrary, counsel recognizes that situation is the result of the honest and obvious conviction of Division 3
(3)

that uniformity of terminal switching services at industries must be achieved even though there be fundamental differences in conditions and, therefore, that evidence of such fundamental differences in conditions may be wholly disregarded as irrelevant. Counsel is aware, moreover, that, despite the specific reservations in this respect in the Commission's basic report under Part II, 209 I.C.C. 11*, it is at least doubtful whether the majority of Division 3 are alone in this conviction or whether it is shared by a substantial number, if not by a majority of the Commission itself.

This petition affords a unique and appropriate opportunity for determining this question. Undeniably, the evidence shows that there are fundamental differences between, on the one hand, the conditions relating to terminal switching services at the petitioner's smelters involved in these proceedings, as well as at the smelters of the Anaconda Copper Mining Company and of the United States Smelting, Refining & Mining Company involved in similar proceedings and, on the other hand, the conditions involved in any cases hitherto considered or decided by this Commission under Part II. Undeniably, also, the report of Division 3 suppresses, without the slightest mention, any reference whatever to the evidence of such fundamental differences in conditions.

In this connection it is important to note that while counsel believes that the apparent conviction of Division 3 that uniformity of terminal switching services at industries can

* At page 24 of that report, the Commission states:

"The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is merely a substituted service which is substantially a like service to that included in the line-haul rate, is a question of fact to be determined in each case."

In *U. S. v. American S. & T. Place Co.*, 301 U. S. 402, 411, the Supreme Court stated with reference to the Commission's basic report:

"The Commission properly held that each case must be decided upon the circumstances disclosed."

(4)

be achieved by applying a uniform formula to basically differing conditions is wholly fallacious,* that even were such a theory valid, it could not justify the suppression in the report of Division 3 of any reference whatever to the evidence showing such fundamentally differing conditions, and to the issues of law raised thereon, not only by the petitioner, but by respondent carriers as well.

Aside from the fact that such a report does not comply with the duties of the Commission under Section 14 of the Act as construed by the Supreme Court of the United States**, it is submitted that questions of the importance of those here presented, and completely ignored in the report of Division 3, are not solved either by ignoring them or by strong arming them. They can be solved only by a full and fair consideration and a reasoned and clearly expressed determination of them. Such consideration and determination, so far as appears from the report of Division 3, has not been had in these proceedings, and the primary purpose of this petition is to obtain such consideration and determination.

As already stated, all other grounds for this petition flow from this basic ground, the failure to accord a full and fair hearing. Furthermore, as already intimated, petitioner's exceptions to the Examiner's proposed report are essentially applicable to the report of Division 3. Nevertheless, petitioner, in the interests of brevity, will not repeat in detail either those exceptions or the discussions therein of the evidence and law on which they are based. Instead, this petition will be confined to the more salient grounds of such exceptions, and reference will be made to them, to petitioner's Brief and to petitioner's Supplemental Memorandum, filed by permission subsequent to the oral argument before

(5)

Division 3, for more detailed discussion of the evidence and law supporting such grounds.

* It seems axiomatic that a uniform formula applied to differing conditions cannot produce uniformity, but must produce non-uniformity of results.

** *Florida v. U. S.*, 282 U. S. 194.

Beaumont S. L. & W. R. Co. v. U. S., 282 U. S. 74

U. S. v. Chi. M. St. P. & P. R. Co., 294 U. S. 490

A. T. & S. F. Ry. Co. v. U. S., 295 U. S. 193

II

THE MAJORITY REPORT OF DIVISION 3 IGNORES NOT ONLY WITHOUT DISCUSSION BUT WITHOUT MENTION AND, SO FAR AS APPEARS, WITHOUT CONSIDERATION, THE BASIC ISSUE IN THESE PROCEEDINGS, AND THE FUNDAMENTAL DISTINCTION BETWEEN THEM AND ALL OTHER PROCEEDINGS HERETOFORE DECIDED BY THE COMMISSION UNDER PART II OF *EX PARTE* 104:

The basic issue in these proceedings, and which distinguishes them from all other proceedings heretofore decided by the Commission under Part II of *Ex Parte* 104, is whether there can be any violation of Section 6 (7) by the performance without compensation in addition to the line-haul rates of terminal switching and weighing services *where, as at petitioner's Leadville smelter,* the tariffs expressly provide that such services are included within the line-haul rates.*

As shown at pages 6 to 12 of petitioner's Brief filed November 1, 1944, the Commissioner's basic report under Part II, by its express terms, applies as stated at page 18 of that report, only to cases where—

"The tariffs publishing the line-haul and switching charges constituting the carrier's holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for 'plant switching' or 'spotting of cars at unloading point' to be performed at plant's convenience."
(italics supplied)

(6)

That report further states, p. 33, that—

"In the absence of a tariff provision, for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of Section 6 of the act, and necessarily preferential." (Italics supplied)

At pages 14 to 18 of petitioner's Brief, petitioner analyzed every case decided by the Commission under Part II up to the date of that Brief, and there is attached to it, as an appendix, a list of all such cases. It there appears that all but 7 of these cases were "allowance cases", and that

* The difference in this respect between the present tariff provisions at petitioner's Leadville smelter, and the present tariff provisions at petitioner's Garfield and Murray smelters, will be referred to later herein

even the 7 excepted cases had the basic characteristics of "allowance cases". As shown in the footnote to page 14 of that Brief, in 59 of the 69 straight "allowance cases", the Commission condemned the allowances as covering terminal services performed by the industry *not included* within the line-haul rates of the carriers; that, however, in 10 of such straight "allowance cases", the Commission approved the allowances, in whole or in part, as covering terminal services performed by the industry *included* within the line-haul rates of the carriers. While that footnote does not so specifically state, it is nevertheless the fact that, neither in the 59 straight "allowance cases" where the Commission condemned the allowances, nor in the 10 straight "allowance cases" where it approved them, *did the carriers' tariffs expressly provide what, if any, terminal switching services were included within the line-haul rates.*

Moreover, counsel has examined all cases since decided by this Commission, *and in no case have the tariffs expressly provided that any of the terminal switching services involved were included within the line-haul rates*, with the sole exception of the instant proceedings and those involving the smelter of the Anaconda Copper Mining Company at Black Eagle, Montana, heretofore referred to. These latter proceedings were considered and decided by Division 3 at the same time as the instant proceedings, and the re-

(7)

port of Division 3 in the Anaconda proceedings, as in these proceedings, ignores without mention this fundamental distinction between them and all other cases heretofore decided by the Commission under Part II.

This is the more inexplicable since when the *Anaconda* proceedings and petitioner's proceedings were jointly argued before Division 3, counsel for petitioner obtained the leave of Division 3 upon oral argument (Tr. 469-470) to file petitioner's Supplemental Memorandum of May 31, 1945, in support of petitioner's contention *that there can be no violation of Section 6 (7) except by a departure from the published tariffs*, and that the published tariffs must be observed although thereby violations of other sections of the Act, or even of the Commission's orders or rules, be involved.

That Memorandum undertook to analyze all the controlling decisions not only of this Commission but of the Supreme Court of the United States bearing on the proper

construction of Section 6 (7). That Memorandum shows that, with the possible exception of the opinion of the Supreme Court in the *Baltimore & Ohio Warehouse case, B. & O. R. Co. v. U. S.*, 305 U. S. 507, and of the Commission's reports preceding that decision (198 I.C.C. 134; 216 I.C.C. 291; 220 I.C.C. 102) both the Supreme Court and this Commission have uniformly held that Section 6 (7) can be violated only by a *departure* from, and *not by a compliance with*, a carrier's published tariff, *even though such compliance involves violations of other sections of the Act, or of the Commission's orders or rules.* As that Memorandum shows, even the decision of the Supreme Court in the *Baltimore & Ohio* case and the reports of the Commission preceding it, are not, when correctly analyzed, necessarily inconsistent with this principle, since the Commission's orders in that case were clearly sustainable under Sections 2 and 3 of the Act, even though not sustainable under Section 6 (7).

Petitioner does not feel warranted or required to repeat the discussion of the law in this respect presented in its

(8)

Supplemental Memorandum. Petitioner desires to point out, however, that the reports of Division 3 in none of these related proceedings give any consideration whatever to this principle. Neither its report in these proceedings, nor its reports in the related proceedings involving the Black Eagle smelter of the Anaconda and the Midvale smelter of the United States Smelting, Refining & Mining Company, makes any distinction as to alleged violations of Section 6 (7) as between the present tariffs at Leadville and Black Eagle and the present tariffs at Garfield, Murray and Midvale. While the present tariffs at Leadville and Black Eagle expressly and clearly provide that the terminal switching and weighing services are included within the line-haul rates, the present tariffs at Garfield, Murray and Midvale do not, unambiguously, so provide, although, as will be further discussed, the petitioner, the United States Smelting, Refining & Mining Company and the respondent carriers contend that they should properly be so construed.

In other words, the only deduction that can be drawn from the reports of Division 3 in all these related proceedings is that the majority of Division 3, although expressing no opinion whatever on this basic question, must consider that, in determining whether Section 6(7) is violated, it is

wholly immaterial whether or not the carriers' tariffs expressly provide that the terminal switching and weighing services performed by the carriers are included in the line-haul rates. Neither this Commission nor the Supreme Court has ever expressly so held. It is therefore submitted that this question is obviously important enough to require a clear expression of the Commission's opinion on so controlling an issue, and that there can be no justification for wholly ignoring that basic issue, as the majority report of Division 3 has done.

(9)

III

THE MAJORITY REPORT OF DIVISION 3 SUPPRESSES ANY REFERENCE WHATEVER TO THE UNCONTRADICTED EVIDENCE THAT THE LINE-HAUL VALUATION RATES ON THE PRINCIPAL INBOUND COMMODITIES, NON-FERROUS ORES AND CONCENTRATES, NOW AND ALWAYS HAVE INCLUDED COMPENSATION FOR THE TERMINAL SWITCHING AND WEIGHING SERVICES NECESSARY TO THE DETERMINATION OF VALUES GOVERNING THE APPLICATION OF SUCH RATES, AND UNDERTAKES TO DECIDE THESE PROCEEDINGS AS IF SUCH EVIDENCE DID NOT EXIST. THIS CANNOT BE JUSTIFIED EVEN THOUGH SUCH EVIDENCE BE CONSIDERED IRRELEVANT, INCORRECT OR INADEQUATE.

THEREBY, MOREOVER, THE MAJORITY REPORT AND ORDER OF DIVISION 3 WOULD REQUIRE THE INDUSTRY TO PAY TWICE FOR THE SAME TERMINAL SWITCHING AND WEIGHING SERVICES.

At pages 13 to 18 of petitioner's Exceptions, petitioner set out the uncontradicted evidence showing that the line-haul valuation rates on non-ferrous ores and concentrates have always included compensation for all the terminal switching and weighing services performed by the carriers which are necessary to determine the value of such commodities and to spot them for final delivery. Accordingly that evidence will not be repeated here. The majority report of Division 3, like the Examiner's proposed report, nevertheless suppresses any reference whatever to such uncontradicted evidence.

Under no circumstances can such suppression be justified, even though the majority of Division 3 may consider such evidence irrelevant, incorrect or inadequate.

If such evidence be considered irrelevant, it could only be on the theory that the industry, having already paid for

such terminal switching and weighing services in the line-haul rates, can be compelled to pay again for the same service—a proposition which it may be doubted either Division 3 or this Commission would wish to avow. If, however, this is the theory upon which all reference to such evidence is suppressed in the report of Division 3, and if this Commission approves such suppression, it should take the responsibility for clearly avowing such a theory, in order that should court review of these proceedings become necessary, the reviewing court may know the real ground for the Commission's decision.

If, however, such evidence has been ignored because considered incorrect, it must be obvious that neither Division 3 nor the Commission would have the right, in the complete absence of contrary evidence, to substitute mere opinion in this respect for the uncontradicted evidence of record. This is particularly true where, as here, the Commission itself was a party to the proceedings and, although it had full opportunity to do so, itself introduced no such contrary evidence. Furthermore, if this is the real ground upon which all reference to such evidence is suppressed in the report of Division 3, the Commission should, properly, reopen these proceedings on its own motion, and thereupon, itself offer contrary evidence, if the Commission is in a position to do so, and if it is not in reality undertaking to decide these proceedings on its own mere opinion instead of on evidence of record.

If, however, such evidence has been ignored for neither of the foregoing reasons, but because it is considered inadequate, any report should so state in order that, in such event, the industry and the respondent carriers might be in a position to avail themselves of their right under such circumstances to ask this Commission to reopen these proceedings to afford them an opportunity to offer additional evidence in this respect.

The majority report of Division 3, therefore, in failing to assign any reason whatever for suppressing all reference to such evidence, and by deciding these proceedings as if such evidence did not exist, obviously not only deprives any reviewing court of information to which such court is entitled under the decisions of the Supreme Court cited in the footnote at page 4 of this petition, but, moreover, de-

prives both the industry and the respondent carriers of a full and fair hearing on this basic issue.

Finally, as will later be shown under Point IX of this petition, the majority report, by ignoring such uncontradicted evidence, renders meaningless and unenforceable the cease and desist order of Division 3, herein, based on the findings of that report.

IV

THE MAJORITY REPORT OF DIVISION 3 WHOLLY MISREPRESENTS THE REAL POSITION OF THE INDUSTRY AS TO THE OBLIGATION OF THE RESPONDENT CARRIERS TO PERFORM TERMINAL SWITCHING AND WEIGHING SERVICES NECESSARY TO DETERMINE THE VALUE OF COMMODITIES MOVING UNDER VALUATION RATES.

THAT REPORT MOREOVER INFERENTIALLY MISREPRESENTS THE REAL POSITION OF THE RESPONDENT CARRIERS IN THIS RESPECT.

Sheet 9 of the majority report of Division 3, by suppressing all reference to the real position of the industry, would make it appear that the industry contends that, under any and all circumstances, it is the duty of the carriers, and not of the industry, to determine the value of commodities moving under valuation rates, and therefore the duty of the carriers to perform *without compensation* the

(12)

terminal switching and weighing services necessary to the determination of such values. While what is said at Sheet 9 of the majority report in this respect has immediate reference to the Garfield smelter of the petitioner, that report expressly states (Sheet 21) that its conclusions in this respect are "equally applicable at the Murray and Leadville smelters."

The real contention of the industry, as shown by its Brief, its Exceptions and its argument, is that where, as in these proceedings, the uncontradicted evidence shows that *the line-haul rates already include compensation to the carriers* for performance of the terminal switching and weighing services necessary to the determination of value of commodities moving under valuation rates, it is, under such circumstances, at least, the duty of the carriers to perform such terminal switching and weighing services *without charge over that already paid in the line-haul rates*, or, in other words, *without being paid twice for the same service*.

ices. The majority report of Division 3 in answering a contention which the industry has never made and which is fundamentally different from the industry's real contention, obviously affords no answer to that contention. If there is an answer to it, which the industry respectfully submits there is not, such answer should be made.

Moreover, while the contention attributed by the majority report to the industry might, with less complete lack of excuse, be attributed to the respondent carriers, such a contention does not even fairly represent the real contention of the carriers. The contention of the respondent carriers in this respect is that, since determination of value is necessary to their own determination of the legally applicable freight charges, it is their duty to perform the switching and weighing services necessary to the determination of value. The respondent carriers' contention to be fairly stated, however, must be presented in the context in which

(13)

the contention was made. The carriers' contention does not go to the extent of claiming that they would be obligated to perform such terminal switching and weighing services without *compensation*, since their own testimony is that *compensation for such services has always been included in the line-haul rates**. Moreover, it is further to be noted that the carriers themselves testified that, in addition to the compensation already included in the line-haul rates for

* Indeed, Mr. Collins, Counsel for the Union Pacific, in his oral argument in these proceedings, expressly based the carriers' obligation to perform such terminal switching services on the ground that the shipper "is paying for it." In Mr. Collins' oral argument in these proceedings, (Tr. 531) he expressly incorporated by reference his argument in the related proceedings involving the United States Smelting, Refining & Mining Company. At Tr. p. 197, of such related proceedings, the following colloquy occurred between Commissioner Patterson and Mr. Collins:

"Commr. Patterson: You agree with the representative of the State that this is an industry that should receive from the Commission special treatment.

Mr. Collins: Not a special favor, no.

Commr. Patterson: No, I didn't say a special favor, I said special treatment.

Mr. Collins: I think the character of the commodity, Mr. Commissioner, is such that you have got to—

Commr. Patterson: Well—

Mr. Collins: Not for the purpose of giving the shipper something that he should not have under the law, *he is paying for it* (Italics supplied).

such switching and weighing services, they receive free use of the weighing, sampling and thawing facilities owned by the industry, which facilities the carriers themselves would otherwise have to provide at their own expense. This is a very different thing, therefore, from a contention by the carriers that they would be obliged to perform such services *without compensation*.

Moreover, this fundamental misrepresentation of the contentions of both the industry and of the respondent carriers in this respect is of particular importance in connection with the further contention advanced by the respondent industry in its original Brief and by Mr. Collins, counsel for the Union Pacific, upon oral argument. That conten-

(14)

tion is that, even under the present tariff provisions in effect at Garfield and Murray since 1938, the rendition of such terminal switching and weighing services does not constitute an "interrupted movement" within the meaning of such present tariffs, since it is the duty of the carriers to perform such services under the line-haul rates, and, therefore that the switching charges in addition to the line-haul rates, which those tariffs provide for an "interrupted movement," do not apply.* This contention must likewise be taken in the context in which it was made, i. e. the uncontradicted testimony that such line-haul rates at Garfield and Murray still include, as they have always included, compensation to the carriers for the performance of such services. See petitioner's Brief, pp. 50-54, 60-61; see Exceptions of Union Pacific, pp. 3-6; see also Mr. Collins's oral argument herein (Tr. 531), in which Mr. Collins refers in this respect to his argument in the *P. S. Smelting, Refining & Mining Co.* case, where Mr. Collins, at pages 186-197 of the transcript in those proceedings, discussed this contention at length.

* See petitioner's letter of June 25, 1945, to Commissioner Miller, in which petitioner advised the Commission that it was filing overcharge claims for refund of switching charges heretofore paid, as shown by Exhibits 23, 24, 29 and 30, under the previous erroneous construction in this respect of the present tariffs at Garfield and Murray.

(15)

V

THE MAJORITY REPORT OF DIVISION 3 SUPPRESSES ANY REFERENCE WHATEVER TO THE UNCONTRADICTED EVIDENCE, INCLUDING THE ADMISSION OF THE COMMISSION'S OWN WITNESS, THAT THE SO-CALLED "PLANT YARD" TRACKS AT GARFIELD ARE IN FACT JOINT RAILROAD TERMINAL TRACKS AND NOT MERE INDUSTRIAL TRACKS OF PETITIONER.

THAT REPORT ALSO SUPPRESSES ANY REFERENCE TO THE UNCONTRADICTED EVIDENCE THAT THE SO-CALLED "HOLD" TRACKS AT MURRAY ARE IN FACT JOINT RAILROAD TERMINAL TRACKS AND NOT MERE INDUSTRIAL TRACKS OF PETITIONER.

WHILE THAT REPORT DOES NOT WHOLLY SUPPRESS REFERENCE TO THE UNCONTRADICTED EVIDENCE THAT THE SO-CALLED "FLAT YARD" TRACKS AT LEADVILLE ARE IN FACT RAILROAD TERMINAL TRACKS AND NOT MERE INDUSTRIAL TRACKS OF PETITIONER, IT COMPLETELY DISTORTS SUCH EVIDENCE.

THESE CONSTITUTE VITAL SUPPRESSIONS AND DISTORTIONS OF EVIDENCE SINCE, ONLY ON THE BASIS OF THEM, COULD THE MAJORITY REPORT FIND THAT THE FOREGOING DESIGNATED TRACKS CONSTITUTE REASONABLE POINTS FOR THE DELIVERY AND RECEIPT OF CARS BY THE RESPONDENT CARRIERS.

PETITIONER DOES NOT FEEL WARRANTED IN PROTRACTING THIS PETITION BY REPEATING HERE WHAT IS SAID IN THE ABOVE RESPECTS AT PAGES 21 TO 28 OF ITS EXCEPTIONS. THERE THE UNCONTRADICTED EVIDENCE IN QUESTION IS FULLY DISCUSSED. THE COMMISSION'S PARTICULAR ATTENTION IS CALLED, HOWEVER, TO THE FRANK ADMISSION BY MR. McDONALD, THE COMMISSION'S OWN WITNESS, QUOTED AT PAGE 21 OF THE EXCEPTIONS, THAT WHAT THE MAJORITY REPORT OF DIVISION 3 TERMS THE "PLANT YARD" TRACKS AT GARFIELD, ARE IN REALITY *joint railroad terminal and storage yard tracks*; ALSO TO THE EVIDENCE TO THE SAME EFFECT

(16)

OF MR. MORIARTY, SUPERINTENDENT OF THE RESPONDENT, THE DENVER & RIO GRANDE WESTERN, QUOTED AT THE SAME PAGE OF PETITIONER'S EXCEPTIONS.

PETITIONER DEEMS IT ONLY FAIR TO SAY THAT THE EVIDENCE IN THIS RESPECT AS TO THE SO-CALLED "HOLD" TRACKS AT MURRAY, WHILE UNCONTRADICTED, IS PERHAPS NOT AS CONCLUSIVE AS THE EVIDENCE RELATING TO GARFIELD AND LEADVILLE. IT IS SYMPTOMATIC OF THE UNIFORMITY WITH WHICH THE MAJORITY REPORT IGNORES ALL DIFFERENCES IN CONDITIONS, HOWEVER, THAT SUCH REPORT APPARENTLY RECOGNIZES, AND CERTAINLY ATTEMPTS TO MAKE, NO DISTINCTION ON THIS BASIS BETWEEN ITS FINDINGS AS TO

Garfield and Leadville, on the one hand, and as to Murray, on the other, but uniformly finds that all such tracks constitute reasonable points for delivery and receipt by the respondent carriers of cars to and from the industry.

Further comment, however, is required as to the total misconstruction and distortion of the purpose and result of petitioner's uncontradicted evidence (Tr. 446-447) that not only the "flat yard" tracks at Leadville, but a portion of the respondent Denver & Rio Grande's own main line, as well as of its own spur to the Ore & Chemical Company, are owned and maintained by that carrier on the industry's property under easements from the industry.

There is not the slightest justification for the attempt at Sheet 22 of the majority report, as well as at Sheet 22 of the Examiner's report, to make it appear that petitioner's purpose in offering evidence of such easements, under which the carrier's main line and spur are maintained on the property of the industry, was to show that such easements were the consideration for the building and maintaining by the carrier of the "flat yard" tracks. The obvious and only purpose such evidence could have, was to show that the "flat yard" tracks are as much the carrier's tracks, and not those of the industry, as are the carrier's own main line and spur. This also was the purpose of the evidence of the use of such "flat yard" tracks by other independent industries and shippers, the purpose of which evidence is also attempted to be distorted on the same pages of the respective reports. This latter distortion was repudiated at pages

(17)

27-28 of petitioner's exceptions yet, nevertheless, it is repeated verbatim in the majority report.

It is therefore submitted that delivery and receipt by the respondent carriers of the industry's cars at any such points, whether the so-called "plant yard" tracks at Garfield the so-called "hold" tracks at Murray, or the so-called "flat yard" tracks at Leadville, no more constitute the completion of the respondent carriers' obligations under their line-haul rates, than would such receipt or delivery at any other railroad terminal yards of respondent carriers, constitute receipt or delivery of the cars of any other industry, without, in addition, the switching of such cars from or to team tracks or industrial sidings.

Finally, in this connection, the majority report of Division 3, Sheet 22, repeats verbatim the following statement from Sheet 22 of the Examiner's proposed report:

"The fact remains that the flat yard is on the property of the smelter, was built and is used primarily and principally for its traffic and that the *only other use made thereof is licensed by the industry and subject to its control.*"

The italicized portion of the foregoing quotation is not only without evidence to support it but is contrary to the evidence and to the law. The uncontradicted evidence (Tr. 446-447) shows that the "flat yard" tracks, while on the property of the industry, were constructed, and are owned and maintained by the respondent carrier under an easement from the industry. The fact that no documentary record of such easement could be located in no way militates against the existence of such easement, particularly since the record shows that the carrier has owned and maintained such tracks since sometime in the Eighteen-Eighties. Under such circumstances, to state that "the only other use made thereof is *licensed by the industry and subject to its control*" is a complete distortion of the record and of the law. It is not open to serious question that, in view of such

(18)

long acquiescence by the industry in such easement and in such dedication to common carrier uses, the industry could not maintain ejectment against the carrier. Certainly, unless the industry could succeed in ejectment proceedings, it could not prevent the carrier from using tracks, wholly owned and maintained by the carrier, for the shipments of independent industries and shippers, for which such tracks are now, and for years have been used, to substantially an equal extent as for the shipments of the industry itself (See Exceptions, pp. 27, 28).

VI

THE MAJORITY REPORT OF DIVISION 3, IN HOLDING THAT THE DENVER & RIO GRANDE'S OWNERSHIP AND MAINTAINANCE OF TRACKS WITHIN THE SMELTING AREA AT LEADVILLE VIOLATES SECTION 6(7) REPEATS, WITHOUT ANY ATTEMPT TO JUSTIFY, THE DEMONSTRATED MISCONSTRUCTION BY THE EXAMINER'S PROPOSED REPORT IN THIS RESPECT OF THE SIOUX CITY SWITCHING CASE, 241 I.C.C. 53, 241 I.C.C. 623.

At Sheet 21, the majority report repeats verbatim the statement from Sheet 21 of the Examiner's proposed report that

"As stated, the Rio Grande owns and maintains all standard-gauge tracks within the plant area. The Commission considered a similar situation in *Sioux*

City Ry. Co. Switching, 241 I.C.C. 53 and 241 I.C.C. 623, and in the latter report on reconsideration found that the providing and maintaining of tracks under such circumstances resulted in a violation of Section 6(7) of the act."

The majority report persists in this misconstruction of the *Sioux City* case, despite the demonstration at pages 54-65 of petitioner's Exceptions that, correctly construed, the *Sioux City* case, on the contrary, is authority for owner-

(19)

ship and maintainance by the Denver & Rio Grande, not only of the "flat yard" tracks, but of all other tracks within the Leadville smelter area, *not used exclusively for loading or unloading of the industry's own shipments*.

In so doing, the majority report makes no attempt to show that petitioner's construction of the *Sioux City Switching* case is in any way erroneous. It simply ignores without the slightest mention, petitioner's demonstration that the construction of that case in the Examiner's proposed report, and persisted in by the majority report, is completely fallacious.

VII

THE MAJORITY REPORT OF DIVISION 3, IN FINDING THAT SECTION 5(1) OF THE ACT REQUIRES THE COMMISSION'S APPROVAL OF THE JOINT SWITCHING CONTRACTS OF THE DENVER & RIO GRANDE AND OF THE UNION PACIFIC AT THE PETITIONER'S GARFIELD AND MURRAY SMELTERS, IGNORES WITHOUT MENTION OR EXPLANATION THE SHOWING IN PETITIONER'S EXCEPTIONS THAT SECTION 1 (18) OF THE ACT EXPRESSLY EXEMPTS SUCH CONTRACTS FROM THE APPLICATION OF SECTION 5(1).

At pages 65 to 74 of petitioner's Exceptions, petitioner shows that the joint switching contracts between the Denver & Rio Grande and Union Pacific at the Garfield and Murray Smelters not only do not constitute "pooling agreements" within the meaning of Section 5(1), but that the last sentence of Section 1(18)* expressly exempts such agreements from the provisions of Section 5. This latter point was also raised in the Exceptions filed by the Union Pacific.

* The last sentence of Section 1 (18) reads:

"Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, smelting, or side tracks. (Italics supplied)"

(20)

The majority report in this, as in other instances where no answer seems possible, attempts no answer to petitioner's Exceptions, but merely proceeds to ignore them completely and to repeat verbatim the apparently demonstrated fallacies of the Examiner's proposed report.

VIII

THE MAJORITY REPORT OF DIVISION 3, WITH COMPLETE IRRESPONSIBILITY, SUGGESTS THE CANCELLING OF THE LONG ESTABLISHED SAMPLING-IN-TRANSIT PRIVILEGES AT GARFIELD AND MURRAY, UTAH, WHICH ARE AN INTEGRAL PART OF THE NON-FERROUS RATE STRUCTURE.

IT DOES SO RATHER THAN TO TAKE THE PROPER RESPONSIBILITY OF DETERMINING (a) WHETHER CORRECTLY CONSTRUED, THE TARIFF PROVISIONS IN EFFECT OF GARFIELD AND MURRAY SINCE 1938, DO OR DO NOT AUTHORIZE THE COLLECTION OF SWITCHING CHARGES IN ADDITION TO THE LINE-HAUL RATES FOR THE TERMINAL SWITCHING NECESSARY TO DETERMINE VALUES OF ORES AND CONCENTRATES, AND (b) IF THEY DO, WHETHER SUCH TARIFF PROVISIONS VIOLATE SECTION 6(7) OF THE ACT.

MOREOVER, IT EVADES DECIDING THESE QUESTIONS ON THE SPECIOUS AND PARADOXICAL GROUND THAT THESE PROCEEDINGS ARE LIMITED SOLELY TO DETERMINING WHETHER SECTION 6(7) OF THE ACT HAS BEEN VIOLATED.

The majority report, states, Sheets 9 and 10:

"The industry contends that any charges for the various services attending the weighing of the cars and switching to and from the thaw house and sampler would be unjustly discriminatory in violation of section 2 of the Interstate Commerce Act as no charges are made for identical services when the ore and concentrates are sampled and reshipped out of the plant

(21)

in many instances from one smelter owned by the American Smelting and Refining Company to another owned by the same company. *This proceeding is one to determine whether section 6(7) is being violated.* If it is, a continuation of such a violation can not be sanctioned because its removal may necessitate changes in other concessions granted in the carriers' tariffs. *If the industry's contention were sound, a question on which it is not necessary for us to pass on here, the obvious and only remedy available to respondents would be to cancel the offending transit provisions.*"

This statement represents the only substantial departure of the majority report from the examiners proposed report, and is a departure which does no credit to the majority report. The proposed report, Sheets 9 and 10, at least took the responsibility of holding that no violation of Section 2 could be involved. The majority report, obviously convinced by petitioner's Exceptions, pages 48 to 54, that the proposed report could not be supported in so patent an error of law, nevertheless evades acknowledging such error. It does so by repeating the demonstrated fallacy of the proposed report that these proceedings are limited to determining solely whether Section 6(7) has been violated, and by holding that, if there has been any violation of Section 2, "the only remedy available to respondents would be to cancel the offending transit provisions."

It would be difficult to find better illustrations of the vices inherent in the majority report as a whole. Those vices consist in the evading of essential issues, the unexplained and undefended repetitions of demonstrated fallacies, and the apparent total lack of appreciation of the vital and practical interests involved in these proceedings, not only to the smelting industry and to the respondent carriers, but to the producers of non-ferrous metals as well.

That these proceedings are not limited solely to determining whether Section 6(7) of the Act has been violated was

(22)

clearly demonstrated in the footnote to page 2 of petitioner's Exceptions. As there shown, the only excuse for this misconception in the proposed report of the scope of this investigation under Part II, is the fact that, as shown at page 3 of petitioner's Brief, all orders heretofore made under Part II have been based solely on the provisions of Section 6(7), and all such orders which have been affirmed by the Supreme Court have been affirmed solely under that section. This misconception is itself the result of the vice, both of the proposed report and the majority report, in completely ignoring the fundamental distinction between the instant proceedings and all other proceedings heretofore had under Part II, already discussed under Point II of this petition. That distinction is, that prior to the instant proceedings and to the related ones involving the Anaconda and the United States Smelting, Refining & Mining Company, the tariffs involved did not, as the Commission has itself found, either expressly or by implication

provide that the specific terminal switching services in issue were included under the line-haul rates. Necessarily, therefore, in all prior proceedings, the findings that the particular terminal switching services were unlawful could be and were based on Section 6(7), since the performance of such services *involved departures* from the published tariffs. In the instant proceedings, on the contrary, the performance of such services under the line-haul rates is *expressly authorized by the tariffs* and, therefore, can involve no violations of Section 6(7). Such fortuitous limitation to Section 6(7) of the issues and orders in all prior cases, however, is far from meaning that the Commission's investigation under Part II is limited to violations merely of 6(7). As shown in the footnote to page 2 of petitioner's Exceptions, the presiding Examiner himself stated at the opening of the hearings in these proceedings that they were set for hearing

“* * * with a view to determining whether and to what extent there may exist *violations of the Interstate Commerce Act*”. (Italics supplied)

(23)

It follows, therefore, that, contrary to the assumption of the majority report, the Commission is called upon to decide what is the proper construction of the present tariffs at Garfield and Murray, and whether, properly construed those tariffs do violate Section 2.

It was clearly demonstrated at pages 54-61 of petitioner's Brief, and at pages 48 to 54 of petitioner's Exceptions that, if the present tariffs at Garfield and Murray be construed to authorize charges in addition to the line-haul rates for terminal switching necessary to determine the value of non-ferrous ores and concentrates, such tariffs necessarily violate Sections 2 of the Act, in view of the sampling in transit provisions of the carriers' tariffs and, moreover, violate Section 1 of the Act in view of the fact that the uncontradicted evidence shows that the line-haul rates already include compensation for such terminal switching services.

Petitioner's brief, however, at pages 50-54, demonstrates that, correctly construed, the present tariffs in effect at Murray and Garfield, ever since their change in 1938, do not authorize charges in addition to the line-haul rates for such terminal switching services, because the performance of such terminal switching service for the determination of values does not constitute an “interrupted movement”

within the meaning of those tariffs, and particularly since the line-haul rates already include compensation for such services.

Decisions of both these questions are evaded, however, even though they were raised not only by petitioner, but by respondent, Union Pacific, in its Exceptions, pages 3-9, and in the oral argument of its counsel, Mr. Collins, quoted in the footnote to page 13 of this petition.

Instead of deciding these essential issues, the majority report, at Sheets 9 and 10 as already quoted, states that

"If the industry's contention were sound, a question on which it is not necessary for us to pass on here, the obvious and only remedy available to respondents would be to cancel the offending transit provisions."

(Italics supplied)

(24)

It is incomprehensible, in view of the record in these proceedings, how the majority report could make such an irresponsible suggestion, and quite incredible that the Commission could approve it.

Petitioner's witness, Mr. Tuckwood, emphasized that not only the smelting and refining, but the mining and transportation of non-ferrous metals, require sampling-in-transit privileges, and, furthermore, that transit privileges of various kinds are a traditional and integral part of the non-ferrous rate structure. He testified (Tr. 135):

"The unusual nature of the non-ferrous mining, smelting and refining business requires these traditional transit privileges, and where they are provided in the line-haul rate there can be no interruptions in movement not already provided for in the orderly process of moisturing, weighing, sampling and thawing when necessary and final spotting at the end of the line-haul at the stock pile or receiving bins. As a matter of fact the metals shipped out of these non-ferrous smelters move under transit privileges through the refineries to final destination and in those cases where line-haul rates do not include the service, a specific charge is made for the transit services through the refinery and the weight losses between smelter and refinery are specifically provided for by railroad tariff provision, and which again illustrates the great importance that carriers place on accurate destination weight at each point of transit in connection with the move-

ment of non-ferrous metals, whether they are transported in the shape of ore, concentrates, or mill products to the smelter, or smelter products from one smelter to another, or in the form of bullion to a refinery." (Italics supplied)

As shown by specific tariff references at page 52 of petitioner's Exceptions, moreover, these sampling-in-transit privileges at Garfield, Murray and Midvale, Utah, apply on rates, blanketed as to destinations, from virtually all points of origin in Colorado, Idaho, Montana, New Mexico, and Utah. Moreover, as shown, for example, in Pacific Freight Bureau Tariff 332, I.C.C. 1386, such sampling-in-transit

(25)

privileges at Utah smelters apply on certain movements to Leadville. It is particularly important to note that such privileges are not confined merely to application between petitioner's smelters, as the majority report would imply, but apply as well to smelters not owned by petitioner, such as Midvale, and at public samplers.

Furthermore, as Mr. Tuckwood testified, such sampling-in-transit privileges are even more essential to the mines producing, and to the carriers transporting non-ferrous metals to such Utah destination, than to the Utah smelters themselves. Mr. Tuckwood's testimony in this respect (Tr. 140-145) is set out at pages 55 to 60 of petitioner's Brief.

As there appears, such sampling-in-transit privileges apply not only to petitioner's smelters at Garfield and Murray but to smelters not owned by petitioner at Midvale and International, Utah (Tr. 140) and to independent samplers (Tr. 140, 143, 145). Under such sampling-in-transit privileges non-ferrous metals may either be sampled at independent public samplers before arrival at destination smelters, or may be sampled at the smelters to which they are originally consigned, and reconsigned, without additional charge either for such reconsignment or for the switching involved in such sampling, to other smelters better adapted to handling the particular shipments.

It is there shown that non-ferrous ores are complex ores, the value of which depends not only upon the predominant metal content—that is, so far as these cases are concerned, copper or lead—but on which metal is smelted at a particular smelter. Garfield, for instance, is a copper smelter, while Murray and Midvale are lead smelters. At Garfield

lead is merely an impurity which incurs a smelter penalty, while at Murray and Midvale copper is an impurity which in turn incurs a smelter penalty. The higher value for ores predominantly copper, therefore, can be obtained at Garfield, and for ores predominantly lead, at Murray or Midvale. The sampling-in-transit privilege, consequently, is,

(26)

as Mr. Tuckwood's testimony shows, of vital interest both to the producers of non-ferrous ores, particularly the marginal mines, and to the carriers transporting such ores. If on sampling at Garfield an ore is determined to be predominantly lead, the producer receives a higher return and the carrier a higher freight rate by reconsigning such ore for smelting to Murray or Midvale than by smelting it at Garfield. Conversely, if on sampling at Murray or Midvale an ore turns out to be predominantly copper, both the producer and the carrier will receive higher returns by the reconsignment of such ore to Garfield. Furthermore, where a public sampler is available in route of movement, ores can be sampled at such public sampler and the producer can then determine to which smelter such ore should be originally consigned.

It is these indispensable sampling-in-transit privileges which the proposed report lightly proposes should be cancelled. It so proposes although neither the non-ferrous metal producers nor the public samplers, both of whom are vitally interested in such privileges, have been made parties to these proceedings, and therefore have had no opportunity to protect their interests. In such circumstances it seems inconceivable that the Commission can do other than reject such a proposal.

IX.

THE CEASE AND DESIST ORDER OF DIVISION 3 IN THESE PROCEEDINGS IS VOID AND UNENFORCEABLE BECAUSE THE FINDINGS ON WHICH IT IS BASED EITHER ARE MEANINGLESS, WHEN APPLIED TO THE EVIDENCE OF RECORD, OR WOULD REQUIRE THE CARRIERS TO CHARGE AND PETITIONER TO PAY TWICE FOR THE SAME SERVICES.

So far as pertinent here, the cease and desist order of Division 3 reads as follows:

"* * * the Commission having found in said sup-

(27)

plemental report that the Union Pacific Railroad Company, Denver & Rio Grande Western Railroad Com-

pany (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railroad Company violate the Interstate Commerce Act in the particulars set forth in the above report:

It is ordered, That the Union Pacific Railroad Company, Denver & Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham & Garfield Railway Company, be, and they are hereby, notified and required to cease and desist, on or before January 10, 1946, and thereafter, to abstain from such unlawful practice."

The finding as to the Garfield smelter of the petitioner on which this order is based, is as follows (Report, sheet 10):

"We further find that the performance of service beyond the yard as described, without adequate and compensatory charges *in addition to the line-haul rate*, is a violation of Section 6(7) of the act." (Italics supplied.)

The finding as to Murray is as follows (Report, sheet 17):

"We further find that performance of service beyond the tracks described at the line-haul rates, *without adequate compensation*, is a violation of Section 6(7) of the act." (Italics supplied.)

As to Leadville, the finding reads (Report, sheet 22):

"We further find that the performance of service beyond the tracks described at the line-haul rates, *without compensation*, is a violation of Section 6(7) of the act." (Italics supplied.)

The significance of the variation in wordings of these findings is particularly to be noted.

Taking them in reverse order, what seems to be forbidden at Leadville is the performance of services "beyond the tracks described" *without compensation*. At Murray, how-

(28)

ever such performance is seemingly forbidden if "without *adequate compensation*". Only at Garfield is the performance forbidden "without adequate and compensatory charges *in addition to the line-haul rate*".

In attempting to determine the meaning of these findings, there must be kept in mind what the majority report completely ignores, (1) that the uncontradicted evidence shows that the rates at Garfield, Murray, and Leadville have al-

ways included compensation for services "beyond the tracks described" and (2) that under the present tariffs at Garfield and Murray, since their change on July 5, 1938, *petitioner actually has paid charges in addition to the line-haul rate* for such services "beyond the tracks described".

So far as the finding at Leadville is concerned, therefore, it is obvious that the respondent carrier, Denver & Rio Grande would not violate the Commission's cease and desist order as to that point, should it continue to do, as it now does and as its tariffs at that point expressly require it shall do, that is, to perform such services "beyond the tracks described" under the line-haul rates. This is clear, since, as the line-haul rates already contain compensation for such services, the continued performance of them under those rates would not be *without compensation*.

At Murray and Garfield, however, as expressly pointed out in petitioner's Exceptions, pages 44-45, Exhibits 23 and 24 as to Garfield, and Exhibits 29 and 30 as to Murray, show that the petitioner, since the tariff changes in 1938, has actually paid charges *in addition to the line-haul rates* for the performance of such services "beyond the tracks described".

As to Murray, therefore, the question arises whether the Commission's finding is intended to imply that, despite the uncontradicted evidence that the carriers already receive compensation under the line-haul rates for the performance of such charges "beyond the tracks described",

(29)

and in addition received for the same services the switching charges specified in the carriers' present tariffs, the carriers still do not receive *adequate* compensation for such services. Unless this is the meaning of the finding as to Murray, that finding is meaningless. If it is the meaning of this finding, such finding is completely without evidence to support it, since there has been no hearing and no evidence on which the Commission could possibly base a finding that the compensation *already contained* in the line-haul rates, plus the charges now paid in addition to those rates, are inadequate.

The finding as to Garfield contains all the infirmities of the finding as to Murray plus an additional one. The evidence already referred to shows that the carriers at Garfield, as at Murray, not only already obtain compensation under the line-haul rates for services "beyond the tracks

described" but already obtain charges in addition to the line-haul rates for those same services. If that finding is intended to mean that such charges already paid in addition to the line-haul rates are not "adequate and compensatory", it is obvious that, as at Murray, there is no evidence upon which the report could base such a finding. If that finding is intended to mean, however, that, despite the compensation already contained in the line-haul rates, the carriers must obtain in addition to the line-haul rates, charges which in themselves are adequate and compensatory for such services "beyond the tracks described," such finding could only mean that the carriers must charge and petitioner must pay twice for the same services.

All this was in substance pointed out in petitioner's Exceptions, pages 44-47, in connection with similar findings and a similar order proposed in the Examiner's report. Nevertheless, the majority report, in this as in other instances, completely ignores petitioner's Exceptions, and repeats verbatim the unintelligible findings of the proposed report, without any attempt to clarify the meaning either of them or of the order, which is based on them.

(30)

X

THE CEASE AND DESIST ORDER IN THESE PROCEEDINGS WOULD, AS A PRACTICAL MATTER, BE UNENFORCEABLE UNLESS (A) THE STATE COMMISSIONS ACQUIESCE THEREIN OR (B) 13TH SECTION PROCEEDINGS CAN BE SUSTAINED, BOTH OF WHICH SEEM IMPROBABLE.

The record in these proceedings shows that at Garfield and Leadville, respectively, only approximately 7 percent, and at Murray only approximately 33 percent, of all inbound traffic, is interstate. At page 9 of petitioner's Exceptions, the consequent absurdity is pointed out of treating the greatly preponderant intrastate traffic at those points as constituting "industrial interference" with such negligible interstate traffic, as did the proposed report at Sheets 10 and 16, and as does the majority report at its similarly numbered sheets.

However, this tremendous preponderance of intrastate traffic and negligible interstate traffic has a more vital significance. It would seem rash for the Commission to assume that the respective Commissions of the States of Colorado and Utah will acquiesce in the disruption of a

rate structure of some fifty years standing, which disruption would seriously threaten the prosperity and, perhaps, even the continued existence of an industry which is one of the basic and most important industries of both states, that is, the mining and smelting of non-ferrous ores.

This Commission is fully informed by its own Non-ferrous Metals Investigation, 204 I. C. C. 317, of the vital effect the prosperity and continued existence of the non-ferrous mining and smelting industry has on the entire economy and prosperity of both states. This is emphasized, moreover, by the testimony of Mr. Carey, Traffic Manager of the Denver & Rio Grande, (Tr. 394-399). Mr. Carey states, (Tr. 394):

(31)

"The Denver & Rio Grande Western Railroad was primarily constructed for the purpose of serving the mining industries in Colorado and Utah and, in normal times, movements of products of mines has constituted the preponderance of tonnage handled by it."

Mr. Carey, after noting (Tr. 394) that the non-ferrous mining industry has declined so that, of the 25 smelters formerly operated on the lines of that company in Colorado, only the Leadville smelter has survived, concludes by pointing out (Tr. 396-397) that even as to Leadville, the situation is already precarious, and that the imposition of additional switching charges would threaten the continued existence particularly of the marginal mines, on which the Leadville smelter is now principally dependent for its essential ore supply.

It would hardly be surprising, therefore, if the State Commissions of Colorado and Utah should not complacently acquiesce in the present cease and desist order. Should they not acquiesce, it would mean that approximately only 7 per cent of the inbound traffic at Garfield and Leadville, and approximately only 33 percent at Murray, would be subject to that order. The remainder of petitioner's traffic would be exempt from that order unless this Commission were able to sustain 13th Section proceedings to subject such vastly preponderant intrastate traffic to an order, which at best, is of doubtful validity even as applied to the negligible interstate traffic which alone, is within the direct jurisdiction of this Commission.

XI

WHILE COMMISSIONER MILLER'S PARTIAL DISSENT EXPRESSLY RECOGNIZES THAT THE RECORD DOES NOT CONTRADICT THE EVIDENCE THAT VALUATION RATES ON ORES AND CONCENTRATES ALREADY CONTAIN COMPENSATION FOR THE TERMINAL SWITCHING SERVICES NECESSARY TO DETERMINE VALUE, HE, APPARENTLY INADVERTENTLY, TERMS SUCH EVIDENCE MERELY A "CONTENTION".

FURTHERMORE, COMMISSIONER MILLER'S SUGGESTION THAT SEPARATE TERMINAL SWITCHING CHARGES MIGHT BE MADE IF THE LINE-HAUL RATES SHOULD BE ADJUSTED SO AS TO ELIMINATE THAT PART NOW PROVIDING COMPENSATION FOR SUCH TERMINAL SWITCHING, IS WHOLLY IMPRACTICABLE.

Commissioner Miller's dissenting opinion states, Sheet 23:

"However, respondents in this case, as in *Anaconda Copper Mining Co.*, I. C. C., and in *U. S. Smelting, Refining & Mining Co.*, E. C. C.

, both decided concurrently herewith, contend that rates based on value are necessary in order to move the various grade ores; that the line-haul rates were made with full knowledge that respondents, for a number of years, had been performing the intraplant switching; and that those rates were made sufficiently high to compensate them for such services. If we accept that contention as correct—and the record does not contradict it—it is my view that since we are here prohibiting the performance by respondents of such switching services without charge, the line-haul rates should be adjusted so as to eliminate that part of such rates which was included as compensation for the intraplant switching." (Italics supplied)

It is important to note that what Commissioner Miller, apparently inadvertently, terms a mere "contention" is in reality uncontradicted evidence.

(33)

Furthermore, it will be noted that his recognition that there is no contradiction in the record of this evidence seems inconsistent with the statement in the first paragraph of his report that

"I am also in agreement with the finding that it is not the duty of the carriers, under their line-haul rates, to perform the intraplant switching necessary to enable the industry to ascertain the value of the ore."

It is probable, however, that what Commissioner Miller really means is merely that a carrier, *in the absence of compensation, either in the line-haul valuation rates on non-ferrous ores and metals, or elsewhere*, for the terminal switching necessary to determine value, would not be obliged to perform such switching *without any compensation, whatever*. If this is Commissioner Miller's real meaning, it is completely in accord with petitioner's real contention in the same respect. (See Point IV of this petition). As there set out, petitioner does not and never has contended, as the majority report, Sheet 9, attempts to make it appear, that valuation rates *ipso facto* impose on a carrier the duty to determine the value of the commodity transported, *without compensation* for the terminal switching services involved in such determination. On the contrary, as there shown, petitioner's only contention is that *here* it is the carrier's duty to determine such value under the line-haul rates, *because of the uncontradicted evidence that such line-haul rates have always included compensation for the terminal switching services necessary to determine such value*.

Commissioner Miller's suggestion, however, that the dilemma in which the majority report places the Commission by its insistence that respondent carriers charge, and petitioner pay, terminal switching charges in addition to such line-haul rates, be solved by eliminating from the line-haul rates the compensation now contained in them for such terminal switching, is wholly impracticable. To determine

(34)

exactly what part of each individual line-haul rate from the innumerable producing points, here involved, represents compensation for such terminal switching, and to proportionately reduce each individual rate, would be an almost impossible task. What would be a fair apportionment of each line-haul rate, as between line-haul and terminal services, would differ in each instance. It would depend, among other things, upon the length of haul, the measure of the particular rate, and the difference in competitive factors which may affect each rate.

In other words, it would require the total disruption of a rate structure which has existed for some fifty years, without complaint by anybody and, so far as the rates at Garfield are concerned, with the knowledge and acquiescence of this Commission since 1932, when this very investigation was started and when, to all appearances, the Com-

mission was satisfied of the propriety of the very tariff provisions then in effect at Garfield and still in effect at Leadville, and which then, as now, expressly provided that such terminal switching services were included in the line-haul rates.

It seems fair to assume that Commissioner Miller neither contemplated nor intended that his suggestion should have any such effect. Moreover, it seems apparent that Commissioner Miller, in thus conditionally concurring in the majority report and order, did not appreciate that such report and order as construed by him is meaningless. As to that report and order Commissioner Miller states,

..... we are here prohibiting the performance by respondents of such switching services *without charge* (Italics supplied)

If this be the proper construction of the majority report and order, the prohibition in that report and order is meaningless since, as shown by Commissioner Miller's own report, such switching services are not now and never have been performed "*without charge*", but are charged for in the line-haul rates. Moreover, as shown under Point IX of

(35)

this petition, the prohibition in that report and order is either thus meaningless, or must be construed as prohibiting the performance by the respondents of such switching services without charge *in addition to the line-haul rates*, in which event it is unlawful, *since it would require the respondent carriers to charge and petitioner to pay twice for the same switching services*. In either aspect it would seem, therefore, that Commissioner Miller should have dissented *in toto*, instead of "in part", from the majority report and order.

XII

IT WOULD SEEM THAT THIS INVESTIGATION, SO FAR AS IT RELATES TO THE NON-FERROUS SMELTING AND MINING INDUSTRIES AND TO THE CARRIERS SERVING THEM, GOT OFF ON THE WRONG FOOT AND HAS REMAINED ON THE WRONG FOOT, AND CAN SERVE NO USEFUL PURPOSE UNTIL THE COMMISSION AS A WHOLE PLACES IT UPON A SOUND AND REASONABLE FOOTING.

In stating that this investigation, so far as the non-ferrous industry is concerned, got off on the wrong foot, it is not intended to be either facetious or disrespectful. It would appear to be the only way of concisely stating what

seems to have really happened and to have been the real trouble with this particular investigation since its inception.

It would seem that the Commission's staff charged with the reopening of this investigation after the Commission's substantial abandonment of it, when originally instituted, so far as petitioner's Garfield smelter was concerned in 1932, have remained oblivious to the unique problems and, consequently, to the unique issues which are inevitably involved in any investigation of the mining, smelting and transportation of non-ferrous ores and concentrates, and to the fundamental distinction between such problems and issues and those heretofore presented in any investigation of any other industry under Part II.

(36)

This misdirection of this investigation, so far as the non-ferrous metal industry is concerned, is best indicated by the character of the evidence offered on behalf of the Commission itself.

The sole evidence offered by the Commission was the testimony and exhibits of its witnesses, Mr. McCormick, of the Bureau of Safety Appliances (Tr. 81-89), Mr. Higgins of the Bureau of Services (Tr. 89-94), and Mr. McDonald, Chief of the Section of Safety Appliances (Tr. 94-115, 401-418). All these witnesses are unquestionably competent in their respective fields and their testimony was commendably frank. That testimony, however, standing, as it does, alone, is irrelevant and worthless, so far as the real issues involved in this investigation are concerned.

Moreover, whoever of the Commission's staff was responsible for the direction which that testimony took should have so realized, in view of the prior hearings in these proceedings already referred to of May 19, 1932, involving the Garfield smelter. In such prior hearings, the respondent carriers took the position, supported by their specific and uncontradicted testimony, that the line-haul valuation rates on non-ferrous ores included compensation for terminal switching services necessary to determine the values of such ore and to spot them for final delivery; further, they showed that their tariffs expressly provided that all such terminal switching services were included in the line-haul rates. See Brief, footnote, pages 38-39; Exceptions, pages 13-18; and Points II and III of this petition. Furthermore, as shown in Point II of this petition, neither of such conditions had appeared in connection with any other industry investigated by this Commission under Part II.

Under such circumstances, it should have been clear that the details of the physical handling of individual cars in terminal switching at petitioner's smelters could have no relevance in these proceedings unless it would serve to prove that, despite the carriers' evidence in 1932, now corroborated by their evidence and that of the industry in the

(37)

present hearings, the line-haul rates do not include adequate compensation for such terminal switching.

Moreover, so far as Section 6(7) alone is concerned, such testimony would be irrelevant even in this respect. Since the carriers' tariffs expressly provide that such terminal switching is included in the line-haul rates, the performance of such terminal switching under the line-haul rates, in strict conformance with such tariffs, could not violate Section 6(7), even though the line-haul rates did not include any compensation for such terminal switching, or such compensation as might be included should be inadequate. While, as pointed out in petitioner's Supplemental Memorandum, Point I, under such circumstances there could be no violation of Section 6(7), this does not mean that there might not nevertheless be violations of Section 1, Section 3 or Section 15 of the Act.

Nevertheless, as already noted, the Commission offered not one word of evidence to show that the carriers' line-haul valuation rates on non-ferrous ores and concentrates do not, as the carriers and the industry testify, contain compensation for such terminal switching services and, therefore, might violate such other sections of the Act. On the contrary, the testimony of the Commission's sole witnesses, Mr. McCormick, Mr. Higgins and Mr. McDonald, were confined merely to detailing the physical movements in the terminal switching of *all* cars, *and not only of cars of non-ferrous ores and concentrates*, at petitioner's smelters on selected days. Moreover, those witnesses themselves frankly admitted (Tr. 84-85, 93, 109, 115, 416) that they did not know the contents of the individual cars which they checked, or for what purposes the physical movements of such cars were made; that is, whether they were made merely for the carriers' operating convenience, or because required by the industry, and, if the latter, whether they were intraplant movements, independent of the line-haul movements, and for which, under the tariffs, separate intraplant switching charges were paid by the industry.

(38)

Furthermore, as counsel for petitioner pointed out on oral argument (Tr. 461), even were such terminal switching movements as complex as the Commission's evidence would make them appear, such mere complexity could involve no violation of Section 6(7), since the tariffs expressly provide that such terminal switching is included in the line-haul rates. Moreover, that, however complex such terminal switching movements may be, the performance of them under the line-haul rates, in conformity with such express tariff provisions, could involve no violation of any other section of the Act; in the absence of any evidence by the Commission that such line-haul rates do not, as the carriers and the industry have testified, include compensation for such terminal switching services.

Accordingly, petitioner respectfully submits:

(1) That the Commission as a whole should reconsider the report and order of Division 3;

(2) That, on such reconsideration, it should consider and decide the issues raised by this petition, which are substantially those raised by the exceptions of the industry and of the respondent carriers to the Examiner's proposed report and order, and which issues have been wholly ignored in the report and order of Division 3.

(3) That, thereupon the Commission should find that no violations of Section 6(7) are here involved; and

(4) That the Commission should further find that no violations of any other section of the Act are involved, unless and until the Commission itself shall reopen these proceedings for further hearing and establish, if it can, by competent evidence, that the presently uncontradicted evidence of the industry and of the carriers, that the line-haul valuation rates on non-ferrous ores and concentrates now contain compensation for the terminal switching services necessary

(39)

to the determination of value and the spotting for final delivery, is incorrect.

Respectfully submitted,

JOHN F. FINERTY,
Attorney for American Smelting
and Refining Company,
120 Broadway,
New York City.

December 11, 1945.

(40)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing petition has been duly served on all parties.

JOHN F. FINERTY.

75

Exhibit B-7

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 22nd day of March, A. D. 1946

AMERICAN SMELTING & REFINING COMPANY

Ex PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND EXPENSES

PART II. TERMINAL SERVICES

Upon further consideration of the record in the above-entitled proceedings, and upon consideration of petitions for reconsideration and reargument filed by the American Smelting & Refining Company, by respondents Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company, and by intervener, The Public Utilities Commission of the State of Colorado:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission:

W. P. BARTEL,
Secretary.

(SEAL)

Before the Interstate Commerce Commission

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES.

PART II, TERMINAL SERVICES.

AMERICAN SMELTING & REFINING COMPANY.

PETITION OF AMERICAN SMELTING & REFINING COMPANY FOR
(a) RECONSIDERATION OF ORDER OF MARCH 22, 1946, DENYING
ITS PETITION OF DECEMBER 11, 1945, FOR RECONSIDERATION BY
AND REARGUMENT BEFORE THE ENTIRE COMMISSION OF THE RE-
PORT AND ORDER OF DIVISION 3 OF OCTOBER 1, 1945; AND (b)
FOR THE GRANTING OF SUCH RECONSIDERATION AND REARGU-
MENT EITHER ON THE BASIS OF THIS PETITION OR ON THE COM-
MISSION'S OWN MOTION.

Petitioner believes this petition warranted because of ex-
ceptional circumstances attending the denial of its petition
of December 11, 1945 for reconsideration by and reargu-
ment before the entire Commission of the report and order
of Division 3 of October 1, 1945, as well as because of the
nature of that petition itself.

(2)

I.

PETITIONER FEELS ASSURED THAT THE MEMBERS OF DIVISION 3
WOULD NOT INTENTIONALLY SEEK BY THEIR OWN VOTES TO
PREVENT A RECONSIDERATION AND REARGUMENT OF A REPORT
AND ORDER OF THAT DIVISION WHICH IS DESIRED BY A MAJORITY
OF THE REMAINDER OF THE COMMISSION.

The Commission's records show that while reconsidera-
tion and reargument of the report and order of Division 3
was denied a majority vote of the entire Commission,
nevertheless a majority of the Commission, excluding the
members of Division 3, voted to grant such reconsideration

and reargument.* In other words, it appears that reconsideration and argument of the report and order of Division 3 was desired by a majority of the remainder of the Commission and was only prevented by the votes of the members of Division 3 themselves.

Petitioner feels assured that the members of Division 3 in so voting had no such deliberate intention. Petitioner concedes that it is the established practice and, therefore, the duty of the members of a Division to vote upon a petition for reconsideration by and reargument before the en-

(3)

tire Commission of a report and order of that Division. Whatever theoretical questions might be raised as to the propriety of this established practice, petitioner raises no such question here. The only question here raised is whether in so voting the members of Division 3 would not themselves prefer to "fall over backwards" rather than even appear to seek by their own vote to prevent the review of their report and order where, as appears here, such review is desired by a majority of the remainder of the Commission. This should particularly be so, not only in view of the novel and important character of the questions as to which review is sought, but because it is alleged that the report and order of Division 3 have resulted in a denial of a full and fair hearing on those questions. Finally, this should be so because by voting merely to permit such review, the members of Division 3 would not thereby commit themselves to any admission that their report and order were necessarily erroneous.

Accordingly, petitioner hopes that with these considerations in mind the members of Division 3, as well as the remainder of the Commission, will now deem it appropriate to vote for reconsideration by and reargument before the entire Commission of the report and order of Division 3.

*In these proceedings, and in the related proceedings of the United States Smelting, Refining and Mining Company, Commissioners Aitchison, Lee, Splawn and Aldredge voted to grant the respective petitions, while Commissioners Barnard, Miller, Patterson, Porter, Johnson and Rogers voted to deny. Commissioner Mahaffie did not participate, because, it is understood, an infected eye prevented his examination of the petitions in both proceedings. In the related proceedings of the Anaconda Copper Company the vote was the same, except that Commissioner Mahaffie voted to grant. In these proceedings and in the U. S. S. R. & N. Co. proceedings, the Commission, excluding the vote of the members of Division 3, therefore, voted 4 to 3 in favor of reargument, etc., while, in the Anaconda proceedings, the comparable vote was 5 to 3 for reargument, etc.

Moreover, this petition will proceed to show that the questions presented in these proceedings are of so novel and important a character that petitioner should be entitled, practically as a matter of right, to final determination of them only after consideration by and argument before the entire Commission.

(4)

II.

PETITIONER SHOULD BE ENTITLED, PRACTICALLY AS A MATTER OF RIGHT, TO CONSIDERATION BY AND ARGUMENT BEFORE THE ENTIRE COMMISSION OF THE REPORT AND ORDER OF DIVISION 3 BECAUSE:

(1) NEVER BEFORE UNDER PART II has the Commission either considered or determined what are lawful switching services under line-haul rates ON COMMODITIES UNDER TARIFF RATES BASED ON ACTUAL VALUE.

(2) NEVER BEFORE UNDER PART II has the Commission either considered or determined what are lawful switching services under line-haul rates WHERE THE TARIFFS EXPRESSLY PROVIDE THAT THE SPECIFIC TERMINAL SWITCHING SERVICES NECESSARY TO DETERMINE VALUE ARE INCLUDED IN THE LINE-HAUL RATES.

(3) NEVER BEFORE UNDER PART II has the Commission either considered or determined what are lawful terminal switching services under line-haul rates where the tariffs not only expressly provide that the line-haul rates include the specific terminal switching services necessary to the determination of value, BUT THE UNCONTRADICTED EVIDENCE SHOWS THAT THE LINE-HAUL RATES HAVE ALWAYS INCLUDED COMPENSATION FOR THE PERFORMANCE OF SUCH TERMINAL SERVICES.

(4) NEVER BEFORE UNDER PART II has the Commission either considered or determined WHETHER THERE CAN BE IN LAW ANY VIOLATION OF SECTION 6 (7) OF THE ACT by the performance of terminal switching services under the line-haul rates WHERE THE TARIFFS SPECIFICALLY PROVIDE THAT SUCH TERMINAL SWITCHING SERVICES ARE INCLUDED IN THE LINE-HAUL RATES AND WHERE THE LINE-HAUL RATES THEMSELVES INCLUDE COMPENSATION FOR SUCH TERMINAL SWITCHING SERVICES.

(5)

Petitioner believes that the above facts, which appear in these proceedings and which have not appeared in any other proceedings heretofore considered and de-

etermined by the Commission under Part II, make these proceedings fundamentally distinguishable from any prior proceedings and, therefore, that the terminal services here involved do not come within the formula prescribed by the Commission's basic report, 209 I. C. C. 11. Whether or not petitioner is right in this belief, Division 3 seems mainly to have been wrong in refusing, so far as appears from its report, even to consider whether this might be so. Furthermore, it would seem that the Commission would be even more wrong should it finally refuse itself to determine these basic questions and leave their determination ultimately in default, not only on the part of Division 3, but of the Commission itself.

Indeed, the primary purpose of this petition is merely to obtain from the Commission itself what petitioner has been unable to obtain from Division 3—that is, a fair and mature consideration of these basic questions, as well as of other vital issues arising in these proceedings, which the report of Division 3 either entirely ignores or as to which it, would seem, misleading or incorrectly states the evidence and the law.

Petitioner hopes, therefore, that whether the Commission shall ultimately affirm or reverse the report and order of Division 3, the Commission will at least issue a new report which will clearly and unmistakably express the Commission's opinion, and its grounds therefor, on all of the principal issues of law and fact presented in these proceedings.

Accordingly, this petition will indicate what are such basic issues of law and fact which should have full

(6)

consideration and reasoned determination by the Commission itself. This petition, however, will not undertake to argue the merits of these issues, but will rely in this respect upon what has been said as to the merits in the petition of December 11, 1945.

III.

ISSUES OF LAW AND FACT WHICH, AFTER ARGUMENT THEREON, SHOULD HAVE CONSIDERATION AND REASONED DETERMINATION BY THE ENTIRE COMMISSION.

(1) Are the terminal switching services involved in these proceedings fundamentally distinguishable in law from any terminal switching services heretofore considered under Part II by reason of the following facts:

(a) That such inbound services are principally performed on commodities moving under tariff rates based on actual value.

(b) That the tariffs, for approximately forty years, have expressly provided that the specific terminal switching services necessary to determine value are included in the line-haul rates.

(c) That the uncontradicted evidence shows that the line-haul rates have always included compensation for the performance of such terminal switching services necessary to determine value.

(2) In view of the foregoing facts, can there be in law any violation of Section 6 (i) of the Act by the performance of such terminal switching services under the line-haul rates?

(3) Since the uncontradicted evidence shows that the line-haul rates have always included compensation for

(7)

the performance of such terminal switching services, can respondent carriers be compelled to charge and petitioner be compelled to pay charges in addition to such line-haul rates for the performance of such terminal switching services? In other words, can the carriers be compelled to charge and the petitioner be compelled to pay twice for the same services?

(4) Is not even Commissioner Miller's partial dissent from the report of Division 3 in this respect wholly impracticable in suggesting that terminal switching charges, in addition to the line-haul rates, might properly be required if the line-haul rates were to be adjusted so as to eliminate from them the compensation which Commissioner Miller recognizes is shown by the uncontradicted evidence now to be contained in such line-haul rates for the terminal switching services here involved?

(5) Irrespective of whether, under the tariffs providing rates based on actual value, the obligation be upon the carriers or upon the petitioner to determine and certify the value of non-ferrous ores and concentrates moving under such rates, can the carriers be compelled to charge and petitioner be compelled to pay switching charges in addition to the line-haul rates for the terminal switching services necessary to determine such value, where the uncontradicted evidence shows that the line-haul rates already include compensation for such terminal switching services?

(6) Was Division 3, as a matter of law, justified in

holly ignoring and in suppressing any reference whatever to the uncontradicted evidence that the line-haul rates have always included compensation for the performance of the terminal switching services necessary to the determination of value of non-ferrous ores and concentrates moving under tariff rates based on actual value?

(8)

ary to the determination of value of non-ferrous ores and concentrates moving under tariff rates based on actual value?

(a) If Division 3 did so on the theory that such evidence was wholly irrelevant, could the Commission so hold without holding that the carriers could lawfully be compelled to charge and the petitioner be compelled to pay twice for the same services?

(b) If Division 3 did so on the theory that such evidence was untrue, could it lawfully substitute its own mere opinion in this respect for the only evidence of record, particularly in view of the fact that the Commission itself participated in the hearings of these proceedings and offered no contrary evidence?

(c) If Division 3 did so on the theory that such evidence was unconvincing, was it not its duty in law at least to have so indicated, and thereby to afford petitioner the right to ask further hearing for the purpose of producing additional evidence? Was not this particularly the duty of Division 3 in view again of the fact that such evidence is the only evidence of record, and of the further fact that the Commission, with full opportunity to do so, neither sought to discredit such evidence by cross-examination or by offering contrary evidence.

(7) Do the present tariffs at Garfield and Murray, in imposing charges in addition to the line-haul rates for at least certain of the switching services necessary to the determination of value, thereby violate Section 1 of the Act in view of the uncontradicted evidence that the line-haul rates already include compensation for such terminal switching services?

(9)

(8) Do such tariffs likewise violate Section 2 of the Act in view of the tariff sampling-in-transit privileges which permit the performance, without charge in addition to the line-haul rate, of the terminal switching services necessary to determine value, where non-ferrous ores and concentrates are either sampled at public samplers before reaching

Garfield and Murray or are sampled at Garfield or Murray reconsigned to points beyond?

(9) Are not the so-called "Plant Yard" tracks at Garfield, the so-called "Hold" tracks at Murray, and the so-called "Flat Yard" tracks at Leadville, in fact railroad terminal tracks instead of mere industrial tracks of petitioner, as found by Division 3?

(10) If so, could delivery and receipt of petitioner's traffic on such tracks properly be held to complete the carriers' obligations under the line-haul rates, even did the carriers' tariffs not specifically provide that the line-haul rates include terminal switching services beyond such tracks, and the uncontradicted evidence not show that compensation for such terminal switching services is included in the line-haul rates?

(11) Does not the report of Division 3 misconstrue the Commission's report in the *Stour City Switching* case, 241 I. C. C. 53, 341 I. C. C. 623, in holding that the ownership and maintenance by the respondent Denver & Rio Grande Western Railroad of the "Flat Yard" tracks and other tracks on property of the petitioner within the Leadville smelter area, violate Section 6 (7) of the Act, except possibly as to such tracks as are *used exclusively for loading or unloading of the petitioner's own traffic*.

(10)

(12) Is not the report of Division 3 in finding that Section 5 (1) of the Act requires the Commission's approval of joint switching contracts of the Denver & Rio Grande Western and the Union Pacific at the petitioner's Garfield and Murray smelters, plainly erroneous in view of the specific provisions of Section 1 (18) of the Act, expressly exempting such contracts from the application of Section 5.

(13) In any event, is not the report of Division 3 plainly erroneous in holding that such contracts constitute "pooling agreements" within the meaning of Section 5 (1), in view of the Commission's decisions and other authorities, cited under Point VII, pp. 65-74, of petitioner's exceptions to the Examiner's proposed report.

(14) Are not the cease and desist orders of Division 3 in these proceedings void and unenforceable because the findings on which they are based are either meaningless when applied to the evidence of record, or otherwise would require the carriers to charge and petitioner to pay twice for the same services?

(15) Would not such cease and desist orders as a practical matter be unenforceable unless (a) the State Commissions should acquiesce therein, or (b) 13th Section proceeding could be sustained, both of which seem improbable?

(16) Finally, should not the Commission find that no violations of Section 6 (7) of the Act, or of any other section of the Act, are involved in these proceedings, except the violations of Sections 1 and 2 of the Act resulting from the present tariffs at the Garfield and Murray smelters?

(11)

In enumerating the foregoing fundamental issues of law and fact on which, after argument, the considered judgment of the entire Commission is asked, petitioner does not mean to waive any incidental issues of law and fact presented by its petition of December 11, 1945, or by its exceptions to the Examiner's report.

It is requested that, pending determination of this petition and of any resultant proceedings, the effective date of the Commission's order herein be appropriately postponed.

Respectfully submitted,

JOHN F. FINERTY

120 Broadway

New York City, N. Y.

Attorney for American Smelting

& Refining Company

April 25, 1946.

CERTIFICATE OF SERVICE.

I hereby certify that I have duly served copies of the foregoing petition on all parties of record.

JOHN F. FINERTY

77 *Exhibit B-9*

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C. on the 3rd day of June, A. D. 1946

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING

REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petition of

American Smelting & Refining Company for reconsideration and reargument:

It is ordered, That the above-entitled proceeding be, and it is hereby, reopened for oral argument, at a time to be hereafter fixed, and for reconsideration.

It is further ordered, That the order entered in said proceeding on October 1, 1945, which was subsequently modified to become effective on or before August 1, 1946, be, and it is hereby, further modified to postpone the effective date thereof until the further order of the Commission.

By the Commission.

W. P. BARTEL
Secretary

(SEAL)

79 In the District Court of the United States
For the District of Utah Central Division
Civil Action File No. 1325

UNITED STATES SMELTING REFINING AND MINING COMPANY, a
corporation, THE DENVER and RIO GRANDE WESTERN
RAILROAD COMPANY and UNION PACIFIC
RAILROAD COMPANY a corporation,
PETITIONERS

VS.

THE UNITED STATES OF AMERICA and the INTERSTATE
COMMERCE COMMISSION,
DEFENDANTS

Petition—Filed June 13, 1947

To the Honorable, the Judges of the District Court of the
United States for the District of Utah:

The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company and United States Smelting Refining and Mining Company, bring this action against the United States of America and the Interstate Commerce Commission, hereinafter called the Commission, for the purpose of enjoining, setting aside and annulling an order of the Commission entered October 14, 1946 in proceedings entitled "United States Smelting Refining and Mining Company, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services." A copy of said order and of the supplemental report therein referred to are attached to

(2)

this petition and marked Appendix A. The report referred to in said order entitled "Propriety of Operating Practices

Terminal Services, 209 I. C. C. 11" is attached to this petition and marked Appendix B. Said reports and order are made a part of this petition by reference.

Petitioners further allege:

I.

The jurisdiction of this Court over this action is invoked under and pursuant to the provisions of Section 41, Subdivision 28, and Sections 43-48, inclusive, of Title 28 of the United States Code.

II.

The order hereby sought to be enjoined, set aside and annulled was made in a proceeding instituted by an order of investigation made by the Interstate Commerce Commission on its own motion as hereinafter set forth. The order relates to transportation and the matters involved arise within the judicial district of this Court, in which judicial district the petitioner, United States Smelting Refining and Mining Company has one of its principal offices.

III.

The petitioner, The Denver and Rio Grande Western Railroad Company (hereinafter referred to as the Denver and Rio Grande) is a corporation of the State of Delaware, the properties of which at the time the order herein complained of was entered, were in possession of and being operated by Wilson McCarthy and Henry Swan as Trustees under an order of the District Court of the United States for the District of Colorado, entered November 18, 1935. That on the 10th day of April, 1947, said district court entered its order terminating

(3)

said trusteeship and the properties of said railroad were returned to The Denver and Rio Grande Western Railroad Company.

Said petitioner is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; and (b) either by itself or in connection with other common carriers, also between points throughout the United States and the State of Utah. As a common carrier by railroad as specified in (b), petitioner is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a), petitioners is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) and (4) thereof. Otherwise, as a common car-

rier by railroad of property as specified in (a), petitioner is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated 1943.

IV.

The petitioner Union Pacific Railroad Company (hereinafter referred to as the Union Pacific) is a corporation of the State of Utah with one of its principal offices at Salt Lake City, Utah.

Said petitioner is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; (b) either by itself or in connection with other common carriers throughout the United States, also between the State of Utah and points throughout the United States. As a common carrier by railroad as specified in (b), petitioner is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a), petitioner is not subject to the provisions of said Interstate Commerce Act, except to the extent of the provi-

(4)

sions of Sections 13 (3) and (4) thereof. Otherwise, as a common carrier by railroad of property as specified in (b), petitioner is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated 1943.

V.

The petitioner United States Smelting Refining and Mining Company (hereinafter called The Industry) is a corporation of the State of Maine, having its principal office at Boston, Massachusetts, and its principal Western office at Salt Lake City, Utah, and is engaged, among other things, in the smelting of non-ferrous ores, concentrates and other non-ferrous metal-bearing materials, and, for this purpose, operates a smelter at Midvale, Utah.

As hereinafter more particularly described, the said smelter at Midvale is served by the Denver and Rio Grande and Union Pacific Railroads.

VI.

The defendant The United States of America is made a party to this action pursuant to express authority of the Congress of the United States as provided in Sections 43-48 inclusive, of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission is an administrative Commission, existing under and by virtue

of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

VII.

The order here sought to be enjoined, set aside and annulled requires the petitioner carriers to cease and de-

(5)

sist from certain alleged violations of the Interstate Commerce Act "in the particulars as set forth in the above report," i. e. the Commission's supplemental report issued on the same date as such order, and which, together with the Commission's report (209 I. C. C. 11) is expressly made part of that order.

VIII.

That the report of the Commission (209 I. C. C. 11) dated May 14, 1935 and which is copied in full in Appendix B of this petition and which is known as the "Basic Report" is a proceeding instituted by the Interstate Commerce Commission upon its own motion. The carriers named as petitioners herein were parties to that original proceeding but the Industry, appearing as petitioner herein, was not a party. The basic report announced certain principles which the Commission indicated would be followed in considering the lawfulness of switching services performed by carriers at industrial plants. The principles formulated were general in character and did not cover specific instances of switching and particularly did not cover switching of cars within the plant of the United States Smelting Refining and Mining Company, nor did said basic report involve tariffs specifying switching services to be performed by the carriers at the Industry's plant involved herein.

On March 24, 1944 the Commission issued an order which shortly thereafter was served upon the petitioner carriers and industry assigning a hearing before an examiner of the Commission on May 8, 1944 at Denver, Colorado:

" . . . with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and ~~less than carload~~ freight at the plant of the United States Smelting Refining and Mining Co. at

(6)

Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act."

In accordance with such order a hearing was held on May 29, 1944. At such hearing extensive testimony and exhibits were introduced by the petitioners and by the Commission. The Public Service Commission of Utah appeared as an intervenor. A certified transcript of such testimony and certified copies of such exhibits will be offered on the hearing of this petition in support thereof. That thereafter the examiners for the Interstate Commerce Commission prepared a proposed report, to which report the petitioners herein duly filed exceptions. That on October 1, 1945 Division 3 of the Interstate Commerce Commission entered its report and order substantially following the proposed report of examiners. That thereafter petitioners herein duly and regularly filed a petition with the Interstate Commerce Commission for re-opening, re-argument and reconsideration of the report and order of Division 3. That pursuant to such petition the matter was heard by the full Commission resulting in the said report and order of October 14, 1946 which substantially followed the report and order of Division 3. Petitioners have exhausted their administrative remedies before the Interstate Commerce Commission.

IX.

The findings of violations of the Interstate Commerce Act in such supplemental report are findings confined solely to alleged violations of Sections 6 (7) of the Act. These findings are: (Decision of Oct. 14, 1946, page 6): (P. 30 herein.)

“With respect to the movement of all commodities,
(7)

not including miscellaneous supplies, referred to above, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with its industrial operations and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

“We find that respondents' interstate line-haul rates cover the delivery and receipt of earload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents;

that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company, a Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of earload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the assembly yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6(7) of the Interstate Commerce Act."

X.

That Section 6(7) of the Interstate Commerce Act (Title 49, Section 6, Paragraph (7), U. S. C. A.) provides as follows:

"Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and

(8)

charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

XI.

That the applicable tariffs (duly and regularly published) regarding shipments of non-ferrous ores, concentrates, other non-ferrous metal-bearing materials and supplies used by the smelter in the process of smelting, include the following provisions with regard to services to be included in the line-haul rate and charges for additional service:

A.

"Garfield, Midvale and Murray, Utah.

- (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

(9)

Note—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in paragraph (a) hereof.
- (c) When movements within the smelting plant are from the stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.
- (e) The line haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter." (Item 520-D (L. A. & S. L. Series) Union Pacific Railroad, I. C. C. No. 265).

(10)

B.

**"SAMPLING AT UTAH POINTS WHEN DESTINED
VARIOUS UTAH POINTS.**

ORE, CONCENTRATES AND MATTE, moving under this Tariff, destined Bauer, Garfield, International, Midvale, Murray, Salt Lake City, or West International, Utah, may be routed via Murray, Midvale or Sandy, Utah, or all of these points, to be sampled in transit under the following arrangement:

For the first stop at sampler No charge

For subsequent stops at samplers, no charge for stops, but local rates, as shown in Local Utah Freight Bureau Joint Freight Tariff No. 6-E, (F. W. McManus, Agent), (I. C. C. No. 2), will be charged for extra movement between samplers. No further charge will be made for out-of-line haul involved.

Shipments may be billed to, or in care of, a sampler and afterward diverted destination without extra charge. (Item 110 U. P. I. C. C. No. 49566, Tariff No. 2047-L).

C.

"MANNER OF WAYBILLING SHIPMENTS

"Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value.

"Rule for Determining Rate

Upon Which Freight Charges Shall Be Assessed

"After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a

(11)

revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays." (Item 40, L. F. Mack, Agent; I. C. C. No. 3, Local Utah Freight Bureau, Tariff No. 6-F).

"WEIGHTS APPLICABLE

"The provisions of T. C. F. B. Tariff No. 58-D, Agent L. E. Kipp's I. C. C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)

"Shipments of Ore and/or Concentrates originating at points on the Union Pacific Railroad may be weighed at points of origin without extra charge.

"EXCEPTION.—Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges." (Item 115 L. F. Mack, I. C. C. No. 3, Local Utah Freight Bureau, Tariff No. 6-F).

XII.

That there is no other public sampler at Midvale than that owned by the United States Smelting Refining and Mining Company.

XIII.

That the railroad tracks owned by the Union Pacific and Denver and Rio Grande and by the smelter, and involved in this proceeding, are situated as set forth on a map (12)

designated as Exhibit 1, in the proceedings before the Commission, a copy of which map is attached hereto, marked Appendix C and made a part of this petition. That the tracks within the plant are particularly described in the findings of "Division 3" of the Interstate Commerce Commission dated October 1, 1945, (adopted by the full Commission), commencing on sheet 1 and ending near the bottom of sheet 3, such part of said findings being designated as Appendix D and made a part of this petition.

That for the purpose of showing the movement of cars, the tracks within the plant yard can be more generally classified as follows:

(a) The "inter-change tracks" owned by the Union Pacific system enter at the northeast corner of the plant area, and the Denver & Rio Grande road-haul tracks enter the plant from the east at about the center, converging to the south.

(b) The "assembly yard" tracks which are in the south portion of the plant consisting of six parallel tracks and

on which are located the old and new scales and the old thaw house.

(c) Tracks leading from the "assembly yard" to the new thaw house in the southeast corner of the plant.

(d) Tracks which lead from tracks described in (a) and (b) above to the ore samplers, there being one sampler in the north portion and one in the south portion of the plant.

(e) Tracks leading from the ore samplers to tracks mentioned in (a) and (b) above.

(f) Other tracks which lead from tracks mentioned in (a) and (b) above to stock piles, roasting plant, lead plant and other unloading points other than to or via samplers.

(13)

(g) Tracks leading from loading points within the plant to tracks mentioned in (a) and (b) above.

XIV

That the principal movements within the plant area, as ordered by the industry, outside of those admitted to be intraplant movements, may be described as follows:

(1) Unsampld ore is ordered to the sampler for unloading, via the scales for weighing. (In winter weather frozen unsampld ore is ordered to the thaw house before unloading at the sampler.) After unloading, the car is released to the carrier and light weighed. For these movements the smelter has heretofore, since 1938 paid a charge of fifty (50¢) cents per car for movement to the thaw house and fifty (50¢) cents for light weighing. The order of the Interstate Commerce Commission herein sought to be enjoined requires the payment as an intraplant movement for all switching past the assembly yard, whether to the track scales, thaw house or any unloading point within the plant.

(2) After sampling, another car receives the sampled ore at the sampler, from which it is moved at carrier's convenience and held at some convenient point, generally the "assembly yard," awaiting an analysis of the ore for the determination of final destination, which may be either the Midvale Smelter, the American Smelting and Refining Co. smelters at Murray or Garfield, or the International Smelting & Refining Co. at Tooele, Utah. If the destination is a smelter other than Midvale, no charge whatever has heretofore been made for any of the sampling in transit movements set forth herein or in the previous paragraph, this being authorized under the tariff provisions set forth in paragraph XI, B, above. If destination is the Midvale

Smelter a charge is paid for all switches beyond the sampler in addition to the charges for switching to the thaw house

(14)

and light weighing in moving from the sampler. Under the order of the Interstate Commerce Commission, herein sought to be enjoined, a charge must be paid for all movements beyond the assembly yard.

(3) Sampled ore (received from Utah Ore Sampling Company at Murray, Utah, American Smelting and Refining Company at Garfield, Utah, or International Smelting and Refining Co. at International, Utah) is ordered direct to the final unloading point. No charge has heretofore been made for this movement. Under the order of the Interstate Commerce Commission herein sought to be enjoined, a charge will be made for all movements beyond the assembly yard.

(4) Carload shipments of smelting materials, such as coal, coke, scrap iron, lime rock, etc., are ordered direct to various unloading points within the plant. Heretofore no charge has been made for this switching movement. The order of the Commission requires payment for all such switching beyond the "assembly yard."

(5) Lead bullion and other smelter products produced at the plant are ordered moved directly from various loading points. Heretofore no charge has been made for the switching of these cars. The order of the Commission requires payment for all switching of outgoing traffic from point of loading to "assembly yard."

XV

That the finding of the Interstate Commerce Commission is: that Section 6 (7) of the Interstate Commerce Act is violated by the carrier rendering service in excess of that provided for in tariffs; that switching of cars beyond the "assembly yards," as in said order defined, constitutes service in excess of that provided for by the published tariffs.

(15)

Said order of the Commission is unlawful and void and beyond the power of the Commission to make for the reasons that:

(a) The Commission has disregarded or misconstrued the provisions of the tariff set forth under paragraph XI, A, above.

(b) The Commission has disregarded or misconstrued the provisions of the tariff set forth under paragraph XI, B, above.

(c) There is no evidence, or any substantial evidence, to support the finding that there is interruption of switching movements at the "Assembly yard" due to "orders from or requirements of the smelter."

(d) That the findings of the Commission "that the line-haul carriers could not, at their own operating convenience, deliver and remove cars to and from numerous loading and unloading points in the "plant" (1) "without interfering with one another" and (2) "without encountering interference from intrastate traffic" and (3) "without interference from intraplant operation," are each without evidence or substantial evidence to support such findings.

(e) That the findings of interference of cars or engines (1) "with one another," and (2) "interference from intrastate traffic" are immaterial findings and have no bearing upon a violation of Section 6 (7), above quoted, under the effective tariff provisions.

(f) The order of the Commission is in violation of the published tariffs in that assuming without admitting that there is interruption of switching movements at the "assembly yard" of some cars or of all of the cars investigated by the Commission, there is no provision for, or allowance for switching of cars "to track scales and subsequent delivery to any designated track within the plant which can

(16)

be accomplished by one uninterrupted movement from road-haul point of delivery."

(g) That there is no provision in said order permitting the movement of cars within the plant under the sampling in transit provision of the tariff set forth under paragraph XI, B, above.

(h) That said order fails to distinguish between interruptions "resulting from orders from or requirements of the smelter" and other interruptions.

(i) That the Commission has erroneously and without evidence to support it, in effect found that every inactive period of a switching locomotive is an interruption attributable to orders from or requirements of the smelter.

(j) That said order is invalid because it in effect holds that interruptions caused by sampling are "requirements of the smelter," when under the published tariffs it was never intended that sampling should be considered as a smelter operation or an interrupted movement "resulting from orders from, or requirements of, the smelter."

(k) That said order is contrary to the rules laid down by the Commission in its original proceedings herein (Ap

pendix B) wherein the end of the line-haul delivery is "such delivery as is customary and reasonable." (209 I. C. C. 11 at page 17.)

(l) That while evidence was taken as to the switching of cars and movements of engines and interruptions encountered, there is no evidence as to whether the delays were from switching orders by the Smelter, from smelter requirements, or for other reasons.

(m) Assuming, without admitting, that there is a general practice of switching cars to the "assembly yard,"

(17)

there is no evidence that such switching movement is from switching orders or requirements of the plant; but on the contrary, there is uncontradicted evidence that interruption of switching at the "assembly yard" is for the convenience of the carrier.

(n) That in the findings as to the switching movements, there is no finding as to which of said switching movements were included in, or paid for as provided for in subdivisions (a), (b), (c) or (d) in the tariff set forth in paragraph XI, A, above, of this petition or which were movements included in line-haul, or the line-haul sampling in transit as provided for in paragraph XI, B, above.

(o) That under the order of the Interstate Commerce Commission herein involved there is no permission to move cars beyond the "assembly yard" without an intraplant charge, regardless of whether there is any interruption in the switching movement or not.

(p) The evidence submitted on behalf of the defendant Interstate Commerce Commission made no distinction between switching movements of intrastate and interstate cars and the findings of the Commission if supported at all may in fact be supported only by evidence of switching movements of intrastate cars.

(q) That the order of the Interstate Commerce Commission fails to find that there is any "interruption resulting from orders from, or requirements of, the smelter," and the Commission has therefore completely disregarded the provisions of the tariff set forth under paragraph XI, A of this petition.

XVI.

(r) Such order is without any finding or evidence to support such finding that the line-haul rates are less than

(18)

minimum reasonable rates for the line-haul service, including movement beyond assembly yard. On the contrary, the

ly evidence of record shows that the line-haul rates include compensation for movement beyond the assembly yard and therefore are not less than minimum reasonable rates.

(s) That the evidence submitted on behalf of the defendant, Interstate Commerce Commission, with regard to switching movements made no distinction between the switching of cars owned by the Smelting Company, which were admittedly intra-plant movements and for which a regular intra-plant switching charge was paid, and other switching movements involved in the receipt and delivery line-haul freight movements.

The petitioner industry was a party to and participated in the proceedings before the Commission in which the order and findings herein assailed were made. The order and the findings upon which it, purports to be based would require the petitioner carriers to collect and the petitioner industry to pay additional charges for the terminal services herein described over and above the charges heretofore collected and now collected by the petitioner carriers and over and above the charges heretofore and now prescribed by their published tariffs. That the said carriers have made no objections to the rates heretofore paid and have not requested any change in the existing practice or claimed that the rates paid are not in accordance with the published tariffs.

WHEREFORE, petitioners, being without adequate remedy at law, respectfully pray:

FIRST: Upon the filing of this petition the presiding judge of this Court shall call to his assistance in the hear-

(19)

ing and determination hereof two other judges, of whom at least one shall be a circuit judge.

SECOND: That process may issue against defendants United States of America and Interstate Commerce Commission, and that due and proper service of such process and of this petition be forthwith made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and another copy thereof in the Department of Justice, as provided by law.

THIRD: That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States a hearing be held, and that thereupon an interlocutory decree be issued staying and

suspending said order of the Interstate Commerce Commission pending final hearing and determination of this petition.

FOURTH: That upon final hearing of this cause a permanent injunction issue decreeing that the order of the Interstate Commerce Commission hereinbefore described is beyond the lawful authority of said Commission and wholly null and void; that said order be set aside and annulled; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce the aforesaid order.

(20)

FIFTH: That this Court grant the respective petitioners such other and further relief as may be deemed proper in the premises.

/s/ PAUL B. CANNON

/s/ C. W. WILKINS

*Attorneys for Petitioner
United States Smelting Refining
and Mining Company*

/s/ G. A. MARR

/s/ A. M. CHENEY
Of Counsel.

/s/ OTIS J. GIBSON

/s/ P. T. FARNSWORTH, JR.

/s/ W. Z. VAN COTT

*Attorneys for Petitioner The
Denver and Rio Grande
Western Railroad Co.*

/s/ ELMER B. COLLINS

/s/ H. B. THOMPSON

*Attorneys for Petitioner Union
Pacific Railroad Company*

Appendix "A"

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

*Submitted June 27, 1946**Decided October 14, 1946*

On reconsideration, findings in prior report, 263 I. C. C. 749, that respondents' line-haul rates do not include services beyond the assembly yard, as described in the report, and that the performance of such services by respondents beyond that yard, without reasonable compensation in addition to the line-haul rates, was unlawful, affirmed.

REPORT OF THE COMMISSION
ON RECONSIDERATION

BY THE COMMISSION:

In the prior report herein, 263 I. C. C. 749, decided October 1, 1945, division 3 considered the propriety and lawfulness of switching services rendered by respondents at the plant of the United States Smelting, Refining and Mining Company at Midvale, Utah, and found, in substance, that respondents' line-haul rates do not include compensation for such services beyond certain tracks described of record, and that the per-

(22)

formance of such services, without compensation in addition to the line-haul rates, was unlawful.

Upon petitions of the parties, the proceeding was reopened on June 3, 1946, for reargument before, and reconsideration by the entire Commission. Oral argument has been heard.

The prior report herein contains a detailed description of the plant facilities and track layout, the manner in which the traffic is moved to and from the plant, the switching services performed by respondents within the plant, and a full and complete statement of all material

facts of record. With a view, therefore, to avoiding unnecessary repetitions, that report is hereby incorporated and made a part hereof, and only such facts are repeated as are deemed necessary to a proper understanding of this report.

The Midvale plant is served by the Union Pacific¹ and the Denver & Rio Grande,² and is engaged in the processing of lead ores and concentrates. The switching within the plant is performed in accordance with an agreement which provides that the expenses incurred and switching charges received shall be divided on the basis of revenue carloads switched for each carrier. The Denver & Rio Grande furnishes and maintains two six-wheel 75-ton switch engines and the Union Pacific furnishes four crews to operate these engines, in four shifts from 7 A. M. to midnight. One engine operates generally in the north yard and the other in the south yard but sometimes both engines operate in the same section of the plant and occasional delays are caused thereby. Other delays are caused by engines standing by while cars are being loaded or unloaded. Instances of such delays are detailed in the prior report.

The inbound traffic consists principally of ore, concentrates, scrap iron, lime rock, coal, coke, sand, and
(23)

miscellaneous supplies. The general practice is to switch all shipments to the assembly yard. All inbound shipments, except coal, coke, and coke breeze are weighed. The preponderance of the inbound shipments are intrastate. For example, during the period from January 1 to March 31, 1944, 2,889 cars were handled into the plant from intrastate origins and 330 cars, or 10.3 percent of the total, from interstate origins. Of these 330 cars, 17 contained miscellaneous supplies which are stated to have been spotted directly at unloading points. The remaining 313 cars contained ore and concentrates moving under a sampling-in-transit arrangement, and were handled as more particularly described hereinafter. The bulk of the outbound traffic during that period consisted of lead bullion, speiss, zinc concentrates, arsenic, and pyrites, all of which, with the exception of lead bullion, move to the assembly yard for weighing. Some ore is reshipped to other smelters. Of the outbound movement, 579 carloads, or 65.2 percent of the total of 875 cars, moved to interstate destinations. A total of 4,094 loaded cars were handled inbound and outbound during the first three months of 1944. It

appears that the volume of interstate shipments at that time was heavier, due to war conditions, than in normal times.

The prior report contains a detailed description of the switching performed in connection with a number of typical movements.

For many years prior to February 25, 1920, switching within the Midvale plant was performed free. Effective on the date mentioned the following provisions were first incorporated in tariff form by respondents:

"Initial or delivery switching at smelters in Colorado and Utah—Delivery of a line Haul carload shipment destined to smelters at * * * Midvale, Utah, will include one movement of commodity within a smelter plant over track scales to and from smelter sampler (or to and

(24)

from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company."

"Intra-plant or internal switching at smelters in Colorado and Utah—From track to track within smelter plant for each additional movement not provided for above \$2.50 per car."

Effective November 27, 1920, the tariff was amended to provide for free switching on line-haul shipments moving to and from the smelter thaw house.

In purported compliance with the principles announced in the original proceeding, 209 I.C.C. 11, the governing tariffs of the Denver and Rio Grande and Union Pacific were amended, effective July 5, 1938, on interstate traffic and June 25, 1938, on intrastate traffic, to provide:

"Garfield, Midvale and Murray, Utah.

- ° (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

- (b) During the winter months when ore or con-concentrates are delivered to the smelting plants in a frozen

condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a (25)

charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirement of, the smelter."

These tariff provisions and charges are in effect at the present time.

The record fails to disclose what charges, if any, were collected under the foregoing tariff provisions and charges. Our findings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where a noncompensatory charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge. The carriers, therefore, will not only be expected to establish reasonable charges for the services for which they do not now maintain any charge but also

(26)

charges which are not less than the cost of the service for those services for which they now publish charges.

Under the terms of the switching agreement between the Denver & Rio Grande and the Union Pacific hereinbefore referred to, the expenses, incurred and switching charges received by the former are apportioned between the two

carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5 (1) of the act is shown.

The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores ascertained by an assay made by the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I.C.C. 255, cited with approval in *Non-ferrous Metals*, 204 I.C.C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry, to which the shipment is consigned will be a reasonable rule to apply in the future. Such ores and concentrates are generally waybilled from point of origin at a rate based on approximate value and after the ore has been sampled the rate is revised in accordance with the value determined and certified to the carrier as the basis on which settlement is made between shipper and consignee.

Under the present tariff provisions inbound or out-bound shipments may be switched without charge between respondents' interchange yards and unloading or loading points in the plant, including movement over scales, provided there

(27)

is no interruption caused by the plant. Cars containing ore or concentrates are switched to the assembly yard and are held in that yard pending instructions from the industry, which is the first interruption encountered that is caused by the requirements of the smelter.² The cars are then weighed and move to either the combined concentrator and sampler in the south yard or to the sampler in the north yard. These shipments are generally unloaded at the sampler and reloaded into other cars after sampling and switched to storage tracks in the assembly yard awaiting further instructions from the plant.³ As previously indicated, the final point of

² Mill sampling of ore is generally accompanied by dumping the entire contents of the car into a bin, from which it is run through the mill and partially crushed, in order that a representative sample may be obtained by automatic mechanical sampling machines. The ore is then returned to another car through a conveyor system. There is no loss of identity of the sampled ore through the transfer from one car to another.

delivery of sampled ore or concentrates depends upon the assay after sampling. A small percentage of the shipments are pipe sampled,* which does not require unloading the car, or sampled in transit prior to arrival at Midvale. These cars are also switched to the assembly yard in the first instance. It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale.

On brief, the respondents differ with respect to the propriety of the switching charges presently in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original proceeding. The Denver & Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from the thaw houses. This contention is based primarily on the ground that certain facilities, such as scales, samplers, and thaw houses are

(28)

necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carries with it the obligation to stand the expense of switching to and from such facilities. However, there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty generally rests upon the shipper to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, due to the fact that there is considerable variation in the value of ores from the same region and even the same mines, and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the smelting industry to make settlement between the seller and buyer on basis of weights and value determined

* Pipe sampling of concentrates is performed by inserting a tube at several different points in the load, and the material extracted is then assayed to determine its value.

by the buyer. The smelters voluntarily agreed to furnish the necessary information and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised "in accordance with the value determined and certified to the carrier by such mill, smelter, or other industry." There is no sound basis for the contention that such a concession increases respondents' common carrier obligations and requires them to establish and operate thaw houses and samplers or as an alternative, to perform all switching and weighing attending the ascertainment of values by the smelters or to contribute in any other way to the expense incurred by the smelters in determining the amounts of money they pay the owner of ore or concentrates.

At the reargument it was contended by the industry that the line-haul rates include compensation for any and all

(29)

services performed within the plant in connection with weighing, assaying, sampling, thawing, and spotting. In this connection it is significant that neither prior to nor subsequent to the date when the so-called "free" switching provision was first published, effective April 16 on intrastate traffic and May 23, 1908, on interstate traffic, was any change made in the transportation rates.

It is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service at their ordinary operating convenience in a continuous movement. Under these circumstances their duty under the line-haul rate in connection with the delivery of such cars does not extend beyond the point of interruption. Any service performed by them beyond such point without proper charge therefor would be unlawful in violation of section 6 of the Interstate Commerce Act.

The industry asserts that miscellaneous supplies move directly from the points of entrance into the plant to the place of unloading without any interference or interruption. No facts have been presented which show the actual handling of that traffic and such information as we have in connection with the other traffic indicates that, except possibly at the warehouse, such traffic could not be placed at the convenience of the carrier without encountering interference from other traffic. We have not been advised as to what commodities are embraced within the description "miscellaneous supplies" but presumably it is in-

tended to cover commodities other than coal, coke, lime rock, and scrap iron and other materials used in the smelting process. Under the circumstances no finding will be made as to that traffic but respondents will be expected to apply thereto the principles announced herein and in other Ex Parte 104 Part II proceedings.

(30)

With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with its industrial operations and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the assembly yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6(7) of the Interstate Commerce Act.

An appropriate order will be entered.

ALLDREDGE, *Commissioner*, dissenting:

For the reasons stated in my dissenting expressions in *Anaconda Copper Mining Co., ... I. C. C. ...*, and *American Smelting & Refining Co., ... I. C. C. ...*, decided concurrently herewith, I am unable to concur in the findings in this report. Those reasons are equally applicable to

(31)

the situation at Midvale, Utah, here considered.

It should be noted that the statement made at page 389 of the report in *Nonferrous Metals*, 204 I. C. C., 319, quoted in my expression in the *American Smelting & Refining Co.* proceeding, specifically names Midvale as one of the points at which ore, concentrates, and matte may be sampled in

transit at no charge in addition to the line haul rates except for a charge on certain out-of-line hauls not designated particularly. Our approval in *Nonferrous Metals, supra*, of the line-haul rates on ores and concentrates in Mountain-Pacific territory was given, therefore, with the full knowledge that no compensation in addition to these rates was received by the railroads for switching services performed in connection with the sampling in transit of these ores and concentrates.

I am authorized to state that Commissioner Mahaffie joins in this expression.

Chairman Barnard being necessarily absent did not participate in the disposition of this proceeding.

Commissioner Aitchison did not participate in the disposition of this proceeding.

The dissenting opinions hereinabove set forth refer for complete explanation to the dissenting opinions in the Anaconda Copper Mining Company case and the American Smelting and Refining Company case. Following are the dissenting opinions in those cases:

(32)

AMERICAN SMELTING AND REFINING CO. CASE

ALLDREDGE, *Commissioner*, dissenting:

The reasons given for the views expressed in my dissenting expression in Anaconda Copper Mining Co., I. C. C., decided concurrently herewith, apply with equal force to the situations at the Garfield, Murray, and Leadville plants here considered.

Further support for the conclusion that the line-haul rates in issue in this proceeding and in the Anaconda case include compensation for the switching services described, particularly as applied to the Murray plant, may be found in our approval in *Nonferrous Metals*, 204 I. C. C. 319, of the line-haul rates as a whole on ores and concentrates in Mountain-Pacific territory notwithstanding our knowledge that no compensation in addition to those rates was received by the railroads for switching services performed in connection with the sampling in transit of these ores and concentrates. Our recognition of this situation is revealed clearly by the following statement on page 389 of the report in that proceeding:

Ore, Concentrates, and matte may be sampled in transit at Murray, Midvale, Salt Lake City, and Sandy.

Utah, Kingman, Ariz., and Hailey, Idaho, at no extra charge except for a charge on certain out-of-line hauls. In the report herein, it is stated that the ownership and maintenance by the Denver & Rio Grande of all standard-gauge tracks within the Leadville plant area constitute a similar situation to that considered in *Sioux City Ry. Co. Switching*, 241 I. C. C. 53, 241 I. C. C. 23, wherein we found that the providing and maintaining by the Sioux City Terminal Railway Company of private sidings for the loading and unloading of the traffic of certain shippers within the plant areas of those shippers

(53)

resulted in a violation of section 6(7) of the act. I do not agree that the two situations are similar. The Denver & Rio Grande tracks within the Leadville plant are used for the same purposes as the tracks on the Anaconda Copper Mining Company land are used by their owner, the Great Northern, which purposes are described in the report in the Anaconda proceeding and my dissenting expression therein. As stated in that dissent, I regard such tracks as a part of the carrier's necessary and legitimate terminal facilities. In this connection, it should be emphasized that in addition to the finding in *Sioux City Ry. Co. Switching supra*, referred to in the report herein, a further finding was made in that case that compensation to the railroad for switching cars to tracks on the industries' property there used for storing, inspecting, cleaning, and repairing cars ~~was~~ included in the line-haul rates. The furnishing and maintenance of the latter tracks within the plant areas of the industries was not condemned. In my opinion, it is the latter situation, and not the one cited by the majority, that is parallel to that here presented.

I am authorized to state that Commissioner Mahaffie joins in this expression.

Chairman Barnard being necessarily absent did not participate in the disposition of this proceeding.

Commissioner Aitchison did not participate in the disposition of this proceeding.

ANACONDA COPPER MINING COMPANY CASE

ALLORICK, Commissioner, dissenting.

I cannot agree that the practices and services here held violative of section 6(7) of the act are actually in contravention of that section or of any other provision of the act.

(34)

The construction reached by the majority that performance by respondent of certain switching services without com-

compensation in addition to the line-haul rates violates section 6(7) seems manifestly erroneous. In my opinion, any doubt that naturally might have been entertained in this connection was removed by the clear and express provisions in the governing tariffs which have been in effect since November, 1941, that initial delivery at this industry's plant of shipments on which road-haul charges have been paid *does include* the particular switching services here condemned. Aside from these tariff provisions, the evidence seems to me entirely convincing that compensation for these services is, and for many years has been, embraced in the line-haul rates. That evidence consists principally of the unquestioned holding out by respondents to perform these services, uncontradicted testimony by competent witnesses that the line-haul rates were established and have been maintained with these services in contemplation, and the undisputed testimony of these witnesses that these rates have included and do include compensation for the services described.

Even if the latter testimony were not in the record, there would be the necessary legal presumption, in the absence of evidence to the contrary, that respondents have received compensation in their line-haul rates for the services here considered. A decision in point in this connection is that of the Supreme Court in *Interstate Com. Com. v. Chicago, B. & Q. R. Co.*, 186 U. S. 321. In that case the line-haul railroads that transported cattle from various points in the United States to delivery points in the Chicago stockyards had, from the opening of the stockyards in 1865 until June 1, 1894, used the tracks of the Union Stock Yards and Transit Company for delivery of the cattle *without charge in addition to the line-haul rates* from the points of origin to Chicago;

(35)

but these line-haul carriers, by tariff provisions effective June 1, 1894, imposed a charge of \$2 per car for delivery services within the stockyards area without any change in the line-haul rates. One of the questions decided by the Court was whether prior to June 1, 1894, compensation for these terminal services had been included in the line-haul rates. Its discussion of this issue was as follows (page 336):

Under these circumstances, in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the ter-

terminal services? That such assumption may not be indulged in results from the ruling in *Covington Stock Yards v. Keith*, 139 U. S. 128, where it was decided that, as for a through rate to a given point, the carrier contracted to deliver at that point, the presumption was that the through rate included adequate compensation for the services rendered at point of delivery. Applying this principle, it results that the through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stockyards.

In the basic report in this general proceeding, 209 I. C. C. 11, we said at page 17:

There is no dispute that delivery at the various industries is covered by the published rate. The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution for that problem. The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable.

(36)

In my opinion, the evidence here clearly establishes that the services incident to the delivery of shipments within the industry plant area are both customary and reasonable. Throughout the entire nonferrous metal industry of the West such a practice has been uniform for more than 50 years. It has not been shown by any evidence of record that the performance by respondents of such terminal services without compensation in addition to that which is included in the line-haul rates is preferential of his industry or prejudicial to any other industry or shipper.

If the foregoing conclusions are sound, it is obvious that the finding by the majority that the furnishing and maintaining by the Great Northern of tracks in the plant area of the Anaconda Copper Mining Company violate section 6 (7) of the act is also unwarranted. It is well settled that it is the use of an industrial or side track by a railroad in the performance of terminal service that determines whether it is a public track or a private track, and not the fact that the industrial or side track may be located on the private property of the industry. *Texas & Pacific v. U. S. F.*, 270 U. S. 66; *St. Louis & San Francisco Railroad Co.*

struction, 170 I. C. C. 565; *Swift & Co. v. Baltimore & O. R. Co.*; 266 I. C. C. 55. The Great Northern's tracks on Anaconda property include tracks used for the storage of cars after unloading until they are wanted again by a shipper, tracks to a car repair facility, and tracks used as a classification and transfer yard. It is apparent that these tracks are the carrier's necessary and legitimate terminal facilities. Equally warranted is the maintenance by the Great Northern of sampler tracks and tracks to and from the thaw shed, as the thawing and sampling there performed are necessary to the determination of the applicable net haul rates.

(37)

I am authorized to state that Commissioner Mahaffie joins in this expression.

Chairman Barnard, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Aitchison did not participate in the disposition of this proceeding.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of October, A. D. 1946.

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon reconsideration of the record in this proceeding concerning the lawfulness and propriety of the terminal services, charges and practices of the Union Pacific Railroad Company and Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), in the receipt and delivery of carload freight at the plant of the United States Smelting Refining and Mining Company at Midvale, Utah, and the Commission having under date of May 14, 1935, made and filed a report, *Propriety of Operating Practices—Terminal Services*, 23 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the Commission having, on the date hereof,

(38)

made and filed an supplemental report containing its findings of fact and conclusions with respect to the services

rendered to the United States Smelting, Refining and Mining Company at Midvale, Utah, which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) violate the Interstate Commerce Act in the particulars as set forth in the above report:

It is ordered, That the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) be, and they are hereby, notified and required to cease and desist, on or before January 31, 1947, and thereafter to abstain, from such unlawful practice.

By the Commission.

(Seal)

W. P. BARTEL
Secretary

(93)

Appendix "D"

Midvale is about 12 miles south of Salt Lake City, Utah, on the Union Pacific¹ and Rio Grande.² The plant is about 100 yards from the Union Pacific station at Midvale and about .5 mile from the Rio Grande station. The plant occupies approximately 25 acres of land and is engaged in the processing of lead or ores and concentrates. Fourteen miles of trackage, comprising 48 separate standard-gauge tracks and serving about 16 locations for the loading and unloading of cars, are located within the plant enclosure. There are also an unspecified number of electrified narrow-gauge tracks in the northern section of the plant yard, operation over which by small electric locomotives owned by the industry does not interfere with operation over the standard-gauge tracks. The industry does not operate a standard-gauge locomotive but does have three locomotive cranes which handle loads and empties on standard gauge tracks in the northern part of the plant.

The industry is served by the Union Pacific and Rio Grande. At the northeast corner of the plant property there are 2 parallel tracks owned and maintained by the

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company, (Wilson McCarthy and Henry Swan, Trustees).

Union Pacific. These tracks, the car capacity of which is not shown of record, but which appear to be 600 to 1,000 feet in length,² are used by the Union Pacific for the receipt and delivery of empty and loaded cars by its line-haul engines, and are hereinafter referred to as the interchange yard. Two parallel leads, also owned and maintained by that carrier, 800 feet long, extend southwestwardly from this interchange yard and merge into a single lead which extends for 150 feet before connecting with an industry-

(94)

owned track near the center of the property. The latter track continues in the same general direction for a distance of 600 feet to a connection with the plant track layout in the southern portion of the yard.

From the Union Pacific leads a number of industry-owned stubbed tracks diverge in the reverse direction or to the north and form what will hereinafter be called the north yard. Track 1, 1,800 feet long, takes off from the southern end of the Union Pacific leads and serves the oxide mill sampler in the approximate center of the north yard. Ore is unloaded at this sampler or into adjacent bins. Track 2, directly east of, and parallel to Track 1, is used for loading sampled ore from the sampler for further movement. This track merges with Track 1 south of the sampler and is 1,000 feet long. Track 3 is directly east of Track 2 and connect with the latter at the south entrance to the sampler. This track, 600 feet in length, is used for dumping into bins miscellaneous commodities, such as roast coke, and lime rock. Tracks 1, 2 and 3 are on trestles. Track 4 takes off the Union Pacific lead just east of Track 1 and serves a storage platform for unloading scrap iron and supplies. It is over 1,900 feet long and, by short diverging tracks, designated Tracks 4-A and 5, serves the high-grade sampling plant and for unloading flotation lead at the wedge roaster, respectively. Track 10 is a short stubbed track just east of Track 4 and serves the plant warehouse. Track 7 diverges from the southern end of the interchange yard referred to above and, together with connecting Tracks 8, 8-A and 9, serves the sintering and roasting mills adjacent to that yard on the west. Track 11 is a short track just west of, and parallel to Track 1, and is also known as the sand hole track. Connecting with the continuation of the Union Pacific lead near the center of the property is Track 12 which extends in the reverse direction to the north for

(95)

about 1,900 feet to the lead refinery, and, in conjunction with connecting Tracks Nos. 14, 15, 18, and 19, serves facilities for loading lead bullion and matte. A water tank, maintained by the industry for respondents' switch engines is located south of the lead refinery. Other tracks, designated 20, 21, 22, and 23, in the western portion of this yard, ranging in length from 500 to 800 feet, are used for storage purposes, and for stock piling coke and other commodities. There are a few tracks in addition to those described but they are relatively unimportant. The total number of tracks is about equally divided between the northern and southern sections of the plant yard and there are no excessive curves or grades.

The Rio Grande's Lark-Bingham branch crosses the plant site from east to west, practically bisecting it. From this branch two carrier-owned parallel tracks diverge towards the southern section of the plant yard in a left curve to connections with industry-owned tracks. One of the Rio Grande tracks is described as a receiving track, is about 800 feet long, and has a capacity of about 13 empty cars. The other is known as the delivery track, where the Rio Grande's line-haul engines cut loose from inbound trains and pick up outbound cars. This track is 1,100 feet long. All tracks except the two Rio Grande tracks and those hereinbefore described as owned by the Union Pacific, are owned and maintained by the industry. The Rio Grande tracks connect with a number of tracks, serving thaw houses, scales, and a combination concentrator and sampler in that portion of the plant hereinafter called the south yard. Tracks 26 to 36, inclusive, are parallel tracks used by both respondents as assembly and classification tracks for general switching and passing and storage tracks. These tracks are herein called the assembly yard, and, except Track 26, range in length from 400 to 1,500 feet. Track 26 is 2,700 feet long from its connection with the Rio

(96)

Grande's receiving track to its terminus. Tracks 34 and 35 also serve the so-called old thaw house in the assembly yard, used for thawing frozen ore for the smelter in the north yard. The plant scales are adjacent to each other on Tracks 28 and 29. About 600 feet south of the scale, on Track 28 there diverges in the reverse direction in the north, Track 42 for a distance of 600 feet, and taking off from this track in the same direction is Track 43, and

long. Just south of the scale on Track 28 diverges in the reverse direction to the north Track 41, 800 feet long. A short stubbed track, designated 40, takes off near the northern end of Track 41. Tracks 40 to 43, inclusive, serve as loading and unloading tracks for the combined concentrator and sampler located east of the assembly yard. Tracks in the assembly yard merge at their southern ends into Track 26 which then serves as a lead, and with six connecting tracks, designated 45 to 50, inclusive, reach the so-called new thaw house and stock piles in the extreme southeastern portion of the south yard. These seven tracks are also used for storage and general switching. Frozen ore for the concentrator and sampler is handled through the new thaw house. Track 44 is a trestle track, 1,600 feet long, and is known as the high line. This track is used for unloading ore and concentrates at the concentrator and sampler and is reached in reverse movement to the north from its connection with Track 45 near the new thaw house.

80 In the District Court of the United States
 For the District of Utah
 Civil No. 1324
 (Title Omitted)

Answer of the United States—Filed June 18, 1947

Now comes the United States of America, one of the defendants in the above action, and for answer to the complaint filed herein, or to so much thereof as it is advised requires answer, answers and says:

1. In answer to paragraphs I, II, III, IV, V, VI, and VII of the complaint, this defendant admits that plaintiffs have standing to bring suit, and waives any defects as to venue.

2. In answer to paragraphs VIII, IX, X, and XI of the complaint, this defendant admits and alleges that the Interstate Commerce Commission, after full and fair hearing in which plaintiffs had the opportunity to and did participate and submit evidence and argument, duly made its report and order of October 14, 1946, set forth as Exhibit C-1 and C-2 to the complaint, to which defendant respectfully refers the Court for a full, true and correct statement of the terms thereof. Defendant alleges that the fact of dissent and expression of views of the dissenting commissioners in this and other proceedings set forth in Exhibits C-2a, C-3, and C-4 are irrelevant and immaterial.

81 terial; and defendant objects to consideration of Exhibit C-5, as being a proposed report of subordinate employees and not constituting the action of the Commission, except as evidence of the fact, which is admitted that the said report was duly filed as a step in the procedural handling of the case by the Commission.

3. In answer to paragraphs XII, XIII, XIV, XV, XVI, and XVII of the complaint, this defendant alleges that the said paragraphs require no answer and should be stricken, as they contain merely argumentative discussion regarding the weight of the evidence and inferences to be drawn therefrom. Defendant alleges that the function of weighing and evaluating the evidence and drawing inferences therefrom is one which is entrusted by law to the Commission.

4. In answer to paragraph XVIII of the complaint, this defendant alleges that the said paragraph, together with Appendix B to the complaint therein referred to, requires no answer, and should be stricken, as containing merely argumentative assertions. Defendant objects to consideration of the said Appendix B, which is referred to in the said paragraph XVIII of the complaint and elsewhere, but is nowhere incorporated in the said complaint by reference, and to Appendix A, which is neither referred to nor incorporated in the said complaint, both of which are for the most part comprised of unsworn statements which were not submitted to the Commission in that form, and of argumentative assertions and expressions of opinion and contentions with respect to matters of law. Defendant alleges that the said Appendix A and Appendix B cannot properly be considered by this Court, except if leave be granted to treat them as constituting a brief on behalf of plaintiffs.

5. Defendant admits the allegations of paragraph XIX of the complaint.

6. Defendant denies the allegations of paragraphs XX, XXI, XXII, XXIII, XXIV, and XXV of the complaint (except that the first two sentences of paragraph XXV are admitted). Defendant further alleges that the

82 aforesaid order of the Interstate Commerce Commission under review in the present suit is not invalid for any of the reasons set forth in the complaint, or for any reason; and defendant alleges that the said order was duly made in accordance with applicable law and upon adequate findings supported by substantial evidence and is not arbitrary or capricious, and was and is in all respects valid and lawful.

7. Except, as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

WHEREFORE, defendant prays that the relief prayed for by plaintiffs be denied and that the suit be dismissed, plaintiffs to pay the costs.

EDWARD DUMBBAULD

Edward Dumbauld

Special Assistant to the Attorney General

Department of Justice

Washington 25, D. C.

JOHN F. SONNETT

Assistant Attorney General

DANIEL B. SHIELDS

United States Attorney

(File Endorsement Omitted)

83

In the United States District Court

In and for the District of Utah

Central Division

Civil No. 1325

(Title Omitted)

Answer of the United States—Filed June 18, 1947

Now comes the United States of America, one of the defendants in the above action, and for answer to the complaint filed herein, or to so much thereof as it is advised requires answer, answers and says:

1. In answer to paragraphs I, II, III, IV, V and VI of the complaint, this defendant admits that plaintiffs have standing to bring suit, and waives any defects as to venue.

2. In answer to paragraphs VII, VIII, IX, X, XI, XII, XIII and XIV of the complaint, this defendant admits and alleges that the Interstate Commerce Commission, after full and fair hearing in which plaintiffs had the opportunity to and did participate and submit evidence and argument, duly made its report and order of October 14, 1946, set forth in Exhibit A to the complaint, to which defendant respectfully refers the Court for a full, true and correct statement of the terms thereof.

3. Defendant denies the allegations of paragraphs XV and XVI of the complaint (except that the first two sentences of the last paragraph of paragraph XVI are admitted). Defendant further alleges that the foregoing

84 order of the Interstate Commerce Commission under review in the present suit is not invalid for any of the reasons set forth in the complaint, or for any reason; and defendant alleges that the said order was duly made in accordance with applicable law and upon adequate findings supported by substantial evidence and is not arbitrary or capricious, and was and is in all respects valid and lawful.

4. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

WHEREFORE, defendant prays that the relief prayed for by plaintiffs be denied and that the suit be dismissed, plaintiffs to pay the costs.

/s/ EDWARD DUMBAULD

Edward Dumbauld

Special Assistant to the Attorney General

Department of Justice

Washington 25, D. C.

JOHN F. SONNETT

Assistant Attorney General

DANIEL B. SHIELDS

United States Attorney

(File Endorsement Omitted.)

85 In the District Court of the United States
For the District of Utah

Civil Action 1324

(Title Omitted)

(File Endorsement Omitted)

Answer of Interstate Commerce Commission—Filed June 18, 1947

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' complaint contained, for answer, thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I.

Answering the allegations of the first seven paragraphs of the complaint, the Commission admits that plaintiff

railroads are common carriers subject to the Interstate Commerce Act; and that plaintiff, American Smelting & Refining Company, is a corporation, that it operates large industrial plants at Garfield and Murray, Utah, and Leadville, Colo., and that this Court has jurisdiction of the action herein and venue of the parties hereto.

II.

86 Answering the remaining allegations of the complaint, the Commission alleges that, upon its own motion, under order entered July 6, 1931, a proceeding was instituted to inquire into and investigate practices of carriers by railroads subject to the Interstate Commerce Act affecting the operating revenues and expenses of such carriers. Part II thereof, dealing with terminal services of Class I rail carriers; following hearings the Commission issued and entered its report in such proceedings on May 14, 1935, such report and decision being designated and referred to as *Ex Parte* No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, (209 I. C. C. 11); that in the course of those proceedings general information was developed as to the general situation, with reference to terminal services of rail carriers as it existed at many plants all over the nation, including plaintiff's plant at Garfield, Utah, that following the general investigation and report of May 14, 1935, and as a part of the general proceeding, the Commission from time to time made specific investigation of particular plants, in most instances those that had been generally considered in the first general investigation, heard such specific cases and decided each one separately under reports and orders supplemental to the main report of May 14, 1935; that on April 4, 1944, the Commission entered its order assigning the instant proceeding for hearing on May 26 and 27, 1944, at Denver, Colo., with respect to terminal services, charges and practices, at the plants of the American Smelting & Refining Company, plaintiff herein, at Garfield and Murray, Utah, and Leadville, Colo., which was designated and considered under the title *Ex Parte* 104, *American Smelting & Refining Company, Practices of Carriers Affecting Operation Revenues or Expenses, Part II, Terminal Services*, Seventy-fifth Supplemental Report of the Commission; that in said hearing a large volume of testimony and other evidence bearing upon matters covered in and by the report and order of the Commission, hereinafter referred to and identified, were submitted to the Commission for consideration, including

testimony and other evidence submitted on behalf of plaintiff herein, by its counsel; that thereafter following the submission of a proposed examiner's report and order, the filing and consideration of exceptions thereto, the Commission entered its report and order by Division 3, on October 1, 1945, (263 I. C. C. 719), Exhibits D-7 and D-8, Appendix "D" to plaintiff's complaint herein, wherein and whereby it was found that the common-carrier transportation service begins and ends, by receipt and delivery, respectively, of carload freight, at the plant yard at the Garfield plant, the hold yard at the Murray plant, and the flat yard at the Leadville plant, and that the service beyond such points is a service which is not the duty of respondent carriers to perform; and that the performance of service beyond the tracks described at the line-haul rates, without compensation, is a violation of section 6(7) of the Interstate Commerce Act, under the finding in said report that the transportation services which it is the duty of the carriers concerned to perform for the American Smelting & Refining Company, plaintiff herein, under the line-haul rates, begins and ends at the described tracks of record, the order entered the same date requiring the carriers concerned to cease and desist from performing such services within said plants without a charge therefor in addition to the line-haul rates and charges; that thereafter plaintiff filed petition with the Commission for reconsideration and oral argument before the entire Commission, which said petition was granted, and thereafter a second report and order (266 I. C. C. 349) was made and entered on October 14, 1946, Exhibits A and B, Appendix "D" to plaintiff's complaint herein, wherein and whereby the findings in the prior report of October 1, 1945, were affirmed; that said order of October 14, 1946, was made effective as of January 21, 1947, which was modified to become effective July 31, 1947.

III.

The Commission further alleges that all the parties to said proceedings were given a full and complete hearing, that the findings and conclusions in said reports and orders were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that in making said report considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission further alleges that said reports and orders were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

IV.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION

By: /s/ ALLEN CRENSHAW

Attorney

/s/ DANIEL W. KNOWLTON

Chief Counsel

Of Counsel

89

Duly sworn to by Carroll Miller

Jurat omitted in printing. (All in italics)

90

In the District Court of the United States

For the District of Utah

Central Division

Civil Action No. 1325

(Title Omitted)

(File Endorsement Omitted)

Answer of Interstate Commerce Commission Filed

June 18, 1947

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' complaint contained, for answer thereto, unto or unto as much or such parts thereof as it is advised that it is material for it to answer, answers and

I.

Answering the allegations of the first seven paragraphs of the Complaint, the Commission admits that plaintiff railroads are common carriers subject to the Interstate Commerce Act; and that plaintiff, United States Smelting, Refining and Mining Company, is a corporation, that it operates a large industrial plant at Midvale, Utah, and that this Court has jurisdiction of the action herein and venue of the parties hereto.

II.

Answering the remaining allegation of the complaint, the Commission alleges that, upon its own motion, under order entered July 6, 1931, a proceeding was instituted to inquire into and investigate practices of carriers by railroads subject to the Interstate Commerce Act affecting the operating revenues and expenses of such carriers, Part II thereof, dealing with terminal services of Class I rail carriers; following hearings the Commission issued and entered its report in such proceedings on May 14, 1935, such report and decision being designated and referred to as *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, (209 I. C. C. 11); that in the course of those proceedings general information was developed as to the general situation, with reference to terminal services of rail carriers as it existed at many plants all over the nation; that following the general investigation and report of May 14, 1935, and as a part of the general proceeding, the Commission from time to time made specific investigation of particular plants, in most instances those that had been generally considered in the first general investigation, heard such specific cases and decided each one separately under reports and orders supplemental to the main report of May 14, 1935; that on March 28, 29, 30, and 31, 1944, such investigation was made at the plant of the United States Smelting, Refining and Mining Company, plaintiff herein, at Midvale, Utah, and on April 4, 1944, the Commission entered its order assigning the instant proceeding for hearing on May 29, 1944, at Denver, Colo., with respect to terminal services, charges and practices, at the plant of the United States Smelting, Refining and Mining Company, plaintiff herein, at Midvale, Utah, which was designated and considered under the title *Ex Parte 104, United States Smelting, Refining, and Mining Company, Practices of Carriers Affecting Operating Rev-*

venues or Expenses, Part II, Terminal Services, Seventy-sixth Supplemental Report of the Commission; that in said hearing a large volume of testimony and other evidence

92 *bearing upon matters covered in and by the report and order of the Commission, hereinafter referred to and identified, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein, by its counsel; that thereafter following the filing of briefs by plaintiffs, herein, and the submission of a proposed examiner's report and order, and the filing and consideration of exceptions thereto, oral argument was made before Division 3, and the Commission entered its report and order by Division 3, on October 1, 1945, (263 I. C. C. 749), wherein and whereby it was found that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of section 6(7) of the Interstate Commerce Act; that thereafter plaintiffs filed petitions with the Commission for reconsideration and oral argument before the entire Commission, which said petitions were granted, and thereafter a second report and order (266 I. C. C. 476) was made and entered on October 14, 1946, wherein and whereby the findings in the prior report of October 1, 1945, were affirmed; that said order of October 14, 1946, was made effective as of January 31, 1947, which was modified to become effective July 31, 1947.*

93

III.

The Commission further alleges that all the parties to said proceedings were given a full and complete hearing; that the findings and conclusions in said reports and orders were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid, and that in making said re-

port it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission farther alleges that said reports and orders were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

IV.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

INTERSTATE COMMERCE COMMISSION

By: /S/ ALLEN CRENSHAW

Attorney

/S/ DANIEL W. KNOWLTON
Chief Counsel
Of Counsel

94 *Duly sworn to by Carroll Miller*
Jurat omitted in printing. (All in italics)

95 In United States District Court
(Civil 1324)

Minute Entry Dated June 18, 1947

On the 18th day of June, 1947, the matter coming on for hearing before the Honorable Orie L. Phillips, Senior Circuit Court Judge of the United States Circuit Court of Appeals for the Tenth Circuit, the Honorable Tillman D. Johnson, United States District Judge for the District of Utah and the Honorable T. Blake Kennedy, United States District Judge for the District of Wyoming, and it was ordered that John F. Finerty, E. B. Evans, Joseph B. Hawley, Allen Crenshaw and Edward Dunbank be admitted to practice in Civil cases No. 1324 and No. 1325. And it was

further ordered that the State of Colorado, The Public Utilities Commission of the State of Colorado, The Colorado Mining Association, The Utah Mining Association, The State of Utah and The Public Service Commission of Utah be allowed to intervene as Party Plaintiffs and they would adopt the pleadings of the complaint filed herein as their pleadings. All of the plaintiffs herein appearing by John E. Finerty, their attorney; The Denver and Rio Grande Western Railroad Company, especially appearing by Otis J. Gibson, its attorney; The Union Pacific Railroad Company especially appearing by Elmer Collins, its attorney; The Colorado Mining Association appearing by Henry S. Sherman, its attorney; The Public Utilities Commission of Colorado appearing by Joseph M. Hawley, its attorney; The State of Colorado appearing by E. B. Evans, its attorney; The Public Service Commission of Utah appearing by Charles A. Root, its attorney; The State of Utah appearing by Grover H. Giles, its attorney; The Utah Mining Association appearing by Mitchell Melich, its attorney; and the defendant, The United States of America appearing by Edward Dunbald, Special Assistant to the Attorney General of the United States, its attorney and The Interstate Commerce Commission appearing by Allen Crenshaw, its attorney, and the matter

96 came on for hearing on the merits. On behalf of the plaintiffs, exhibits were introduced in evidence and admitted, and it was stipulated that the defendants, The United States of America and The Interstate Commerce Commission waived service of summons and the statutory time in which to plead herein. It was further ordered that the plaintiffs would present their arguments in this case and in case No. 1325, and that the defendants would consolidate their arguments in the two cases. The Court heard arguments of plaintiffs' counsel, John F. Finerty, and further arguments in this case was continued until June 19, 1947 at 10:00 o'clock A. M.

97 In United States District Court
(Civil 1325)

Minute Entry Dated June 18, 1947

On this 18th day of June, 1947, the matter came on for hearing before the Honorable Orie L. Phillips, Senior Circuit Court Judge of the United States Circuit Court of Appeals for the Tenth Circuit, the Honorable Tillman D. Johnson, United States District Judge for the District of

Utah and the Honorable T. Blake Kennedy, United States District Judge for the District of Wyoming, and it was ordered that the Utah Mining Association, The Public Service Commission of Utah be allowed to intervene as party plaintiffs and would adopt the same pleadings as the plaintiffs herein. The plaintiff, United States Smelting & Refining Company appearing by Paul B. Cannon and C. W. Wilkens; Company appearing by Otis J. Gibson, its attorney; The its attorneys; The Denver & Rio Grande Western Railroad Union Pacific Railroad Company appearing by Elmer Collins, its attorney; the Utah Mining Association appearing by Mitchell Melich, its attorney; and the Public Service Commission of Utah appearing by Charles A. Root, its attorney; and the defendant, The United States of America appearing by Edward Dunbault, its attorney; and The Interstate Commerce Commission appearing by Allen Crenshaw, its attorney, and the matter came on for hearing on the merits. It was stipulated that the defendants, The United States of America and The Interstate Commerce Commission waived the service of summons and the statutory time in which to answer to the complaint. The Court heard argument of plaintiffs' counsel, Paul B. Cannon until the hour of adjournment whereupon the Court was recessed until Thursday Morning, June 19, 1947 at 10 o'clock A. M.

98

In United States District Court

(Civil 1324)

(Civil 1325)

Minute Entry Dated June 19, 1947

On this 19th day of June, 1947, the continuation of these 3 Judge Courts were resumed and the same judges setting in the causes, and the same attorneys appearing in said causes as noted on June 18, 1947. On behalf of the plaintiffs, the court heard further arguments of plaintiffs' counsel, Otis J. Gibson, Elmer Collins, E. B. Evans, Charles Root and S. D. Huffaker. On behalf of the defendants, the court heard further arguments of defendants' counsel, Edward Dunbault, and Elmer Crenshaw and further rebuttal arguments were given by John F. Finerty and Paul B. Cannon for the plaintiffs. The matter was taken under advisement by the court and plaintiffs given 30 days to file its briefs and the defendants given 20 days thereafter to file their briefs.

99

Clerk's Note

#5 of the Praeceptum requests Records of the Interstate Commerce Commission in American Smelting & Refining Company, *Ex Parte* No. 104, etc., etc.

These are exhibits offered in Case No. 1324, Civil, and are separately certified as Exhibits H-1, H-2, H-3, and H-4, and H-5.

Clerk's Note

#6 of the Praeceptum requests Records of the Interstate Commerce Commission in United States Smelting Refining and Mining Company, *Ex Parte* No. 104, etc., etc.

These are exhibits offered in Case No. 1325, Civil, and is identified and certified as original Exhibit H-1.

100 In the District Court of the United States for
the District of Utah

Central Division

Civil No. 1324

Civil No. 1325

(Titles Omitted)

*Findings of Fact and Conclusions of Law and Remanding
Cases to the Interstate Commerce Commission—
Filed Nov. 14, 1947*

The above entitled causes are before a Statutory 3-Judge Court upon application of the plaintiffs for an order restraining the carrying into effect of an order of the Interstate Commerce Commission with respect to charges for switching services involved in the transportation of ores to and in connection with the operation of the smelters.

In connection therewith the Court makes the following Findings of Fact and Conclusions of Law.

101

FINDINGS OF FACT

(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants.

(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary.

(4) That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority.

CONCLUSIONS OF LAW

(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, ~~and that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court~~ 102 laid down in *Securities & Exchange Commission vs. Chenery Corporation*, . . . U. S. . . ., June 23, 1947, and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this Court.

JUDGE PHILLIPS, concurring:

I join in the foregoing findings and in the disposition to be made of the cases, and desire to further indicate my views.

The Commission found and determined that the "plant yard" at Garfield; the "hold tracks" at Murray; the assembly yard at Midvale, and the "flat yard" at Leadville constituted reasonable points for the delivery of cars of ore and receipt of empty cars at the Smelters; and that line-haul outbound transportation begins and line-haul inbound transportation terminates at those points.

I would find:

(1) That such "plant yard"; "hold tracks", assembly yards, and "flat yard" have the physical characteristics of terminal facilities and are actually used by the railroads as terminal facilities.

(2) That the line-haul transportation properly includes one uninterrupted switch placement, or customary and reasonable terminal services not "in excess of that performed in simple switching or team-track delivery."

The challenged order is predicated on the finding that railroad companies "line-haul rates do not include compensation" for switching services beyond the points where the Commission found line-haul transportation begins and terminates, and that such switching services were performed without compensation in addition to the line-haul rates, and were therefore unlawful.

103 The order requires the railroads to establish reasonable and compensatory charges for all switching services rendered beyond the points where it held the line-haul transportation begins and terminates.

I would further find:

(1) That the only evidence in the record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the points where the Commission found the line-haul transportation begins and terminates, especially uninterrupted movements beyond such points.

(2) That there is no evidence in the record to support a contrary factual conclusion.

(3) That there is no evidence in the record to overcome the presumption that the railroads are not performing services gratuitously and that the tariffs do include compensation for movements beyond the points where the Commission found line-haul transportation begins and terminates.

(See Interstate Commerce Commission vs. Chicago, Burlington & Quincy Ry. Co., 186 U. S. 320.)

The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and

requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

The question whether the Commission might require the railroad companies to file and publish new tariffs that provide separate and distinct charges for transportation services to and from the points where it found line-haul transportation begins and terminates, and additional and separate charges for switching services beyond those points, is not presented, and it is my view that we should not express any opinion with respect thereto.

104 While for the reasons indicated I would hold the order illegal and permanently enjoin its enforcement, I will join in the order of remand.

ORDER

The above entitled causes having been presented to a Statutory 3-Judge Court and having been presented by oral argument and briefs, and the court having filed its Findings of Fact and Conclusions of Law, it is hereby ORDERED:

That said cases be remanded to the Interstate Commerce Commission for such action as it may find justifiable in the premises, and that in the meantime said Commission be temporarily enjoined from requiring its formal order to be carried into force and effect, until further order of this court.

Dated, November 14, 1947.

ORIE L. PHILLIPS
U. S. Circuit Judge

TILLMAN D. JOHNSON
U. S. District Judge

T. BLAKE KENNEDY
U. S. District Judge

(File Endorsement Omitted)

COPY

105

In the District Court of the United States
For the District of Utah
Central Division
(File Endorsement Omitted)

Civil Action
File No. 1524

UNITED STATES SMELTING REFINING AND MINING COMPANY,
a Corporation, THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY, a corporation, and UNION PACIFIC
RAILROAD COMPANY, a corporation,
PLAINTIFFS,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COM-
MERCE COMMISSION,
DEFENDANTS.

Complaint—Filed Oct. 6, 1948

*To the Honorable, the Judges of the District Court of the
United States for the District of Utah:*

The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company and United States Smelting Refining and Mining Company, bring this action against the United States of America and the Interstate Commerce Commission, hereinafter called the "Commission," for the purpose of enjoining, setting aside and annulling an order of the Commission entered May 18, 1948, in proceedings entitled, "United States Smelting Refining and Mining Company, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services." A copy of said order and of the supplemental report therein referred to are attached to this Complaint and marked Appendix "A". Said order of May 18, 1948, refers to and makes a part thereof a certain previous order of the Commission dated October 14, 1946, and a report and order of Division 3 of the Commission dated October 1, 1945. Copies of said order of October 14, 1946, and October 1, 1945, are attached hereto and made a part hereof and are referred to as Appendix "B" and Appendix "C", respectively.

Plaintiff further allege:

I.

106 The jurisdiction of this Court over this action is invoked under and pursuant to the provisions of Section 41, Subdivision 28, and Sections 43-48, inclusive, of Title 28 of the United States Code.

II.

The order hereby sought to be enjoined, set aside and annulled was made in a proceeding instituted by an order of investigation made by the Commission on its own motion as hereinafter set forth. The order relates to transportation and the matters involved arise within the judicial district of this Court, in which judicial district the plaintiff, United States Smelting Refining and Mining Company, has one of its principal offices.

III.

The plaintiff, The Denver and Rio Grande Western Railroad Company, is a corporation of the State of Delaware, the properties of which were, until April 10, 1947, in possession of and being operated by Wilson McCarthy and Henry Swan as Trustees. On said 10th day of April, 1947, the District Court of the United States for the District of Colorado, entered its order terminating said trusteeship and returned the properties of said railroad to The Denver and Rio Grande Western Railroad Company. Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; and (b) either by itself or in connection with other common carriers, also between points throughout the United States and the State of Utah. As a common carrier by railroad as specified in (b), plaintiff is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a), plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) and (4) thereof. Otherwise, as a common carrier by railroad of property as specified in (a), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated 1943.

IV.

The plaintiff, Union Pacific Railroad Company, a corporation of the State of Utah with one of its principal offices at Salt Lake City, Utah. Said plaintiff is a common carrier of property by railroad (a) wholly within the State
107 of Utah between points within that State; (b) either by itself or in connection with other common carriers throughout the United States, also between the State of Utah and points throughout the United States. As a common carrier by railroad as specified in (b), plaintiff is subject to the provisions of said Interstate Commerce Act.

As a common carrier by railroad of property as specified in (a), plaintiff is not subject to the provisions of said Interstate Commerce Act, except to the extent of the provisions of Section 13 (3) and (4) thereof. Otherwise, as a common carrier by railroad of property as specified in (b), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated 1943.

V.

The plaintiff, United States Smelting Refining and Mining Company, is a corporation of the State of Maine, having its principal office at Boston, Massachusetts, and its principal Western Office at Salt Lake City, Utah, and is engaged, among other things, in the smelting of nonferrous ores, concentrates and other nonferrous metal-bearing materials, and, for this purpose, operates a smelter at Milvale, Utah.

As hereinafter more particularly described, the said smelter at Milvale is served by the Denver and Rio Grande and Union Pacific Railroads.

VI.

The defendant, The United States of America, is made a party to this action pursuant to express authority of the Congress of the United States as provided in Sections 43-48, inclusive, to Title 28 of the United States Code.

The defendant, Interstate Commerce Commission, is an administrative Commission existing under and by virtue of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

VII.

The order here sought to be enjoined, set aside and annulled requires the carriers named as plaintiffs herein to cease and desist from certain alleged violations of the Interstate Commerce Act.

108

VIII.

The report of the Commission (209 I. C. C. 11) dated May 14, 1935, and which is made a part of the report and order herein sought to be enjoined, is an order in proceedings instituted by the Commission upon its own motion. The carriers named as plaintiffs herein were parties to that original proceeding, but the United States Smelting Refining and Mining Company, appearing as a plaintiff

herein, was not a party. The basic report announced certain principles which the Commission indicated would be followed in considering the lawfulness of switching services performed by carriers at industrial plants. The principles formulated were general in character and did not cover specific instances of switching and particularly did not cover switching on cars within the plant of the United States Smelting Refining and Mining Company, nor did said basic report involve tariffs specifying switching services to be performed by the carriers at the United States Smelting's plant involved herein.

On March 24, 1944, the Commission issued an order which shortly thereafter was served upon the plaintiff carriers and United States Smelting Refining and Mining Company assigning a hearing before an examiner of the Commission on May 8, 1944, at Denver, Colorado:

"... with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting Refining and Mining Co., at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order of orders as may be appropriate under said Act."

In accordance with such order, a hearing was held on May 29, 1944. At such hearing extensive testimony and exhibits were introduced by the plaintiffs and by the Commission. The Public Service Commission of Utah appeared as an intervenor. A certified transcript of such testimony and certified copies of such exhibits will be offered on the hearing of this Complaint in support thereof. Thereafter the examiners for the Commission prepared a proposed report, to which report the plaintiffs herein duly filed exceptions. On October 1, 1945, Division 3 of the Commission entered its report and order substantially following the proposed report of examiners and thereafter plaintiffs herein duly and regularly filed a petition with the Commission for reopening, reargument and reconsideration of the report and order of Division 3. Pursuant to such petition, the
 109 matter was heard by the full Commission resulting in the said report and order of October 14, 1946, which substantially followed the report and order of Division 3.

IX.

Thereafter suit was filed in this Court, being Civil Case No. 1325, praying for an injunction to set aside said order

of October 14, 1946, and on November 14, 1947, this Court entered its order temporarily enjoining the order of the Commission of October 14, 1946. A copy of the decree of this Court, dated November 14, 1947, is attached hereto as Appendix "D" and made a part hereof. The following findings were made and entered by the Court:

"(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the companies within the respective plants.

"(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

"(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary.

"(4) That in view of the decision of the Commission in Ex Parte No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

"(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under Ex Parte 104 in that the order made is not specifically based upon that authority."

Said decision of this Court was not appealed from nor set aside and such findings remain as this Court's decision upon matters therein decided. All of the parties to this action were parties to said Civil Action No. 1325. No other matters presented to this court in Civil Action No. 1325 were decided, except as above set forth, and except as set forth in the concurring opinion of Judge Phillips. The Commission thereafter entered the following order vacating its order of October 14, 1946.

"ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1947.

UNITED STATES SMELTING, REFINING AND MINING
COMPANY

Ex Parte 104

110 PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES AND EXPENSES

PART II, TERMINAL SERVICES

Upon consideration of the record in the above-entitled proceeding; and for good cause appearing therefor;

It is ordered, That the said proceeding be, and it is hereby, reopened for reconsideration of the report and order entered October 14, 1946, upon the present and existing record.

It is further ordered, That the order entered herein on October 14, 1946, as subsequently modified to become effective on January 1, 1948, be, and it is hereby, vacated and set aside.

By the Commission.

(SEAL)

W. P. BARTEL
Secretary

The Commission took no additional or further evidence and entered its order of May 18, 1948. The Commission based said order of May 18, 1948, hereinabove referred to as Appendix "A", upon the same evidence and record previously taken and upon which it based its findings and order of October 14, 1946.

X.

The findings of violations of the Interstate Commerce Act in the order herein sought to be enjoined are findings confined solely to alleged violations of Section 6 (7) of the Act.

XI.

The applicable tariffs (duly and regularly published) regarding shipments of nonferrous ores, concentrates, other nonferrous metal-bearing materials and supplies used by the smelter in the process of smelting, include the following

provisions with regard to services to be included in the line-haul rate and charges for additional service:

A.

"SAMPLING AT UTAH POINTS WHEN DESTINED VARIOUS UTAH POINTS.

ORE, CONCENTRATES and MATTE, moving under this Tariff, destined Bauer, Garfield, International, Midvale, Murray, Salt Lake City, or West International, Utah, may be routed via Murray, Midvale or Sandy, Utah, or all of these points, to be sampled in transit under the following arrangement:

For first stop at sampler, no charge.

11 For subsequent stops at samplers, no charge for stops, but local rates as shown in Local Utah Freight Bureau Joint Freight Tariff No. 6-E, (F. W. McManus, Agent), (I. C. C. No. 2), will be charged for extra movement between samplers. No further charge will be made for out-of-line haul involved.

Shipments may be billed to, or in care of, a sampler and afterward diverted destination without extra charge." (Item 110 U. P. I. C. C. No. 49566, Tariff No. 2047-L).

B.

"Garfield, Midvale and Murray, Utah.

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE: By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching-line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter." (Item 520-D (L. A. & S. L. Series) Union Pacific Railroad, I. C. C. No. 265.)

C.

"MANNER OF WAYBILLING SHIPMENTS.

Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value."

"RULE FOR DETERMINING RATE UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED.

112 After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays." (Item 40, L. F. Mack, Agent, I. C. C. No. 3, Local Utah Freight Bureau, Tariff No. 6-F).

"WEIGHTS APPLICABLE.

The provisions of T. C. F. B. Tariff No. 58-D, Agent L. E. Kipp's I. C. C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)

Shipments of Ore and/or Ore Concentrates originating at points on the Union Pacific Railroad may be weighed at point of origin without extra charge.

EXCEPTION: Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges." (Item 115 L. F. Mack, I. C. C. No. 3, Local Utah Freight Bureau, Tariff No. 6-F.)

XII.

There is no other public sampler at Midvale than that owned by the United States Smelting Refining and Mining Company.

XIII.

The order of the Commission dated May 18, 1948, is unlawful and void and beyond the power of the Commission to make for the reasons that:

A. It has failed to find that the switching services beyond the "assembly yard" are paid for and that the railroad is compensated for such services under the line-haul rate.

B. The Commission has not followed the mandate of this Court in Civil Case No. 1325.

C. The Commission did not follow the order of this Court mandating said matter for the purpose of taking further evidence or for the purpose of requiring separate and distinct tariffs covering "so-called line-haul rates and plant service."

D. The Commission has disregarded or misconstrued the provisions of the tariff set forth under paragraph XI, A, above.

E. The Commission has disregarded or misconstrued the provisions of the tariff set forth under Paragraph XI, B, above.

F. There is no evidence or any substantial evidence to support Findings Nos. 2, 4, 5, 6, 7, 8, and 9, this allegation being made as to each numbered paragraph said findings separately.

G. The order of the Commission is in violation of the published tariffs in that assuming without admitting that there is interruption of switching movements at the "assembly yard" of some cars or of all the cars investigated by the Commission, there is no provision for, or allowance for

switching of cars "to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement from road-haul point of delivery."

H. There is no provision in said order permitting the movement of cars within the plant under the sampling in transit provision of the tariff set forth under paragraph XI, A, above.

I. Said order fails to distinguish between interruptions "resulting from orders from or requirements of the smelter" and other interruptions.

J. The Commission has erroneously and without evidence to support it, in effect, found that every inactive period of a switching locomotive is an interruption attributable to orders from or requirements of the smelter.

K. Said order is invalid because it in effect holds that interruptions caused by sampling are "requirements of the smelter," when under the published tariffs it was never intended that sampling should be considered as a smelter operation or an interrupted movement "resulting from orders from, or requirements of, the smelter."

L. Said order is contrary to the rules laid down by the Commission in its original proceedings herein (209 I. C. C. 11) wherein the end of the line-haul delivery is "such delivery as is customary and reasonable." (209 I. C. C. 11 at page 17.)

M. While evidence was taken as to the switching of cars and movements of engines and interruptions encountered, there is no evidence as to whether the delays were from switching orders by the smelter, from smelter requirements, or for other reasons.

N. Assuming, without admitting, that there is a general practice of switching cars to the "assembly yard", there is no evidence that such switching movement is from switching orders or requirements of the plant; but on the contrary, there is uncontradicted evidence that
114 interruption of switching at the "assembly yard" is for the convenience of the carrier.

O. In the findings as to the switching movements, there is no finding as to which of said switching movements were included in, or paid for as provided for in subdivisions (a), (b), (c) or (d) in the tariff set forth in paragraph XI, B, above, of this Complaint or which were movements included in line-haul, or the line-haul sampling in transit as provided for in paragraph XI, A, above.

P. Under the order of the Commission herein involved, there is no permission to move cars beyond the "assembly yard" without an intraplant charge, regardless of whether there is any interruption in the switching movement or not.

Q. The evidence submitted on behalf of the defendant, Interstate Commerce Commission, made no distinction between switching movements of intrastate and interstate cars, and the findings of the Commission, if supported at all, may, in fact, be supported only by evidence of switching movements of intrastate cars, which is immaterial.

R. The order of the Commission fails to find that there is any "interruption resulting from orders from, or requirements of, the smelter," and the Commission has therefore completely disregarded the provisions of the tariff set forth under paragraph XI, B of this Complaint.

S. Such order is without any finding or evidence to support such finding that the line-haul rates are less than minimum reasonable rates for the line-haul service, including movement beyond "assembly yard." On the contrary, the only evidence of record shows that the line-haul rates include compensation for movement beyond the "assembly yard" and therefore are not less than minimum reasonable rates.

T. The evidence submitted on behalf of the defendant, Interstate Commerce Commission, with regard to switching movements made no distinction between the switching of cars owned by the United States Smelting Refining and Mining Company, which were admittedly intraplant movements and for which a regular intraplant switching charge was paid, and other switching movements involved in the receipt and delivery of line-haul freight movements.

XIV.

The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

XV.

Plaintiffs have exhausted their administrative remedies before the Interstate Commerce Commission.

WHEREFORE, plaintiffs being without adequate remedy at law, respectfully pray:

FIRST: Upon the filing of this Complaint the presiding judge of this Court shall call to his assistance in the hearing and determination hereof two other judges, of whom at least one shall be a circuit judge.

SECOND: That process may issue against defendants, United States of America and Interstate Commerce Commission, and that due and proper service of such process and of this Complaint be forthwith made by filing a copy of said Complaint in the office of the Secretary of the Interstate Commerce Commission and another copy thereof in the Department of Justice, as provided by law.

THIRD: That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States, a hearing be held, and that thereupon an interlocutory decree be issued staying and suspending said order of the Interstate Commerce Commission pending final hearing and determination of this Complaint.

FOURTH: That upon final hearing of this cause, a permanent injunction issue decreeing that the order of the Interstate Commerce Commission hereinbefore described is beyond the lawful authority of said Commission and wholly null and void; that said order be set aside and annulled; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce the aforesaid order.

116 FIFTH: That this Court grant the respective plaintiffs such other and further relief as may be deemed proper in the premises.

C. W. WILKINS

PAUL B. CANNON

Attorneys for Plaintiff,

United States Smelting, Refining

and Mining Company

A. M. CHENEY,

G. A. MARR,

Of Counsel.

OTIS J. GIBSON
W. Q. VAN COTT
Attorneys for Plaintiff,
The Denver and Rio Grande
Western Railroad Company

BRYANT P. LEVERICH
ELMER B. COLLINS,
Attorneys for Plaintiff,
Union Pacific Railroad Company

117

Appendix "A"

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OF EXPENSES
PART II, TERMINAL SERVICES

Civ. 1325

Decided May 18, 1948

On reconsideration, found that certain switching services performed beyond tracks described of record at plant of the United States Smelting, Refining and Mining Company located at Midvale, Utah, are in excess of the services involved in team track spotting or spotting on an ordinary industrial siding; that such services are plant services; and that the performance thereof without charge in addition to the line-haul rates results in the industry's receiving preferential service not accorded shippers generally in violation of section 6(7) of the Interstate Commerce Act. Prior reports 263 I. C. C. 749 and 266 I. C. C. 476.

Appearances same as in prior reports.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

The proceeding in which the original report herein, *Ex Parte 104, Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, was issued, was a general investigation of industrial plants throughout the country. We there announced certain principles which we indicated

would be followed in considering the propriety and lawfulness of switching services performed by railroads at industrial plants. The supplemental report by Division 3, 263 I. C. C. 749, herein is the seventy-sixth in a long line of such supplemental reports. In that report in connection with terminal services performed by respondents at the plant of the United States Smelting, Refining and Mining Company at Midvale, Utah, Division 3 found that line-haul rates of the Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company (Wilson McCarthy

Ex Parte No. 104, Part II—Sheet 2 and Henry Swan, Trustees)¹ cover the delivery and receipt of carload shipments at a reasonably convenient point; that the assembly yard as described in that report constitutes such a reasonable point for delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company at Midvale under the line-haul rates begins and ends at the described assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of respondents to perform. It further found that the performance of such services beyond the assembly yard without reasonable and compensatory charges in addition to the line-haul rates is a violation of section 6(7) of the act.

Upon petitions of the parties the proceeding was reopened on June 3, 1946, for reargument before, and reconsideration by, the entire Commission. Reargument was heard and on October 14, 1946, we made our report on reconsideration, 266 I. C. C. 476, wherein we made findings identical with those previously made by Division 3, and issued a cease and desist order.

Respondents and the industry instituted a suit in the United States District Court, District of Utah, wherein they asked that our order of October 14, 1946, be set aside and enjoined. Following the convening of the three-judge court

¹ By decree of the District Court of the United States for the District of Colorado entered April 10, 1947, the entire property of the debtor, The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees), was on April 11, 1947, restored to and vested in The Denver and Rio Grande Western Railroad Company. Accordingly, the Commission on May 18, 1948, entered an order substituting The Denver and Rio Grande Western Railroad Company for the debtor as a respondent herein.

pursuant to the Urgency Deficiencies Act and after hearing, the court on November 14, 1947, handed down a decision embracing Civil No. 1325, the cause referred to above, and Civil No. 1324, a similar action brought by the American Smelting & Refining Company and the respondent carriers asking that our order in *American Smelting & Refining Co., Ex Parte* 104, Part II, 263 I. C. C. 719, 266 I. C. C. 349, be set aside and enjoined.

The court did not discuss any of the facts and circumstances surrounding or attending the terminal services at any of the four plants embraced in the two proceedings. Its decision contained conclusions of law and findings of fact applicable in all particulars, and to the same extent to both actions, and to all four plants covered by our orders in the two proceedings. It held in the one decision that our orders in both proceedings were unlawful and temporarily enjoined enforcement thereof on the same grounds

Ex Parte No. 104, Part II—Sheet 3

118 and remanded both proceedings to us for such action as we might find justified. We have, therefore, vacated the orders and reopened both proceedings for reconsideration, but are disposing of them in separate reports.

We have concurrently herewith decided and issued our report on reconsideration in *American Smelting & Refining Co., supra*. The court's conclusions of law and findings of fact are set forth in that report and need not be repeated here. The court justified its remand by the holding of the Supreme Court in *Securities and Exchange Commission v. Chenery Corporation*, 333 U.S. 194.

That decision and the court's findings of fact and conclusions of law indicate that it is necessary for us to clarify the basis of our findings and order in this proceeding as to whether they are based in whole or in part upon provisions of tariffs and/or the sufficiency or insufficiency of the published rates, or entirely upon authority established in *Ex Parte* 104, Part II proceedings.

The court's findings of fact (1) and (5) appear to be directed to the statement in the Commission's report in *American Smelting & Refining Co., supra*, that one of the principal and important facts in issue in that proceeding is whether the line-haul rates include compensation for switching services. The court evidently regards questions of the applicability and compensatory character of rates as being different from the basic questions in issue in *Ex*

Parte 104, Part II proceedings. We are in full accord with that view. The Supreme Court's opinion in *United States v. Wash R. Co.*, 321 U. S. 403, 407, 408, and the later statutory and Supreme Court's decisions in *Corn Products Refining Co. v. United States*, 69 Fed. Supp. 863, 331 U. S. 790, ~~apply~~ support that view, and our conclusions in this report on reconsideration, that such questions are not required to be considered in this proceedings. The question of reasonableness of published rates or of charges that are or may be fixed for performing industrial services can be decided only in a proceeding brought, or an investigation instituted, under different provisions of the act. It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which, in turn, are based solely upon the principles and authority established, with the approval of the Supreme Court, in our original and supplemental reports in *Ex Parte* 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the proposed rates are reasonable or do or do not include compensation for switching within the plant area.

The prior supplemental reports herein are hereby made a part hereof. They contain a full and complete statement of all material facts of record including, among other things, a description of the track lay-out leading to and within the plant, the loading and unloading points, the

Ex Parte No. 104, Part II—Sheet 4

volume of traffic that moves to and from the plant and to and from the several loading and unloading points, and a detailed description of the various switching services performed within the plant by respondents. All witnesses who the industry and respondents desired to call, all evidence they introduced, and employees of the Commission who visually inspected the plant and observed the switching services, were heard. A further hearing would serve no purpose.

In our report on reconsideration in American Smelting & Refining Company, issued concurrently herewith, we have set forth the basic principles announced in the original report in these proceedings, which we have applied in this report on reconsideration and in the prior supplemental reports in this and other *Ex Parte* 104, Part II proceedings. We have also shown in that report that our practice, followed here, of applying those principles to the con-

ditions and services performed at individual plants has been sustained and approved by the Supreme Court. We have also shown therein that transportation by rail carriers does not include any terminal services greater than those rendered shippers generally which we have described as the equivalent of team track or simple switch placement; that there can be no question but that services rendered in many industrial plants are strictly industrial services rather than common-carrier transportation; that some line of demarcation must be drawn where the common-carrier services end and the plant or industrial services begin; that provisions in tariffs specifying industrial services that may be performed by carriers at the line-haul rates do not supersede our authority to declare where transportation ends or prevent a violation of section 6(7) of the act; that the performance of industrial switching at unreasonably low charges is just as much unlawful as the performance of such services without charge; and that it is our duty by applying the principles announced in the original report after an "intensive study of the traffic conditions at the particular plant" to determine where the line of demarcation should be drawn. That is what we did in the prior supplemental reports and do in this report on reconsideration in this proceeding.

We also pointed out in the report on reconsideration in *American Smelting & Refining Co., supra*, that it is well settled that the question of lawfulness under section 6(7) of the act of the performance by carriers of plant spotting services at the line-haul rates depends upon the operating circumstances and conditions obtaining at the industrial plant under consideration. A rather detailed discussion of the several matters referred to above and others together with our reasons therefor and citation of court decisions in support thereof is contained in the report in *American Smelting & Refining Co., supra*, and it is not believed it would serve any purpose to repeat it here.

Upon further reconsideration of all the facts of record we make and substitute for the findings in the prior supplemental reports herein the following findings:

Ex Parte No. 104, Part II—Sheet 5

119 (1) That it is the duty and obligation of the smelter to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation

or duty to perform any switching or other services for the purpose of ascertaining or assisting the smelter in ascertaining such values.

(2) That the assembly yard, as described in the prior supplemental reports herein, is a reasonably convenient point for the delivery and receipt of carload traffic moving to and from the plant of the United States Smelting, Refining and Mining Company..

(3) That the respondents serving the plant move loaded and empty freight cars from said convenient point to points within the plant area, from such points within the plant area to the convenient point, and between points within the plant area.

(4) That the said services rendered within the plant area to and from the assembly yard are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(5) That said services rendered between points within the plant area are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(6) That the services to and from the assembly yard and between points within the plant area are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plant, including the manner in which industrial operations are conducted, all as explained in the prior supplemental reports herein.

(7) That said services rendered between the assembly yard and points in the plant area and between points within the plant area are in excess of those performed in simple switching and team-track delivery, and are industrial or plant services which respondents are not obliged to and should not perform at the line-haul rates.

(8) That common-carrier transportation which respondents are obliged to perform begins and ends at the assembly yard and that all services beyond that point in the plant area are industrial or plant services for which respondents should make reasonably compensatory charges.

(9) That the performance by respondents without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant area beyond the convenient point results in the United States Smelting, Refining and Mining Company receiving a preferential

Ex Parte No. 104, Part II—Sheet 6

service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6(7) of the act.

An appropriate order will be entered.

Commissioner Mahaffie dissents.

Commissioner Alldredge did not participate in the disposition of this proceeding.

120

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of May, A. D. 1948.

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon consideration of the record in this proceeding concerning the lawfulness and propriety of terminal services, charges, and practices of the Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), according as they participate in such services in the receipt and delivery of earload freight at the plant of the United States Smelting, Refining and Mining Company at Midvale, Utah, and the Commission having, on May 14, 1935, made and filed a report, *Propriety of Operating Practices, Terminal Services*, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented; and in its report on reconsideration in *United States Smelting, Refining and Mining Co.*, 266 I. C. C. 476, decided October 14, 1946, affirmed the prior findings of Division 3 in 263 I. C. C. 749, that respondents' line-haul rates do not include services beyond the assembly yard, as described in the report, and that the performance of such services by respondents beyond that yard, without reasonable compensation in addition to the line-haul rates, was unlawful; and

It appearing, That the United States District Court for the District of Utah on November 14, 1947, held the order entered in 266 I. C. C. 476, unlawful, temporarily enjoined enforcement thereof, and remanded the proceeding to the Commission for such action as it might find justified; and

It further appearing, That by order entered May 18, 1948,

the Commission substituted The Denver and Rio Grande Western Railroad Company as respondent for The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees); and

It further appearing, That the Commission having, on the date hereof, made and filed a second report on reconsideration containing its findings of fact and conclusions with respect to the services rendered by respondents to the United States Smelting, Refining and Mining Company at its plant at Midvale, Utah, which report and the aforesaid reports and orders are hereby referred to and made parts hereof, and the Commission having found in said second report on reconsideration that respondents violate the Interstate Commerce Act in the particulars as set forth in the above-mentioned reports:

It is ordered, That the Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company be, and they are hereby, notified and required to cease and desist on or before September 7, 1948, and thereafter to abstain from such unlawful practices.

By the Commission.

W. P. BARTEL
Secretary

(SEAL)

121

Appendix "B"

UNITED STATES SMELTING REFINING AND MINING
COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTS OPERATING
REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Submitted June 27, 1946. Decided October 14, 1946

On reconsideration, findings in prior report, 263 I. C. C. 749, that respondents' line-haul rates do not include services beyond the assembly yard, as described in the report, and that the performance of such services by respondents beyond that yard, without reasonable compensation in addition to the line-haul rates, was unlawful, affirmed.

Appearances same as in prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report herein, 263 I. C. C. 749, decided October 1, 1945, division 3 considered the propriety and lawfulness

of switching services rendered by respondents at the plant of the United States Smelting Refining and Mining Company at Midvale, Utah, and found, in substance, that respondents' line-haul rates do not include compensation for such services beyond certain tracks described of record, and that the performance of such services, without compensation in addition to the line-haul rates, was unlawful.

Upon petitions of the parties, the proceeding was reopened on June 3, 1946, for reargument before, and reconsideration by, the entire Commission. Oral argument has been heard.

The prior report herein contains a detailed description of the plant facilities and track lay-out, the manner in which the traffic is moved to and from the plant, the switching services performed by respondents within the plant, and a full and complete statement of all material facts of record. With a view, therefore, to avoiding unnecessary repetitions, that report is hereby incorporated and made a part hereof, and only such facts are restated as are deemed necessary to a proper understanding of this report.

476

(477)

The Midvale plant is served by the Union Pacific¹ and the Denver & Rio Grande,² and is engaged in the processing of lead ores and concentrates. The switching within the plant is performed in accordance with an agreement which provides that the expenses incurred, and switching charges received, shall be divided on the basis of revenue carloads switched for each carrier. The Denver & Rio Grande furnishes and maintains two six-wheel 75-ton switch engines, and the Union Pacific furnishes four crews to operate these engines, in four shifts from 7 a. m. to midnight. One engine operates generally in the north yard and the other in the south yard, but sometimes both engines operate in the same section of the plant and occasional delays are caused thereby. Other delays are caused by engines standing by while cars are being loaded or unloaded. Instances of such delays are detailed in the prior report.

The in-bound traffic consists principally of ore, concentrates, scrap iron, limerock, coal, sand, and miscellaneous supplies. The general practice is to switch all shipments to the assembly yard. All in-bound shipments, except coal,

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

coke, and coke breeze, are weighed. The preponderance of the in-bound shipments are intrastate. For example, during the period from January 1 to March 31, 1944, 2,889 cars were handled into the plant from intrastate origins and 330 cars, or 10.3 percent of the total, from interstate origins. Of these 330 cars, 17 contained miscellaneous supplies which are stated to have been spotted directly at unloading points. The remaining 313 cars contained ore and concentrates moving under a sampling-in-transit arrangement, and were handled as more particularly described hereinafter. The bulk of the out-bound traffic during that period consisted of lead bullion, speiss, zinc concentrates, arsenic, and pyrites, all of which, with the exception of lead bullion, move to the assembly yard for weighing. Some ore is reshipped to other smelters. Of the out-bound movement, 579 carloads, or 66.2 per cent of the total of 875 cars, moved to interstate destinations. A total of 4,094 loaded cars were handled in-bound and out-bound during the first 3 months of 1944. It appears that the volume of interstate shipments at that time was heavier, owing to war conditions, than in normal times.

The prior report contains a detailed description of the switching performed in connection with a number of typical movements.

For many years prior to February 25, 1920, switching within the Midvale plant was performed free. Effective on the date mentioned, the following provisions were first incorporated in tariff form by respondents:

(478)

Initial or delivery switching at smelters in Colorado and Utah—Delivery of a Line Haul carload shipment destined to smelters at * * * Midvale, Utah, will include one movement of commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company.

Intra-plant or internal switching at smelters in Colorado and Utah—From track to track within smelter-plant for each additional movement not provided for above \$2.50 per car.

Effective November 27, 1920, the tariff was amended to provide for free switching on line-haul shipments moving to and from the smelter thaw house.

Garfield, Midvale and Murray, Utah.

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note.—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per ear for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

In purported compliance with the principles announced in the original proceeding, 209 I. C. C. 11, the governing tariffs of the Denver & Rio Grande and Union Pacific were amended, effective July 5, 1938, on interstate traffic and June 25, 1938, on intrastate traffic, to provide:

These tariff provisions and charges are in effect at the present time.

The record fails to disclose what charges, if any, were collected under the foregoing tariff provisions and charges. Our findings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to

(479)

instances where a noncompensatory charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge. The carriers, therefore, will not only be expected to establish reasonable charges for the services for which they do not now maintain any charge, but also charges which are not less than the cost of the service for those services for which they now publish charges.

Under the terms of the switching agreement between the Denver & Rio Grande and the Union Pacific, hereinbefore referred to, the expenses incurred and switching charges received by the former are apportioned between the two carriers, in the ratio that the number of revenue carloads han-

dled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under section 5 (1) of the act is shown.

The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores, ascertained by an assay made by the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry, to which the shipment is consigned will be a reasonable rule to apply in the future. Such ores and concentrates are generally waybilled from point of origin at a rate based on approximate value and after the ore has been sampled, the rate is revised in accordance with the value determined and certified to the carrier as the basis on which settlement is made between shipper and consignee.

Under the present tariff provisions in-bound or out-bound shipments may be switched without charge between respondents' interchange yards and unloading or loading points in the plant, including movement over scales, provided there is no interruption caused by the plant. Cars containing ore or concentrates are switched to the assembly yard and are held in that yard pending instructions from the industry, which is the first interruption encountered that is caused by the requirements of the smelter. The cars are then weighed and moved to either the combined concentrator and sampler in the south yard, or to the sampler in the north yard. These shipments are generally unloaded at the sampler, and reloaded into other cars after sampling, and switched to storage tracks in the assembly yard awaiting further instructions from the plant.³ As previously in-

(480)

indicated the final point of delivery of sampled ore or concentrates depends upon the assay after sampling. A small per-

³ Mill sampling of ore is generally accomplished by dumping the entire contents of the car into a bin from which it is run through the mill and partially crushed in order that a representative sample may be obtained by automatic mechanical sampling machines. The ore is then returned to another car through a conveyor system. There is no loss of identity of the sampled ore through the transfer from one car to another.

centage of the shipments are pipe sampled, which does not require unloading the car, or are sampled in transit prior to arrival at Midvale. These cars are also switched to the assembly yard in the first instance. It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale.

On brief, the respondents differ with respect to the propriety of the switching charges at present in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original proceeding. The Denver & Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from the thaw houses. This contention is based primarily on the ground that certain facilities, such as scales, samplers, and thaw houses, are necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carries with it the obligation to stand the expense of switching to and from such facilities. However, there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates, or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty generally rests upon the shipper to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, owing to the fact that there is considerable variation in the value of ores from the same region, and even from the same mines, and the consignors in many instances do not have facilities for sampling at origin. It is a custom of the smelting industry to make settlement between the seller and buyer on the basis of weights and value determined by the buyer. The smelters voluntarily agreed to furnish the

* Pipe sampling of concentrates is performed by inserting a tube at several different points in the load and the material extracted is then assayed to determine value.

necessary information, and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised "in accordance with the value determined (481)

mined and certified to the carrier by such mill, smelter, or other industry." There is no sound basis for the contention that such a concession increases respondents' common-carrier obligations, and requires them to establish and operate thaw houses and samplers or, as an alternative, to perform all switching and weighing attending the ascertainment of values by the smelters, or to contribute in any other way to the expense incurred by the smelters in determining the amounts of money they pay the owner of ore or concentrates.

At the reargument, it was contended by the industry that the line-haul rates include compensation for any and all services performed within the plant in connection with weighing, assaying, sampling, thawing, and spotting. In this connection it is significant that neither prior to, nor subsequent to, the date when the so-called "free" switching provision was first published, effective April 16, on intrastate traffic, and May 23, 1908, on interstate traffic, was any change made in the transportation rates.

It is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service at their ordinary operating convenience in a continuous movement. Under these circumstances their duty under the line-haul rate, in connection with the delivery of such cars, does not extend beyond the point of interruption. Any service performed by them beyond such point, without proper charge therefor, would be unlawful in violation of section 6 of the Interstate Commerce Act.

The industry asserts that miscellaneous supplies move directly from the points of entrance into the plant to the place of unloading, without any interference or interruption. No facts have been presented which show the actual handling of that traffic, and such information as we have in connection with the other traffic indicates that, except possibly at the warehouse, such traffic could not be placed at the convenience of the carrier without encountering interference from other traffic. We have not been advised as to what commodities are embraced within the description "miscellaneous supplies," but presumably it is intended to

cover commodities other than coal, coke, limerock, scrap iron, and other materials used in the smelting process. Under the circumstances no finding will be made as to that traffic, but respondents will be expected to apply thereto the principles announced herein and in other *Ex Parte* 104 part II proceedings.

With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both inbound and out-bound, the evidence is convincing that the switching of the plant has to be coordinated with its industrial operations, and that the line-haul carriers could not at
(482)

their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant without interfering with one another, and without encountering interference from intrastate traffic and from the intraplant operations.

We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard, as described herein, constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the United States Smelting Refining and Mining Company, at Midvale, Utah, under the line-haul rates, begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the assembly yard, as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the Interstate Commerce Act.

An appropriate order will be entered.

ALLDREDGE, *Commissioner*, dissenting:

For the reasons stated in my dissenting expressions in *Anaconda Copper Mining Co.*, 266 I. C. C.—, and *American Smelting & Refining Co.*, 266 I. C. C.—, decided concurrently herewith, I am unable to concur in the findings in this report. Those reasons are equally applicable to the situation at Midvale, Utah, here considered.

It should be noted that the statement made at page 387 of the report in *Nonferrous Metals*, *supra*, quoted in my expression in the *American Smelting & Refining Co.* proceeding, specifically names Midvale as one of the points at which

ore, concentrates, and matte may be sampled in transit at no charge in addition to the line-haul rates, except for a charge on certain out-of-line hauls not designated particularly. Our approval in *Nonferrous Metals, supra*, of the line-haul rates on ores and concentrates in mountain-Pacific territory was given, therefore, with the full knowledge that no compensation in addition to these rates was received by the railroads for switching services performed in connection with the sampling in transit of these ores and concentrates.

I am authorized to state the COMMISSIONER MAHAFFIE joins in this expression.

CHAIRMAN BARNARD, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER AITCHISON did not participate in the disposition of this proceeding.

122

Appendix "C"

INTERSTATE COMMERCE COMMISSION UNITED STATES SMELTING, REFINING, AND MINING COMPANY EX PARTE NO. 104 PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES PART II, TERMINAL SERVICES

Submitted May 3, 1945. Decided October 1, 1945

Respondents' line-haul rates found not to include services beyond the assembly yard, as described in the report, and the performance of such services by respondents beyond that yard found to be in violation of section 6 (7) of the Interstate Commerce Act.

Elmer B. Collins, L. T. Wilcox, W. M. Campbell, and W. M. Carey for respondents.

Omar O. Victor for the industry.

Charles A. Root for the Public Service Commission of Utah.

D. H. Williams for Interstate Commerce Commission.

SEVENTY-SIXTH SUPPLEMENTAL REPORT OF THE COMMISSION
DIVISION 3, COMMISSIONERS MILLER, PATTERSON, AND
BARNARD

BY DIVISION 3:

Exceptions were filed by the parties to the report proposed by the examiners, and the case was orally argued.

In the original report in this proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, certain principles were announced which the Commission indicated would be followed in considering the propriety and lawfulness of switching services preformed by respondents at industrial plants. This supplemental report deals with the practice of respondent carriers in performing switching services within the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah.

Midvale is about 12 miles south of Salt Lake City, Utah, on the Union Pacific¹ and Rio Grande.² The plant is about 100 yards from the Union Pacific station at Midvale and about 0.5 mile from the Rio Grande station. The plant

749

(750)

occupies approximately 25 acres of land and is engaged in the processing of lead or ores and concentrates. Fourteen miles of trackage, comprising 48 separate standard-gage tracks and serving about 16 locations for the loading and unloading of cars, are located within the plant enclosure. There are also an unspecified number of electrified narrow-gage tracks in the northern section of the plant yard, operation over which by small electric locomotives, owned by the industry, does not interfere with operation over the standard-gage tracks. The industry does not operate a standard-gage locomotive but does have 3 locomotive cranes which handle loads and empties on standard-gage tracks in the northern part of the plant.

The industry is served by the Union Pacific and Rio Grande. At the northeast corner of the plant property there are 5 parallel tracks owned and maintained by the Union Pacific. These tracks, the car capacity of which is not shown of record, but which appear to be 600 to 1,000 feet in length,³ are used by the Union Pacific for the receipt and delivery of empty and loaded cars by its line-haul engines, and are hereinafter referred to as the interchange yard. Two parallel leads, 800 feet long, also owned and maintained by that carrier, extend southwestwardly from this interchange yard and merge into a single lead which

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

³ A map of record shows all of the tracks involved in this proceeding drawn to scale. The distances used in describing them in this report are based on the scale and are approximate only.

extends for 150 feet before connecting with an industry-owned track near the center of the property. The latter track continues in the same general direction for a distance of 600 feet to a connection with the plant track layout in the southern portion of the yard.

From the Union Pacific leads a number of industry-owned stubbed tracks diverge in the reverse direction or to the north and form what will hereinafter be called the north yard. Track 1, 1,800 feet long, takes off from the southern end of the Union Pacific leads and serves the oxide mill sampler in the approximate center of the north yard. Ore is unloaded at this sampler or into adjacent bins. Track 2, directly east of, and parallel to track 1, is used for loading sampled ore from the sampler for further movement. This track merges with track 1 south of the sampler and is 1,000 feet long. Track 3 is directly east of track 2 and connects with the latter at the south entrance to the sampler. This track, 600 feet in length, is used for lumping into bins miscellaneous commodities, such as roast, coke, and limerock. Tracks 1, 2, and 3 are trestles. Track 4 takes off from the Union Pacific lead just east of track 1 and serves a storage platform for unloading scrap iron and supplies. It is over 1,900 feet long and, by short diverging tracks, designated tracks 4-A and 5, serves the high-grade sampling plant and for unloading flotation lead

(751)

at the wedge roaster, respectively. Track 10 is a short stubbed track just east of track 4 and serves the plant warehouse. Track 7 diverges from the southern end of the interchange yard referred to above and, together with connecting tracks 8, 8-A, and 9, serves the sintering and roasting mills adjacent to that yard on the west. Track 11 is a short track just west of, and parallel to, track 1, and is also known as the sand-hole track. Connecting with the continuation of the Union Pacific lead near the center of the property is track 13 which extends in the reverse direction to the north for about 1,900 feet to the lead refinery, and, in conjunction with connecting tracks Nos. 14, 15, 18, and 19, serves facilities for loading lead bullion and matte. A water tank, maintained by the industry for respondents' switch engines, is located south of the lead refinery. Other tracks, designated 20, 21, 22, and 23, in the western portion of this yard, ranging in length from 300 to 800 feet, are used for storage purposes, and for stock piling coke and other commodities. There are a few tracks in addition to those described but they are relatively unimportant. The

total number of tracks is about equally divided between the northern and southern sections of the plant yard and there are no excessive curves or grades.

The Rio Grande's Lark-Bingham branch crosses the plant site from east to west, practically bisecting it. From this branch 2 carrier-owned parallel tracks diverge towards the southern section of the plant yard in a left curve to connections with industry-owned tracks. One of the Rio Grande tracks is described as a receiving track, is about 800 feet long, and has a capacity of about 13 empty cars. The other is known as the delivery track, where the Rio Grande's line-haul engines cut loose from in-bound trains and pick up out-bound cars. This track is 1,100 feet long. All tracks except the 2 Rio Grande tracks and those hereinbefore described as owned by the Union Pacific, are owned and maintained by the industry. The Rio Grande tracks connect with a number of tracks serving thaw houses, scales, and a combination concentrator and sampler in that portion of the plant hereinafter called the south yard. Tracks 26 to 36, inclusive, are parallel tracks used by both respondents as assembly and classification tracks for general switching and passing and storage tracks. These tracks are herein called the assembly yard, and, except track 26, range in length from 400 to 1,500 feet. Track 26 is 2,700 feet long from its connection with the Rio Grande's receiving track to its terminus. Tracks 34 and 35 also serve the so-called old thaw house in the assembly yard, used for thawing frozen ore for the smelter in the north yard. The plant scales are adjacent to each other on tracks 28 and 29. About 600 feet south of the scale on track 28 there diverges in the reverse direction to the north, track 42 for a distance of 600 feet, and taking off from this track in the same direction is track 43, 500 (752)

feet long. Just south of the scale on track 28, track 41, 800 feet long, diverges in the reverse direction to the north. A short stubbed track, designated 40, takes off near the northern end of track 41. Tracks 40 to 43, inclusive, serve as loading and unloading tracks for the combined concentrator and sampler located east of the assembly yard. Tracks in the assembly yard merge at their southern ends into track 26 which then serves as a lead, and with 6 connecting tracks, designated 45 to 50, inclusive, reach the so-called new thaw house and stock piles in the extreme southeastern portion of the south yard. These 7 tracks

are also used for storage and general switching. Frozen ore for the concentrator and sampler is handled through the new thaw house. Track 44 is a trestle track, 1,600 feet long, and is known as the high line. This track is used for unloading ore and concentrates at the concentrator and sampler and is reached in reverse movement to the north from its connection with track 45 near the new thaw house.

The switching within the plant is performed in accordance with an agreement which provides that the expenses incurred and switching charges received shall be divided on the basis of revenue carloads switched for each carrier. The Rio Grande furnishes and maintains two 6-wheel 75-ton switch engines and the Union Pacific furnishes 4 crews to operate these engines, in 4 shifts from 7 a. m. to midnight. One engine operates generally in the north yard and the other in the south yard. Both engines can operate in the same section of the plant, but occasional delays occur by reason of such operation, as well as by reason of engine standing by while cars are loaded or unloaded. For example, some of the delays reported by our inspectors during the 4-day inspection period from March 28 to March 31, 1944, inclusive, were as follows: On March 28, from 8:42 a. m. to 8:45 a. m., waiting for engine to clear scale; from 10:30 a. m. to 11:10 a. m. waiting for engine to clear scale and blocked from south yard; from 5:28 p. m. to 5:38 p. m. waiting for completion of unloading at ore-crushing mill; from 10:40 p. m. to 10:55 p. m., delayed on high line waiting for cars to be dumped; and from 7:30 p. m. to 12:30 a. m. waiting for cars to be loaded at roasting mill. On March 29, from 10:50 a. m. to 11:05 a. m. blocked from entering south yard; from 5:38 p. m. to 6:20 p. m., delayed awaiting completion of loading on track 1; from 4:20 p. m. to 4:40 p. m., blocked from entering south yard; several other delays in switching due to interference by industry cranes. On March 30, from 9:25 a. m. to 9:45 a. m., blocked by other engine switching south yard; from 7:30 p. m. to 10:46 p. m., waiting for completion of loading of cars on roast hole track. On March 31, from 4:20 p. m. to 4:55 p. m., blocked from entering south yard. Written switching instructions are given to the Union Pacific by the industry, and charges for switching are paid to that carrier. (753)

rier. In the normal switching operations, a switch crew handled on an average of from 4 to 10 cars at a time.

The in-bound traffic consists principally of ore, concentrates, scrap iron, limerock, coal, coke, sand, and miscel-

laneous supplies. The general practice is to switch all shipments to the assembly yard. All in-bound shipments, except coal, coke, and coke breeze are weighed. The preponderance of the in-bound shipments are intrastate. For example, during the period from January 1 to March 31, 1944, 2,889 cars were handled into the plant from intrastate origins and 330 cars, or 10.3 percent of the total, from interstate origins. Of these 330 cars, 17 contained miscellaneous supplies which are stated to have been spotted directly at unloading points. The remaining 313 cars contained ore and concentrates moving under a sampling-in-transit arrangement, and were handled as more particularly described hereinafter. The bulk of the out-bound traffic during that period consisted of lead bullion, speiss, zinc concentrates, arsenic, and pyrites, all of which, with the exception of lead bullion, move to the assembly yard for weighing. Some ore is shipped to other smelters. Of the out-bound movement, 579 carloads, or 66.2 percent of the total of 875 cars, moved to interstate destinations. A total of 4,094 loaded cars were handled in-bound and out-bound during the first 3 months of 1944. It appears that the volume of interstate shipments at the present time is heavier, owing to war conditions, than in normal times.

The following examples depict the switching performed in connection with representative shipments during March 1944:

Car USSSCo 2 was switched loaded from track 8-A, also called the wedge roast track, in intraplant movement to the scale in the south yard, weighed and placed on the track 1 where it was unloaded and the empty car switched to the sand hole track.

Car WP 5933, limerock from Dolomite, Utah, was switched from the Rio Grande delivery track to the assembly yard. This car was received in the plant prior to March 28 and was switched to the scale on March 30. The car then moved to track 1 for unloading and was switched empty to the Rio Grande receiving track.

Car D&RGW 42492, containing ore from Bingham, Utah, was switched from the Union Pacific's interchange yard to the assembly yard on March 28, weighed, and thence to the sampler on track 1 for unloading. The empty car was returned to the scale for weighing light and moved to the Union Pacific yard. The contents of this car, after sampling, were reloaded on track 2 into car UCR 21079. The latter car was then switched to the assembly yard to be

held awaiting disposition instructions. Those instructions are governed by the assay value disclosed by sampling, (754)

more particularly discussed hereinafter. In this instance, the car was ordered switched on March 30 to the high line, track 44, and unloaded at the concentrator.

Car UCR 21403, lead ore from Lark, Utah, was switched to the assembly yard from the Rio Grande's delivery track on March 29, weighed, and switched to track 34 serving the old thaw house. The same day the car was switched to track 44 where it was unloaded and returned to the scale and delivered to the Rio Grande for out-bound movement. This carrier transports all ore to the plant from Lark, averaging 15 to 16 cars daily, except Sunday. These shipments are generally switched to the assembly yard and weighed. The number of cars that can be set for unloading at one time on the high line serving the concentrator is not shown of record, but our inspectors' reports indicate that all of the in-bound cars of Lark ore cannot be spotted for unloading as soon as received, the number of cars switched being limited by the inability of the engine to push more than 8 cars at a time up the grade to the trestle. The remaining cars are generally held in the assembly yard until the high line has been cleared of empties. After unloading, the cars are returned to the scale, weighed, and then move to the Rio Grande receiving track.

Car D&RGW 40320, crude lead and zinc ore from Leadville, Colo., was switched from the Rio Grande delivery track on March 29 to the assembly yard. On March 31 this car was shifted to the scale and then to track 1 for unloading. The empty car was returned the same day to the scale and after weighing to the Rio Grande receiving track.

Car UP 88706, ore from Dillon, Mont., arriving at the plant on March 28 and was switched from the Union Pacific yard to the assembly yard. On March 29 the car was switched to the scale, weighed and moved to the sampler on track 1 and unloaded. On March 30 the car was returned over the scale to the Union Pacific. On the same day the contents of this car were reloaded, after sampling, into car D&RGW 40419 on track 2 and switched to the assembly yard. On April 3 the car was switched to track 1 where the sampled ore was dumped into unloading bins.

Car UP 62255, ore from Basin, Mont., on March 29, was handled the same as car UP 88706, except that the sampled ore, after reloading into car D&RGW 43349 on track 2,

moved to the assembly yard and on April 4 was switched to the concentrator in the south yard.

Car D&RGW 40500, crude ore from Sargent, Colo., sampled in transit at an independent sampler at Murray, Utah, arrived at Midvale on the Rio Grande prior to March 28, and was switched to the assembly yard. On March 30 the car was switched to the scale, weighed, and moved to track 35 and thence to the high line, for unloading at the concentrator. On the same day, the empty car, without (755)

being weighed, was switched to the assembly yard for delivery to the Rio Grande.

Car UP 375051, concentrates from Silverton, British Columbia, Canada, switched from the Union Pacific yard to assembly yard on March 29. The car was weighed on March 30 and moved to track 4 in north yard where the concentrates were pipe-sampled without being unloaded and then on March 31, switched to the ore bin on track 3 and dumped. This car then moved light to the scale and returned to the Union Pacific yard.

Car NYC 135827 arrived empty on March 16 and moved from the Union Pacific yard to the assembly yard for storage and thence, on March 29, to bullion track 14. The car was loaded with lead bullion for Grasselli, Ind., and was switched directly to the Union Pacific yard. Cars for loading lead bullion are not weighed either loaded or light, the cast bullion being weighed over small scales.

Prior to February 25, 1920, respondents accorded free switching from track to track within the plant under the line-haul rate. On that date, the free switching was limited to one movement of a line-haul shipment within the plant over track scales to and from smelter sampler or to and from combination sampler and concentrator,* to an unloading point designated by the smelter. For each additional movement from track to track within the plant the switching charge was \$2.50 per car.

In purported compliance with the principles announced in the original report in this proceeding, respondents' tariffs were amended effective July 5, 1938, on interstate traffic, to provide, in substance, that the line-haul rate would include the movement of loaded cars from the road-haul point of delivery to the switching line to track scales and subsequent delivery to any designated track within

* Effective November 27, 1920, a free switch was also accorded on line-haul shipments moving to and from the smelter thaw house.

the plant which could be accomplished by one continuous switching movement without interruption resulting from orders from, or requirements of, the smelter. A similar provision also applied on the out-bound movement of loaded cars from point of loading to track scales for weighing and subsequent movement to the point of interchange with the road-haul carrier. For each additional movement within the plant, except as hereinafter shown, a charge of \$1 per car was applicable. Ore or concentrates arriving at the smelter in a frozen condition would be switched to and from the thaw house at a charge of 50 cents per car. After thawing, the car could be switched to track scales and thence to the sampler or other designated location within the plant as indicated above. In-bound or out-bound empty cars could be switched to track scales for weighing, on (756)

demand of the smelter, at a charge of 50 cents per car. When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within the plant) will be charged for at \$2.70 per car for each movement. These tariff provisions and charges are in effect at the present time.

Owing to the complex nature of ores produced in the inter-mountain district and shipped to Utah smelters, there has been in effect for many years a sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters by allowing shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then move to the smelter selected by the shipper. During the period from January 1 to March 17, 1944, a total of 34 cars were sampled in transit at Midvale, and reforwarded to other destinations, 9 of which were interstate in character. The sampling-in-transit provision published in D. & R. G. W. tariff I. C. C. No. 757, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Midvale without charge for the first stop at sampler or for out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 565. The propriety and lawfulness of such practices are not within the scope of this proceeding. The tariffs governing the transportation

of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry, to which the shipment is consigned will be a reasonable rule to apply in the future. Such ores and concentrates are generally waybilled from point of origin at a rate based on approximate value, and, after the ore has been sampled, the rate is revised in accordance with the value determined and certified to the carrier as the basis for settlement between shipper and consignee.

Under the present operating arrangements, in-bound or out-bound shipments are switched without charge between respondents' interchange yards and unloading or loading points in the plant, including movement over scales, provided there is no interruption caused by the plant. Cars containing ore or concentrates are switched to the assem-

(757)

bly yard and are held in that yard pending instructions from the plant. The cars are then weighed and move to either the combined concentrator and sampler in the south yard or to the sampler in the north yard. These shipments are generally unloaded at the sampler and reloaded into other cars after sampling and switched to storage tracks in the assembly yard awaiting further instructions from the plant. As previously indicated, the final point of delivery of sampled ore or concentrates depends upon the assay after sampling. A small percentage of the shipments are pipe-sampled, which does not require unloading the car, or sampled in transit prior to arrival at Midvale. These cars are also switched to the assembly yard in the first instance. It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale. If, however, the final destination of the ore is Midvale, a charge of \$1 is made for switching from the sampler to unloading point, plus 50 cents per car for light weighing

on demand of the smelter, and 50 cents per car for movement to and from thaw houses, if such movement is required.

On brief, the respondents differ with respect to the propriety of the switching charges at present in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original report in this proceeding. The Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from thaw houses. This contention is based primarily on the ground that certain facilities, such as scales, samplers, and thaw houses are necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carries with it the obligation to stand the expense of switching to and from such facilities. However, there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier. Moreover, it is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service, and their duty under the line-haul rate in connection with the delivery of such cars does not extend

(758)

beyond the point of interruption. Any service performed by them beyond such point without proper charge therefor would be unlawful in violation of section 6 of the Interstate Commerce Act.

The industry asserts that miscellaneous supplies move directly from the points of entrance into the plant to the place of unloading without any interference or interruption. No facts have been presented which show the actual handling of that traffic and such information as we have in connection with the other traffic indicates that, except possibly at the warehouse, such traffic could not be placed at the convenience of the carrier without encountering interference from other traffic. We have not been advised

as to what commodities are embraced within the description "miscellaneous supplies" but presumably it is intended to cover commodities other than coal, coke, lime-rock, and scrap iron and other material used in the smelting process. Under the circumstances no finding will be made as to that traffic.

With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both in-bound and out-bound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

Under the terms of the switching agreement between the Rio Grande and the Union Pacific hereinbefore referred to, the expense incurred and the switching charges received are divided on the basis of revenue carloads switched for each carrier. This is a pooling arrangement for which no authorization under section 5 (1) of the act is shown.

We find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which is not the duty of the carriers to perform. We further find that the performance of service beyond the yard as described at

(759)

the line-haul rates, without compensation, is a violation of section 6 (7) of the Interstate Commerce Act.

An appropriate order will be entered.

MILLER, *Commissioner*, dissenting in part:

What I have said in my dissenting-in-part expression in *American Smelting and Refining Co.*, 263 I. C. C., decided concurrently herewith, applies with equal force to the situation here involved.

123

Appendix "D."

CLERK'S NOTE:

The attached Appendix D. is a duplicate of the Findings of Fact, etc. requested in No. 7 of the Praceipe.

128 In the District Court of the United States
For the District of Utah.

Civil Action No. 1525

(File Endorsement Omitted)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY;
UNION PACIFIC RAILROAD COMPANY; and
AMERICAN SMELTING & REFINING COMPANY,
PLAINTIFFS,
AGAINST

THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION,
DEFENDANTS.

Complaint—Filed October 11, 1948

TO THE HONORABLE, THE JUDGES OF THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF UTAH:

The Denver and Rio Grande Western Railroad Company; Union Pacific Railroad Company; and American Smelting & Refining Company, bring this action against The United States of America and the Interstate Commerce Commission, hereinafter sometimes called the Commission, for the purpose of enjoining, setting aside and annulling an order of the Commission entered May 18, 1948, in proceedings entitled "American Smelting & Refining Company, *Ex Parte* No. 104, Practices of Carriers affecting Operating Revenues or Expenses, Part II, Terminal Services". A copy of said order* and of the Commission's second report on reconsideration of the same date as such order and therein referred to, are attached to this complaint, marked respectively Exhibit N-1 and Exhibit N-2. The Commission's report also referred to in said order, entitled "*Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11", and hereinafter referred to as the Commission's basic report, is incorporated in and made part of this complaint by reference. The Commission's other reports in the same proceedings also referred to in said

* Such order was originally effective September 7, 1948, but by appropriate order of the Interstate Commerce Commission its effective date has been postponed to December 23, 1948.

order, 263 I. C. C. 719, and 266 I. C. C. 349, are attached to this complaint marked respectively Exhibit N-3 and Exhibit N-4.

Said plaintiffs allege:

I.

The jurisdiction of this Court over this action is under and pursuant to the provisions of Section 41, Subdivision 28, and Sections 43-48, inclusive, of Title 28 of the United States Code.

129

II.

The order hereby sought to be enjoined, set aside and annulled, was made in a proceeding instituted by an order of investigation made by the Interstate Commerce Commission on its own motion as shown by a copy of that order attached to this complaint marked Exhibit N-5. The order relates to transportation and the matters involved arise within the judicial district of this Court, in which judicial district two of the plaintiffs, as hereinafter shown, have their respective principal offices.

III.

The plaintiff, The Denver and Rio Grande Western Railroad Company (hereinafter sometimes referred to as The Denver and Rio Grande), is a corporation of the State of Delaware.

Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; (b) wholly within the State of Colorado between points within that State; and (c) either by itself or in connection with other such common carriers, also between points in each of said States and points throughout the United States. As a common carrier by railroad as specified in (c), plaintiff is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a) and (b), however, plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) (4) of Part I thereof. Otherwise, as a common carrier by railroad of property as specified in (a), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated, 1943, and as a common carrier by railroad as specified in (b), it is subject exclusively to the Public Utilities Act of the State of Colorado, Chapter 137, Volume 4, 35 Colorado Stat. Annotated.

IV.

The plaintiff Union Pacific Railroad Company (hereinafter sometimes referred to as the Union Pacific) is a corporation of the State of Utah, having its principal office at Salt Lake City, Utah.

Said plaintiff is a common carrier of property by railroad (a) wholly within the State of Utah between points within that State; (b) wholly within the State of Colorado between points within that State; and (c) either by itself or in connection with other such common carriers, also between points in each of said States and points throughout the United States. As a common carrier by railroad as specified in (c), plaintiff is subject to the provisions of said Interstate Commerce Act. As a common carrier by railroad of property as specified in (a) and (b), however, plaintiff is not subject to the provisions of said Interstate Commerce Act except to the extent of the provisions of Section 13 (3) (4) of Part I thereof. Otherwise, as a common carrier by railroad of property as specified in (a), plaintiff is subject exclusively to the Public Utilities Act of the State of Utah, Title 76, Utah Code Annotated, 1943, and as a common carrier by railroad as specified in (b), it is subject exclusively to the Public Utilities Act of the State of Colorado, Chapter 137, Volume 4, 35 Colorado Stat. Annotated.

130

V.

The plaintiff American Smelting & Refining Company (hereinafter sometimes called the industry) is a corporation of the State of New Jersey, having its principal office at New York City, New York. As hereinafter more fully described, it is engaged, among other things, in the smelting of non-ferrous ores, concentrates and other non-ferrous metal bearing materials, and operates, among other plants for this purpose, its smelters at Garfield and Murray, Utah, and Leadville, Colorado.

The smelter at Garfield is served by the Denver and Rio Grande and the Union Pacific; the smelter at Murray by the Denver and Rio Grande and Union Pacific; and the smelter at Leadville by the Denver and Rio Grande.

VI.

The defendant The United States of America is sued pursuant to express authority of the Congress of the United States as provided in Sections 43-48, inclusive, of Title 28 of the United States Code.

The defendant, Interstate Commerce Commission is an administrative Commission, existing under and by virtue

of the Interstate Commerce Act, United States Code, Title 49, and is specifically charged with the administration and enforcement of the provisions of said Act.

VII.

The order here sought to be enjoined, set aside and annulled requires the plaintiff carriers to cease and desist from certain alleged violations of the Interstate Commerce Act "in the particulars as set forth in the above-mentioned report", i. e. the Commission's second report on reconsideration, 270 I. C. C. 359, (Exhibit N-2 to this complaint), issued on the same date as such order, and which, together with the Commission's other reports heretofore referred to in Section I of this complaint, is expressly made part of that order.

VIII.

The findings of violations of the Interstate Commerce Act in said supplemental report, are findings confined solely to alleged violations of Section 6(7) of that Act, which section reads as follows:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

IX.

The Commission, prior to its order of May 18, 1948, here sought to be enjoined, and hereinafter referred to as the Commission's new order, had made an order dated October 14, 1946, hereinafter referred to as the Commission's old order, in the same proceeding before it in which the Commission's new order was subsequently made, to wit, *Amer*

ican Smelting & Refining Company, Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Termin Services. A copy of said order of October 14, 1946, is attached to this complaint, marked Exhibit N-6. This old order of the Commission was based upon its report on reconsideration, and on the findings therein, 266 I. C. C. 349, of the same date as its old order. A copy of such report, as already stated, is attached to this complaint, marked Exhibit N-4.

X.

On or about June 16, 1947, the plaintiff herein* filed in this Court, a complaint, which was docketed as Civil Action No. 1324, asking that such old order of the Commission be enjoined on the grounds stated therein, and that pursuant to the provisions of § 47, Title 28, U. S. C. A., a statutory three-judge court be convened to hear and determine such complaint. Thereupon the Honorable Tillman D. Johnson, a judge of this Court, in accordance with the statute, convened such a court consisting, in addition to himself, of the Honorable Orie L. Phillips, Judge of the United States Circuit Court of Appeals for the Tenth Circuit, and the Honorable T. Blake Kennedy, Judge of the District Court of the United States for the District of Wyoming. Final hearing upon such complaint was held before such Court on June 18 and June 19, 1947. Upon such hearing, motions or petitions in writing to intervene in support of the complaint, and stating the grounds for such intervention, were presented by counsel for the State of Colorado, for the Public Utilities Commission of Colorado, for the State of Utah, for the Public Service Commission of Utah, for the Colorado Mining Association and for the Utah Mining Association, and such interventions were allowed by the

* In addition to the plaintiffs herein, there was as plaintiff to the complaint in Civil Action No. 1324, the Bingham & Garfield Railway Company. Since the making of the Commission's new order here sought to be enjoined, however, the Commission, on June 24, 1948, entered an order, Finance Docket No. 16093, *Bingham & Garfield Railway Company Abandonment*, permitting the Bingham & Garfield Railway Company to abandon, as to interstate and foreign commerce, its entire line of railroad from and after July 31, 1948, and permitting said carrier to cancel its tariffs and its concurrences and powers of attorney, theretofore applicable to interstate and foreign commerce, upon the terms and conditions therein specified, and such cancellations have been made by the Bingham & Garfield Railway Company accordingly. Such order of the Interstate Commerce Commission and the report upon which it is based will be offered in evidence upon the hearing of this complaint.

SECOND: That process may issue against defendants United States of America and Interstate Commerce Commission, and that due and proper service of such process and of this complaint be forthwith made by filing a copy of said complaint in the office of the Secretary of the Interstate Commerce Commission and another copy thereof in the Department of Justice, as provided by law.

THIRD: That after not less than five days' notice to the Interstate Commerce Commission and to the Attorney General of the United States a hearing be held, and that thereupon an interlocutory decree be issued staying and suspending said order of the Interstate Commerce Commission pending final hearing and determination of this complaint.

FOURTH: That upon final hearing of this cause a permanent injunction issue decreeing that the order of the Interstate Commerce Commission hereinbefore described is beyond the lawful authority of said Commission and wholly null and void; that said order be set aside and annulled; that its enforcement, execution and operation be forever enjoined and that the United States of America and the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce the aforesaid order.

FIFTH: That this Court grant the respective plaintiffs such other and further relief as may be deemed proper in the premises.

/s/ W. Q. VAN COTT

/s/ BRYAN P. LEVERICH

/s/ PAUL RAY

Attorneys for Plaintiffs

OTIS GIBSON

ELMER B. COLLINS

JOHN F. FINERTY

Of Counsel

October 10, 1948.

Court. Thereafter this Court issued its findings and order of November 14, 1947, temporarily enjoining the Commission's old order, a copy of such findings and order of this Court is attached to this complaint, marked Exhibit N-7.

By oral stipulation between counsel for the plaintiffs herein and counsel for the United States and for the Interstate Commerce Commission, respectively, at an informal conference, with Judge Phillips, a member as aforesaid of the statutory court in Civil Action No. 1324, and a prospective member of the statutory court to be convened to hear the instant complaint,* it was agreed that upon the filing of this complaint, and upon any hearing thereon, and in any order made thereunder, the entire record in Civil Action No. 1324 should be incorporated by reference in any record made on this complaint, with the same force and effect as if physically incorporated in such record.**

XI.

As shown by Exhibit N-7 to this complaint, the order of this Court, temporarily enjoining the Commission's old order of October 14, 1946, made among others, the following findings of fact:

"(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants.

* This informal conference before Judge Phillips, at which such stipulation was entered into, was held on the informal understanding with Judge Phillips, as well as with Judge Johnson and Judge Kennedy, the other members of the statutory court before whom the complaint in Civil Action No. 1324 had been heard and determined, that a statutory court, consisting of the same judges would be convened to hear and determine the instant complaint. Hereafter in this complaint, the term "this Court," will be used as embracing both the statutory court which heard and determined Civil No. 1324, and the statutory court consisting of the same judges, which it is assumed, will be convened to hear and determine the instant complaint, irrespective of whether or not such former and such prospective statutory courts are legally identical.

** Such record in Civil Action No. 1324 includes the complaint therein, the respective answers of the defendants thereto, all evidence taken and all exhibits received upon hearing thereof, all briefs, arguments, motions and other pleadings of the parties thereto, and all findings and orders of the Court therein. Among such exhibits in Civil Action No. 1324 are the transcripts of hearings before the Commission, the proposed reports of its Examiners, all reports and orders of the Commission prior to the order of this Court of November 14, 1947, temporarily enjoining the Commission's old order, and all briefs, petitions and other pleadings before the Commission prior to such order of this Court.

"(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

"(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary."

As further appears from such exhibit, Judge Phillips, while concurring in the unanimous finding of the Court, made additional findings, among which were the following:

"(1) The such 'plant yard', 'hold tracks', 'assembly yard' and 'flat yard' have the physical characteristics of terminal facilities and are actually used by the railroads as terminal facilities.***

"(2) That the line-haul transportation properly includes one uninterrupted switch placement, or customary and reasonable terminal services not 'in excess of that performed in simple switching of team-track delivery.' "

133 As also appears at said exhibit, Judge Phillips in concurring in the unanimous findings of the Court, further stated:

"The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

"The question whether the Commission might require the railroad companies to file and publish new tariffs that provide separate and distinct charges for transportation services to and from the points where it found line-haul transportation begins and terminates,

*** As shown in the preceding portion of Judge Phillips' additional findings, the 'plant yard' referred to is at Garfield, the 'hold tracks' at Murray, the 'assembly yard' at Midvale and the 'flat yard' at Leadville. See Exhibit N-7 to this complaint.

and additional separate charges for switching services beyond those points, is not presented, and it is my view that we should not express any opinion with respect thereto."

XII.

The Commission took no appeal from such order and decree of this Court of November 14, 1947. Thereby the findings of fact upon which this Court based such order and decree became *res adjudicata*, there and thereafter, between the parties to the complaint in Civil Action No. 1324, and as to each of them. Since, as will hereinafter appear, the Commission's new order, here sought to be enjoined, is based upon the same record as was the Commission's old order, temporarily enjoined by the aforesaid order of this Court of November 14, 1947, there is a conclusive presumption that such record upon which the Commission's new order is based, not only is without evidence to support a finding of fact that the line-haul rates *do not include* compensation for the terminal switching services, but that the sole evidence in such record is that the line-haul rates *do contain* such compensation.

XIII.

Although the order of this Court of November 14, 1947, only temporarily enjoined the Commission's order of October 14, 1946, the Commission by an order dated December 5, 1947, wholly vacated and set aside its order of October 14, 1946, and reopened the proceedings before it in which such order had been made.

"* * * for reconsideration of the report and order entered October 14, 1946, upon the present and existing record." (Italics supplied.)

A copy of the Commission's order in this respect is attached to this complaint, marked Exhibit N-8.

Pursuant to such order, the Commission upon such reopening held no further hearings, received no further evidence, nor accorded to the plaintiffs any right to further brief or argument.

XIV.

On May 18, 1948, the Commission thereupon made its new order here sought to be enjoined, based upon its second report on reconsideration, hereinafter called its new report, such new order and new report being, as already stated, attached to this complaint as Exhibits N 1 and N 2. As appears from Exhibit N 2, Commissioner

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 18th day of May, A. D. 1948.

AMERICAN SMELTING & REFINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES OF EXPENSES

PART II, TERMINAL SERVICES

Upon consideration of the record in this proceeding concerning the lawfulness and propriety of terminal services, charges, and practices of the Union Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), and Bingham and Garfield Railway Company, according as they participate in such services in the receipt and delivery of carload freight at the plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., and the Commission having, on May 14, 1935, made and filed a report, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented; and in its report on reconsideration in *American Smelting & Refining Co.*, 266 I. C. C. 349, decided October 14, 1946, affirmed the prior findings of Division 3 in 263 I. C. C. 719, that respondents' line-haul rates do not include services beyond the tracks at those plants as described in the report, and that the performance of such services by respondents beyond those tracks without reasonable compensation in addition to the line-haul rates, was unlawful; and

It appearing, That the United States District Court for the District of Utah on November 14, 1947, held the order entered in 266 I. C. C. 349, unlawful, temporarily enjoined enforcement thereof, and remanded the proceeding to the Commission for such action as it might find justified; and

It further appearing, That by order entered May 18, 1948, the Commission substituted The Denver and Rio Grande Western Railroad Company as respondent for The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees); and

Mahaffie dissented from such new report and Commissioner Alldredge did not participate therein.

As further appears from Exhibit N-2, the Commission in its new report made the following findings in substitution for the findings in its prior supplemental report, i. e., its old report of October 14, 1946, attached as already stated, to this complaint, marked Exhibit N-4. Such findings in its new report are as follows:

"(1) That it is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values.

(2) That the 'plant yard' at the Garfield plant, the 'hold tracks' at the Murray plant, and the 'flat yard' at the Leadville plant, hereinafter referred to collectively as the 'convenient points' as described in the prior supplemental reports herein, are reasonably convenient points for the delivery and receipt of carload traffic moving to and from the plants of the American Smelting & Refining Company.

(3) That the several respondents serving said plants move loaded and empty freight cars from said convenient points to points within the plant areas, from such points within the plant areas to the convenient points, and between points within the plant areas.

(4) That the said services rendered within the plant areas to and from the convenient points are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(5) That the said services rendered between points within the plant areas are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(6) That the services from and to the convenient points and between points within the plant areas are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plants, including the manner in which the industrial operations are conducted, all as explained in the prior supplemental reports.

(7) That the said services rendered between the convenient points and points in the plant areas and between points within the plant areas are in excess of those performed in simple switching and team-track delivery and are industrial or plant services which respondents are not obligated to and should not perform at the line-haul rates.

(8) That the common-carrier transportation which respondents are obligated to perform begins and ends at the convenient points, and that all services beyond those points in the plant areas are industrial or plant services for which respondents should make reasonably compensatory charges.

135 (9) That the performance by respondents without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant areas beyond the convenient points at any and all of the said plants results in the American Smelting & Refining Company receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6(7) of the act."

In addition, as stated, p. 362 of such new report, *the Commission expressly eliminated any finding as to whether the line-haul rates do or do not include compensation for the terminal switching services, and expressly repudiated the finding in its old report that the line-haul rates do not include such compensation.* In this respect the Commission stated with reference to its new order:

"... said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas. We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

XV.

In so expressly eliminating in the making of its new order any finding that the line-haul rates do or do not include compensation for terminal switching services, and in expressly repudiating its former finding that the line-haul

rates do not include such compensation, the Commission thereby deprived its new order of a basic finding of fact essential to support it, since a finding of fact that the line-haul rates do not include compensation for the terminal switching services is essential to the finding of a violation of Section 6 (7), upon a violation of which section the Commission's new order is solely based.

XVI.

That a finding of fact that the line-haul rates do not include compensation for terminal switching services is essential to any finding of a violation of Section 6 (7) of the failure of a carrier to exact charges in addition to the line-haul rates for terminal switching services, is shown by the Commission's own general conclusion of law in its basic report in *Ex Parte* 104, Part II, 209 I. C. C. 11. In such basic report the Commission under the specific heading, "DISCUSSION OF THE APPLICABLE LAW", in construing Section 6 (7) in this respect made its own general conclusion of law that

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its *legal obligation in such operations extends no further than is covered by the compensation it exacts for the services performed.* In other words, the obligation upon the carrier in such circumstances, is *to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes.*" (Italics supplied)

Furthermore, pursuant to this general conclusion of law by the Commission itself, the Commission, in every other finding of a violation of Section 6 (7) and in every other order requiring the respondent carriers to cease and desist from such violation which the Commission has made in supplemental proceedings under *Ex Parte* 104, Part 136 II, with the sole exception of its new order in these supplemental proceedings, has based such findings and order on an express finding of fact that the line-haul rates *did not* include compensation for the terminal switching services there involved. That the Commission made such a finding of fact, expressly appears from the opinions of the Supreme Court in the following cases:

United States v. American S. & T. P. Co., 301 U. S. 402, pp. 406-407, 408;

United States v. Pan-American Petroleum Corp.,
304 U. S. 156, p. 157;
United States v. Wabash R. Co., (*Staley Case*)*
321 U. S. 403, pp. 406, 408.

The only other cases in which the Supreme Court has passed upon the validity of findings and orders of the Commission, under Section 6 (7), are the following:

Goodman Lumber Co. v. United States, 301 U. S. 669.

Smith Corporation v. United States, 301 U. S. 669;

Corn Products Refining Co. v. United States, 331 U. S. 790.

In such cases the Supreme Court filed only memoranda opinions affirming, on the authority of the foregoing decisions of the Supreme Court, the orders of the respective statutory courts in such cases, which had upheld the validity of the Commission's findings and orders therein. It, of course, does not appear from such memoranda opinions of the Supreme Court in these last mentioned cases, what findings of fact were made by the Commission. It does appear, however, from the Commission's reports in the respective cases, that in each case the Commission had made a finding of fact that the terminal switching there involved was not included in the line-haul rates. See as to the *Goodman Lumber Case*, 214 I. C. C. 89, p. 92; as to the *Smith Corporation Case*, 215 I. C. C. 534, p. 536; as to the *Corn Products Refining Co. Case*, 252 I. C. C. 57, p. 76, 266 I. C. C. 181, p. 199. *In no case prior to the Commission's new report and order in this case, has the Commission, as here, expressly disclaimed any finding of fact in this respect, or, as here, expressly repudiated a former finding of fact that the line-haul rates do not include compensation for the terminal switching services.*

* That such a finding of fact had been expressly made by the Commission in all findings of a violation of Section 6(7), and in all orders to cease and desist from such violations, prior to the decision of the Supreme Court in the *Staley Case*, expressly appears from the following statement of the Supreme Court in its opinion in that case, p. 406:

"After a study of the conditions at some two hundred industrial plants to which rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charges by the carriers, The Commission found that the freight rates had not been so fixed as to compensate the carriers for such service, and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs."
(Italics supplied.)

The Commission, by electing to base its new report, findings, and order "upon the present and existing record," thereby left its new finding (2)

"That the 'plant yard' at the Garfield plant, the 'hold tracks' at the Murray plant, and the 'flat yard' at the Leadville plant . . . are reasonably convenient points for the delivery and receipt of carload traffic . . . and its new finding (8)

"That the common carrier transportation which respondents are obligated to perform begins and ends at the convenient points and that all services beyond those points within the plant areas, are industrial or plant services . . ."

without any evidence to support them.

That the "present and existing record" contains no evidence to support the above findings of the Commission, appears from the independent findings made by Judge Phillips in connection with the order of this Court of November 14, 1947, temporarily enjoining the Commission's order, the other members of the Court making no findings in these respects.

The material portions of such independent findings of Judge Phillips, are quoted under Section XI of this complaint, and as there stated, appear in full in Exhibit N-6, hereto.

Aside from Judge Phillips' independent findings, the evidence in these respects in the "present and existing record" is analyzed in detail under Points I and II of the brief filed by the plaintiffs on July 31, 1947 in Civil Action No. 1324, said brief being made, by stipulation previously referred to herein, *ante* p. 5, a part of the record upon this complaint. Moreover, Points I and II from such prior brief of the plaintiffs, are reproduced as Appendix A to the brief filed by the plaintiffs in support of this complaint, and Appendix A to such brief is hereby made a part of this complaint by reference. The Commission's new findings (3), (4), (5), (6) and (7), being related to and dependent upon the Commission's new findings (2) and (8), are likewise without evidence to support them.

XVIII.

The Commission's new finding (8):

"That the common carrier transportation which respondents are obligated to perform begins and ends at the convenient points and that all services beyond those points in the plant areas are industrial or plant serv-

ices for which respondents should make reasonably compensatory charges."

is not only without evidence to support it, as shown in section XVI of this complaint, but is based on two errors of law.

First, that portion of the finding stating

"That the *common carrier transportation* which respondents are obligated to perform begins and ends at the convenient points * * * (italics supplied)

138 is based on an error of law, in that the *terminal switching services* beyond such convenient points, *equally with line-haul services*, constitute *common carrier transportation* which the plaintiff carriers are obligated to perform, whether or not those carriers are bound to perform such switching services without charge in addition to the line-haul rates.

Second, that portion of said finding stating

"* * * that all services beyond those points in the plant areas are industrial or plant services for which respondents should make reasonably compensatory charges."

is based on a further error of law since, as shown by the Commission's own general conclusion of law, p. 29, of its basic report, 209 I. C. C. 11, already referred to, that

"* * * the obligation upon the carrier * * * *is to be measured by the compensation received* and not by any definite duty otherwise placed upon the carriers by the statutes." (Italics supplied.)

and since it must be conclusively presumed under findings (1), (2) and (3) of this Court in Civil Action No. 1324, as set out in Section XI of this complaint, that "upon the present and existing record", the line-haul rates *do include* compensation for the terminal switching services.

XIX.

The Commission's new finding (1)-

"That it is the duty and obligation of the smelters to obtain and certify to the carriers the value of ores for ascertaining freight charges and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values."

is not only without evidence to support it but is based on an error of law. Assuming that it is the duty of the smelters to certify to the carriers the value of ores, it is nevertheless the duty of the carriers to perform the terminal switching

services necessary for this purpose, since it must conclusively be presumed on this record that the carriers have already been paid in the line-haul rates for performing such terminal switching services, and since under the Commission's own general conclusion of law in its basic report as already set out in Section XVI and Section XVII of this complaint

... the obligation upon the carrier * * * is to be measured by the compensation received."

XX.

The duly and regularly published tariffs of the plaintiff carriers, presently effective at Garfield and Murray, Utah, and effective at the time the Commission made its new order, herein sought to be enjoined, and its new report upon which said order is based, read as follows:

A.

"Garfield, Midvale and Murray, Utah.

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE: By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of

switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter." (Item 520-D (L. A. & S. L. Series) Union Pacific Railroad, I. C. C. No. 265.)

B.

"SAMPLING AT UTAH POINTS WHEN DESTINED VARIOUS UTAH POINTS.

ORE, CONCENTRATES and MATTE, moving under this Tariff, destined Bauer, Garfield, International, Midvale, Murray, Salt Lake City, or West International, Utah, may be routed via Murray, Midvale, or Sandy, Utah, or all of these points, to be sampled in transit under the following arrangement:

For first stop at sampler, no charge.

For subsequent stops at samplers, no charge for stops, but local rates as shown in Local Utah Freight Bureau Joint Freight Tariff No. 6-E, (F. W. McManus, Agent), (I. C. C. No. 2), will be charged for extra movement between samplers. No further charge will be made for out-of-line haul involved.

Shipments may be billed to, or in care of, a sampler and afterward diverted destination without extra charge." (Item 110 U. P. I. C. C. No. 49566, Tariff No. 2047-L.)

C.

"MANNER OF WAYBILLING SHIPMENTS.

Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value."

140 "RULE FOR DETERMINING RATE UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED.

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value deter-

mined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays." (Item 40, L. F. Mack, Agent, I. C. C. No. 3, Local Freight Bureau, Tariff No. 6-F.)

WEIGHTS APPLICABLE.

The provisions of T. C. F. B. Tariff No. 58-D, Agent L. E. Kipp's F. C. C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)

Shipments of Ore and/or Ore Concentrates originating at points on the Union Railroad may be weighed at point of origin without extra charge.

EXCEPTION: Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges." (Item 115 L. F. Mack, I. C. C. No. 3, Local Utah Freight Bureau, Tariff No. 6-F.)

XXI.

The duly and regularly published tariffs of the plaintiff carriers presently effective at Leadville, Colorado, and effective at the time the Commission made its new order, herein sought to be enjoined, and its new report upon which said order is based, read as follows:

"Delivery of a line-haul carload shipment destined to smelters at Leadville, Colorado, would include movement of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company."

XXII.

The principal inbound commodities delivered by the plaintiff carriers to the smelters of the plaintiff industry at Garfield, Murray and Leadville, respectively, consist of carload shipments of non-ferrous ores and concentrates and other non-ferrous metal bearing commodities, all of which move under the published and effective tariffs of the plaintiff carriers on graduated rates based on the value of the metal content thereof.

XXIII.

The Commission's conduct of these particular supplemental proceedings in *Ex Parte* 104, Part II, in which both the Commission's new order and the Commission's old order have been made, has from the inception of such supplemental proceedings been arbitrary and superficial. The Commission has wholly ignored or distorted material and uncontradicted evidence, has persistently misrepresented basic contentions of the plaintiffs, and has evaded basic legal issues. The details of the Commission's conduct in this respect, are set out by allegations under Section V, pages 14 to 20, inclusive, of Appendix B, to the complaint in Civil Action No. 1324, which allegations are hereby incorporated in this complaint by reference. Additional allegations of similar conduct by the Commission, subsequent to the order and findings of this Court of November 14, 1947, in Civil Action No. 1324, are set out under sections XII, XIII, XIV of this complaint.

XXIV.

By reason of all of the foregoing, the Commission's order of May 18, 1948, here sought to be enjoined, is without foundation and law, is based on errors of law, is arbitrary and capricious, is in violation of the Interstate Commerce Act, and exceeds the statutory powers of the Commission in, among others, the following respects:

(1) Such order is made without findings requisite to support it and is without any evidence to support such findings, had they been made.

(2) The basic findings upon which such order purports to be made, are without evidence to support them and contrary to the uncontradicted evidence of record.

(3) Such order is based on a fundamental error of law, in that it would require the plaintiff carriers to collect, and the plaintiff industry to pay twice for the same terminal switching services, for which it must be conclusively presumed on the record upon which such order is expressly based, that such carriers have already collected, and such industry has already paid once under the line-haul rates. Such order thereby would violate Section 1(5)(a) of the Act.* Such order, so far as the plaintiff industry is con-

* Section 1(5)(a) provides:

All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for any service rendered or to be rendered shall be deemed to be unlawful.

cerned, would further violate the Fifth Amendment to the Constitution of the United States, in that it would thereby deprive the plaintiff industry of its property without due process of law.

(4) Such order is based on a further fundamental error of law in that such order is without authority under Section 6(7), as construed by the Commission itself in its own general conclusion of law in its basic report in *Ex Parte* 104, Part II, set out in Section XVI of this complaint; further, said order is in violation of the construction placed by the Commission on Section 6(7), in making, pursuant to this general conclusion of law, every other finding of a violation of Section 6(7) and every other order requiring the respondent carriers to cease and desist from such violations, which the Commission has made in all other supplemental proceedings under *Ex Parte* 104, Part II, including
142 such orders of the Commission in such supplemental proceedings under *Ex Parte* 104, Part II, as have come before, and have been affirmed by the Supreme Court, in the cases cited in Section XVI of this complaint.

(5) Such order is based on a further fundamental error of law in that it would require the respondent carriers, in violation of Section 6(7) to depart from the provisions of their published and effective tariffs set out in Sections XX and XXI of this complaint, without any finding by the Commission, and without any evidence to support such finding, that the provisions of such published tariffs violate either Section 6(7) or any other section of the Act.

(6) Such order is based on a further fundamental error of law in that at Leadville it would require the plaintiff carriers, in violation of Section 6(7), to collect charges in addition to the line-haul rates for all terminal switching services beyond the "flat yard" at Leadville, although the published and effective tariffs specifically provide that such switching services are included within the line-haul rates; and in that, at Garfield and Murray, such order would require the plaintiff carriers to collect charges in addition to the line-haul rates for all terminal switching services beyond the "plant yard" at Garfield and the "hold tracks" at Murray, even though such switching services involve no interrupted movement, as defined in the published and effective tariffs, which tariffs provide additional charges for terminal switching services only when interrupted movements, as therein defined, are involved.

(7) Such order is based on a further fundamental error of law in that, in violation of Section 2 of the Act* such order would require the plaintiff carriers to collect charges in addition to the line-haul rates for terminal switching services at Garfield and Murray, incident to the sampling of ores and concentrates to determine their value, where final delivery thereof is made at either of those smelters, although such carriers, under the provisions of their published tariffs for the sampling in transit of such commodities at such smelters, as set out in Section XX of this complaint, perform and are required to perform at such smelters, without charge in addition to the line-haul rates, exactly the same switching services for the same purposes, on the same commodities, originating at the same points under the same line-haul rates, where such commodities, after sampling, are reconsigned for final delivery to other points specified in such tariffs.

(8) Such order, if intended by the Commission to be construed as merely requiring, that line-haul and terminal switching rates be segregated in publication, without necessarily requiring increase in the total combined charges, is invalid under Section 6(7), in that such section
143 confers no such authority upon this Commission; such authority, if any, being conferred by Section 6(1), on which section said order does not purport to be based.

XXV.

WHEREFORE, plaintiffs, being without adequate remedy at law, respectfully pray:

FIRST: Upon the filing of this complaint the presiding judge of this Court shall call to his assistance in the hearing and determination hereof two other judges, of whom at least one shall be a circuit judge.

* Section 2 of the Act reads as follows:

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like, and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

It further appearing. That the Commission having, on the date hereof, made and filed a second report on reconsideration containing its findings of fact and conclusions with respect to the services rendered by respondents to the American Smelting & Refining Company at its plants at Garfield and Murray, Utah, and Leadville, Colo., which report and the aforesaid reports and orders are hereby referred to and made parts hereof, and the Commission having found in said second report on reconsideration that respondents violate the Interstate Commerce Act in the particulars as set forth in the above-mentioned reports: 9

145 *It is ordered.* That the Union Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company, and Bingham and Garfield Railway Company be, and they are hereby, notified and required to cease and desist on or before September 7, 1948, and thereafter to abstain from such unlawful practices.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

146

Exhibit N-2

25103

INTERSTATE COMMERCE COMMISSION

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING

REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Decided May 18, 1948.

On reconsideration found that certain switching services performed beyond the tracks described in the prior reports at the plants of the American Smelting & Refining Company, located at Garfield and Murray, Utah, and Leadville, Colo., are in excess of the services involved in team track or simple switch placement, that such services are plant services, and that the performance thereof without charge in addition to the line-haul rates results in the industry's receiving preferential services not accorded shippers generally in violation of section 6 of the Interstate Commerce Act - Prior reports, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

Appearances as shown in prior reports.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

The proceeding in which the original report herein, *Ex Parte* No. 104, Part II, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, was issued, was a general investigation of industrial plants throughout the country. It covered approximately 200 plants where spotting allowances were paid and numerous other plants where the carriers performed the services, including at least 1 of the 3 plants here considered. The industries investigated had systems of tracks in their plants which varied in extent from a few tracks aggregating only a few hundred feet in length to extensive intricate systems of interlacing tracks many miles in length. We there announced certain principles which we indicated would be followed in determining the propriety and lawfulness of switching services performed by railroads at industrial plants. We did not there undertake to deal with the lawfulness of paying allowances or the performing of services at individual plants, but announced that we would consider such plants separately in subsequent reports.

The supplemental report herein by division 3, hereinafter referred to as the division's report, 263 I. C. C. 719, is the seventy-fifth in a long line of such supplemental re-

359

(360)

ports. Upon petitions of the parties the supplemental proceeding was reopened June 3, 1946, for reargument and reconsideration by the entire Commission, which, on October 14, 1946, rendered its report, 266 I. C. C. 349, hereinafter referred to as the Commission's report, wherein we affirmed the division's report.

The practice of considering individual plants in supplemental reports was adopted by us to avoid the necessity for reiterative reference to the voluminous record obtained in the general investigation and repetitious discussion of the grounds for the principles announced in the original report which have since been approved by the Supreme Court, and to enable us, without undue lengthening of the supplemental reports, to give a comprehensive exposition of the facts and circumstances attending and surrounding the track lay-out and the services performed at each individual plant.

The division's and Commission's prior reports herein are hereby made a part hereof. They deal separately with

each of the plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colo., and contain as to each plant a full and complete statement of all material facts of record, including, among others, a description of the track lay-outs leading to and within the plant, the loading and unloading points, the volume of traffic that moves to and from the plant, and to and from the several loading and unloading points, and a detailed description of the various switching and spotting services performed within each of the plants by respondents.

After considering all of those facts, we found in the prior supplemental reports herein, among other things, that the "plant yard" at the Garfield plant, the "hold tracks" at the Murray plant, and the "flat yard" at the Leadville plant, all as described in the prior reports herein, constitute reasonable points for the delivery and receipt of cars by respondents Union Pacific Railroad Company, The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees)¹ and Bingham and Garfield Railway Company; that the transportation services which it is the duty of respondents to perform under the line-haul rates begin and end at those places; and that the movement of traffic beyond those places is a service which it is not the duty of the carriers to perform.

Respondents and the industry filed an action in the United States Court for the District of Utah seeking to en-
(361)

join and annul our order of October 14, 1946, issued in this proceeding. On November 14, 1947, that court rendered its decision, holding our order to be unlawful, temporarily enjoining the enforcement thereof, and remanding the proceedings therein to us for reconsideration in the light of the court's opinion as stated in its findings of fact and conclusions of law. We have, therefore, vacated and set aside our order of October 14, 1946, and reopened the proceeding for reconsideration in the light of the court's decision.

¹ By decree of the District Court of the United States for the District of Colorado entered April 10, 1947, the entire property of the debtor, The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) was on April 11, 1947, restored to and vested in The Denver and Rio Grande Western Railroad Company. Accordingly, the Commission on May 18, 1948, entered an order substituting The Denver and Rio Grande Western Railroad Company for the debtor as a respondent herein.

As its conclusion of law the statutory court said, "there is no legal basis for the order issued," and it remanded the case to us for further proceedings "upon the basis of evidence to be taken or otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant services."

The court made five findings of fact, namely, (1) "The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants;" (2) that "upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory . . . for the service so rendered;" (3) that "the sole evidence in the record which would justify a finding upon that point is to the contrary;" (4) that "in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered . . . within the respective plants;" and (5) "the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

The court justified its remand by the holding of the Supreme Court in *Securities & Exchange Commission v. Chenery Corporation*, 332 U. S. 194. That decision and the court's findings of facts and conclusions of law stated above indicate that it is necessary for us to clarify the basis for our findings and order particularly as to whether they are based in whole or in part upon provisions of tariffs and/or the sufficiency or insufficiency of the published rates, or entirely upon authority established in *Ex Parte* No. 104, Part II proceedings.

The court's findings of fact (1) and (5) appear to be directed to the statement in the Commission's report that

(362)

"one of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the switching service." The court evidently regards questions of the applicability and compensatory

character of rates as being different from the basic questions in issue in *Ex Parte* No. 104, Part II proceedings. We are in full accord with that view.

The Supreme Court's opinion in *United States v. Wabash R. Co.*, 321 U. S. 403, 407, 408, and the later statutory court and Supreme Court decisions in *Corn Products Refining Co. v. United States*, 69 Fed. Supp. 869, 331 U. S. 790, as hereinafter indicated, amply support that view, and our conclusions in this report on reconsideration, that such questions are not required to be considered and decided in this proceeding. The question of the reasonableness of published rates or of charges that are or may be fixed for performing industrial services can be decided only in a proceeding brought, or investigation instituted, under different provisions of the act. It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in *Ex Parte* No. 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or not include compensation for switching within the plant areas. We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein.

In the original proceeding we said at page 32:

To summarize, it is well settled that carload freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitled a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant or upon a track agreed upon by him and the carriers. * * * It is likewise clear from these same authorities that service beyond such reasonably convenient point is not a service which the carrier is obligated to perform or pay for under its line-haul rates.

And at page 44:

When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of

(363)

that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act.

Generally the payment of allowance for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest.

In that proceeding we used the phrase "equivalent of team track or simple placement" to describe the terminal services rendered to shippers generally in delivery of freight, and the extent of terminal services carriers are obligated to and may perform as a part of their transportation obligation under the line-haul rates. The use of this standard, in determining what is included and excluded from carrier transportation obligations, has definite approval of the Supreme Court, along with other fact elements also used in that determination. This is clearly and concisely stated in *United States v. Wabash R. Co.*, *supra*, 408, 409.

In this, as in its earlier supplemental reports, the Commission has examined the actual conditions of operation at the industrial plant in question, here the Staley plant, and has found these conditions to be similar in type to those held sufficient to support its order in *United States v. American Sheet & Tin Plate Co.*, *supra*, and *United States v. Pan American Petroleum Corp.*, *supra*. It made an extended examination of car movements within the plant area of the Staley Company, which extends for a distance of about two and a quarter miles, includes some forty buildings used in the manufacture of various products, principally from corn and soy beans, and contains approximately 20 miles of track, having 19 points at which freight is loaded or unloaded. It found that inbound cars in the first instance placed upon interchange track, from which they are later spotted at the points of loading and unloading, a service requiring in numerous instances two or more car movements performed by engines and crews regularly and exclusively assigned to it, that the interchange tracks are reasonably convenient points for the delivery and receipt of cars, that the movements between the interchange tracks and the points of loading and unloading are not performed at the carrier's convenience but are "coordinated with the industrial operations of the Staley Company and conform to its convenience" that the service beyond the interchange points is in excess of that involved in switching cars to a team track or ordinary industrial siding or spur and is consequently not a part of the rail service which ends at the interchange tracks.

The method followed by us in this proceeding of considering the conditions and services at individual plants and applying thereto the principles set forth in the original report was sustained by the Supreme Court in the first of (364)

the supplemental report cases it decided, *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, 405, and in the last such case in which there was an opinion, *United States v. Wabash R. Co.*, 321 U. S. 403, 407-408, where it said:

The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered. It is for this reason that the Commission, in carrying into effect the principles announced in *Ex Parte 104*, has found it necessary to proceed to a series of supplemental investigations of the spotting service rendered at particular plants. Accordingly the Commission made no order on the foot of its main report, but following a series of supplemental reports, including the present one, each detailing the facts found as to the spotting service rendered at the particular plant investigated, the Commission has made cease and desist orders, applicable to that service, a number of which this Court has upheld on review. See *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co. v. United States*, 301 U. S. 669; *A. O. Smith Corp. v. United States*, 301 U. S. 669; *United States v. Pan American Petroleum Corp.*, 304 U. S. 156. In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence: *United States v. American Sheet & Tin Plate Co.*, *supra*, 408; *United States v. Pan American Petroleum Corp.*, *supra*, 158; *Interstate Commerce Commission v. Hoboken Mfrs. R. Co.*, 328 U. S. 368, 378 and cases cited.

Line-haul rates apply and must apply under sections 2 and 3 of the Interstate Commerce Act to all shippers alike. They are fixed to cover only transportation by all railroads which they perform as common carriers and include only such terminal services as are rendered to shippers generally, which we have described as being the equivalent of team or simple industrial track placement. There is such a variance between the terminal services required at industrial plants that it is totally impracticable for carriers or for us to fix line-haul rates that fairly compensate them for services at all such plants without some shippers getting much more service than others for the rates they pay. The factual findings in our original report that the practices of carriers as to spotting services, with or without a charge, in addition to the line-haul rates, at industries

in the same section of, or throughout, the country are not consistent, similar or uniform, and that its rates for common-carrier transportation are not fixed to compensate carriers for such services has been accepted and approved by the Supreme Court, *United States v. Wabash R. Co.*, *supra*. The question of custom and practices as to terminal services at the line-haul rates was one of the issues in *Corn Products Refining Co. Terminal Service*, 262 I. C. C. 57, 266 I. C. C. 181. Our finding in that proceeding was sustained by a statutory court in *Corn Products Refining Co. v. United States*, *supra*, and the court's decision was affirmed (365)

per curiam by the Supreme Court, 331 U. S. 790. The statutory court in that proceeding said:

The other purpose for which plaintiff appears to have intended its proffered evidence was to show that the standards established by the Commission in Ex Parte 104 were erroneous because established on the basis of an inadequate investigation of the practice with reference to spotting services. While an administrative agency should not impose rules based on an inadequate investigation of a problem, it should also, in a case of this sort, not be compelled to re-litigate the basic issues in each supplementary proceeding brought to enforce the rules in situations where violations are found to occur. If this were a case of first impression, this court would be inclined to scrutinize the record in the original proceeding and the evidence which the plaintiff wishes to introduce. But because of the fact that the Supreme Court has already reviewed the Commission's report and has approved the standards established therein, this court must hold that the original extensive investigation by the Commission of the problem of spotting services was fair and that the standards determined therein were based upon sufficient evidence, and that the Commission's duty in each supplementary proceeding is merely to apply the aforesaid standards to the traffic conditions found to exist at any particular plant where spotting services are involved.

The courts' decisions in *Corn Products Refining Co. v. United States*, *supra*, were entered since our reports in this proceeding. The agent that published the tariffs there involved and a railroad traffic official testified that the published line-haul rates provided for the switching services then being rendered by the carriers and that the rates included compensation therefor. That testimony was not controverted. We rejected it, quoting some of the general principles announced in the original proceeding. In the statutory court, plaintiffs, in their complaint and briefs and on oral presentations and in their brief in opposition to the motion to affirm on appeal to the Supreme Court stressed the importance of that evidence as one of its principal grounds for reversal of our report. Both courts obviously considered such grounds as insufficient for the re-

versal of the Commission's order apparently for the reason stated in the quotation next above "that the Commission's duty in each supplementary proceeding is merely to apply the aforesaid standards to the traffic conditions found to exist at any particular plant where spotting services are involved."

There can be no question but that the services rendered within many industrial plants, as is the case in the three plants here considered, are strictly industrial services rather than common-carrier transportation. Some line of demarcation must be drawn where the common-carrier services end and the plant or industrial services begin. It is our duty by applying the principles announced in the original proceeding, which have been fully approved by the Supreme Court, after an "intensive study of the traffic conditions at the particular plant," to determine where (366)

that line should be drawn. That is what we did in the prior reports and do in this report in this proceeding. It is well settled we believe that the question of lawfulness under section 6 (7) of the performance by carriers of plant-spotting services included in the line-haul rates depends upon the operating circumstances and conditions obtaining at the industrial plant under investigation, *United States v. Wabash R. Co., supra*. The decision in the case just cited sustained our report and order in *A. E. Staley Mfg. Co. Terminal Allowance*, 245 I. C. C. 383, where we found that the performance of spotting services at the Staley plant at the line-haul rates was unlawful and refused to permit the carriers to cancel their separate charge (\$2.50 a car established because of our finding in a prior report, 215 I. C. C. 656) for spotting services. In its opinion, the Supreme Court, in referring to the fact that the lower court had misunderstood a conclusion of law in our report, said:

If the Commission's reference, in its conclusion of law to "a preferential service not accorded to shippers generally" means more than the statement in the fifth finding of fact that the service is "in excess of that rendered shippers generally in the receipt and delivery of traffic on team tracks," it is obviously irrelevant to the present proceeding. For it could not serve to foreclose the legal conclusion to be drawn from the fifth finding that the free performance of the spotting services at the Staley plant is in violation of section 6 (7) because of the traffic conditions found to prevail there.

All witnesses which the industry and respondents desired to call, all evidence which they introduced, and employees of the Commission who visually inspected the plant and observed the switching operations for several days

were heard. A further hearing would serve no purpose as the record contains a full and complete statement and description of all material facts appertaining to and the reasons for all services actually performed by respondents at each plant. This was impliedly conceded by all parties as no request for a further hearing to introduce additional evidence was made. In our prior reports herein we applied, and we here apply, the principles announced in the original report to those facts and the conclusions and findings set forth in this report are reached strictly in accord with the established practice in proceedings in *Ex Parte* No. 104, Part II, which has consistently been approved by the Supreme Court.

As shown in the prior supplemental reports herein to the extent described therein the tariffs applicable at two of the plants provided that the line-haul rates include some spotting services and also provide charges for service in excess of such services. In argument before us counsel for the industry contended that the tariffs superseded our authority to declare when transportation ends, urging that it would not be violative of section 6 (7) of the act for car-

(367)

riers to perform the services at the rates and charges set forth in the tariffs. The same, or much the same, contention has been made before and dismissed without merit in *Ex Parte* No. 104, Part II proceedings. *American Sheet & Tin Plate Co. v. United States*, *supra*, page 406; *Elgin, J. & E. Ry v. United States*, 18 Fed. Supp. 19, 20-23. The question in these proceedings is not one of rate applicability. If it were, the carriers could avoid complying with our findings as to where the transportation services begin and end by changing their tariffs. It would be in their power to decide for themselves what plant services they will and will not perform for individual industries without charge and enable them to nullify our authority which consistently has been sustained by the Supreme Court.

In the Commission's report we said:

Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge, but also charges which are not less than the full cost of the service for those services for which they now publish charges.

We do not intend by the above statement to say definitely that the charges now in effect are unreasonably low because that question is not before us, but in instances where that may be the case it is clear in view of the findings herein, that the above statement is sound and we hereby affirm it.

Upon further consideration of all the facts of record we make and substitute for the findings in the prior supplemental report herein the following findings:

(1) That it is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values.

(2) That the "plant yard" at the Garfield plant, the "hold tracks" at the Murray plant, and the "flat yard" at the Leadville plant, hereinafter referred to collectively as the "convenient points" as described in the prior supplemental reports herein, are reasonably convenient points for the delivery and receipt of carload traffic moving to and from the plants of the American Smelting & Refining Company.

(3) That the several respondents serving said plants move loaded and empty freight cars from said convenient points to points within the plant areas, from such points within the plant areas to the convenient points, and between points within the plant areas.

(368)

(4) That the said services rendered within the plant areas to and from the convenient points are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(5) That the said services rendered between points within the plant areas are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

(6) That the services from and to the convenient points and between points within the plant areas are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plants, including the manner in which the industrial operations are conducted, all as explained in the prior supplemental reports.

(7) That the said services rendered between the convenient points and points in the plant areas and between points within the plant areas are in excess of those performed in simple switching and team-track delivery and are industrial or plant services which respondents are not obligated to and should not perform at the line-haul rates.

(8) That the common-carrier transportation which respondents are obligated to perform begins and ends at the convenient points, and that all services beyond those points in the plant areas are industrial or plant services for which respondents should make reasonably compensatory charges.

(9) That the performance by respondents without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant areas beyond the convenient points at any and all of the said plants in the American Smelting & Refining Company receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6(7) of the act.

An appropriate order will be entered.

COMMISSIONER MAHAFFIE dissents.

COMMISSIONER ALLDREDGE did not participate in the disposition of this proceeding.

147

Exhibit N-3

CLERK'S NOTE:

The attached Exhibit N-3 is a duplicate of Exhibit C-3 attached to Complaint No. 1324 and requested in No. 1 of the Praeipie.

148

Exhibit N-4

CLERK'S NOTE:

Exhibit N-4 is a duplicate of Exhibit C-2 attached to the Complaint in Civil 1324, as requested in No. 1 of the Praeipie.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of July, A. D., 1931

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND EXPENSES

Sections 12 and 15(a) of the interstate commerce act being under consideration, and the commission desiring to know whether certain practices of carriers by railroad subject to the act will affect operating revenues or expenses are lawful and consistent with economical and efficient management, and to have full and complete information necessary to perform its duties; all with a view to making such order or orders or findings of fact as may be appropriate under the interstate commerce act:

It is ordered. That the commission on its own motion and without formal pleading, enter upon a proceeding of inquiry and investigation into and concerning practices of carriers by railroad subject to the interstate commerce act which affect operating revenues or expenses;

It is further ordered. That copies of this order be served upon all common carriers by railroad subject to the interstate commerce act; and that such carriers be made respondents to this proceeding;

And it is further ordered. That this proceeding be assigned for hearing at such times and places and with respect to such practices as the commission may hereafter direct.

By the Commission.

GEORGE B. MCGINTY
Secretary

(SEAL)

CLERK'S NOTE:

The attached Exhibit N-6 is a duplicate of the Exhibit C-1 attached to the original complaint in No. 1324 and requested in No. 1 of the Praecipe.

151

Exhibit N-7

CLERK'S NOTE:

The attached Exhibit N-7 is a duplicate of the Findings of Fact, etc., as requested in No. 7 of the Praecipe, and of Exhibit D as attached to the Complaint in No. 1524, and requested in No. 8 of the Praecipe.

155

Exhibit N-8

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1947.

AMERICAN SMELTING & REFINING COMPANY

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUES AND EXPENSES

PART II, TERMINAL SERVICES

Upon consideration of the record in the above-entitled proceeding; and for good cause appearing therefor:

It is ordered, That the said proceeding be, and it is hereby, reopened for reconsideration of the report and order entered October 14, 1946, upon the present and existing record.

It is further ordered, That the order entered herein on October 14, 1946, as subsequently modified to become effective on January 1, 1948, be, and it is hereby, vacated and set aside.

By the Commission.

W. P. BARTEL
Secretary

[SEAL]

157

In the District Court of the United States
For the District of Utah
Civil Action No. 1324
(Title Omitted)

(File Endorsement Omitted)

*Petition in Intervention on Behalf of The State of Utah—
Filed June 17, 1947*

To:

The Honorable, the Judges of the District Court of the
United States for the District of Utah:

Comes now the STATE OF UTAH, by Grover A. Giles, its
Attorney General, and respectfully prays that it be allowed

to intervene herein as a party plaintiff, and as grounds therefor states:

1. That the State of Utah, as one of the sovereign states of the United States, files this petition in intervention at the order of Honorable Herbert B. Maw, Governor of the State of Utah, by and through Grover A. Giles, its duly elected, qualified and acting Attorney General.

2. That the State of Utah has a vital interest in any final judgment or decree which might be entered in this cause, and appears herein on behalf of persons, firms and corporations who are now and for a long period of time have been engaged not only in the mining of non-ferrous ores within the State of Utah, but also the transporting of said ores and concentrates from the mines where said ores are

158 produced within the State of Utah to the smelters of the American Smelter and Refining Company at Garfield and Murray, Utah, respectively, and in the smelting and refining of such ores; that the mining of non-ferrous ores is one of the basic and principal industries of the State of Utah; that any order or judgment of this Court which will change, and, particularly, increase, the cost of transporting, smelting or refining said ores will seriously affect the economic conditions of the State of Utah as a whole; and in particular the economic condition of the mining, railroad and smelting industries of the State of Utah.

3. That the testimony and exhibits in the proceeding (*Ex Parte* 104) before the Interstate Commerce Commission, upon which was entered the order of said Commission (266 I. C. C. 349), herein sought to be enjoined and reversed, show that the charges for transporting non-ferrous ores and concentrates from the mines to the smelters at Garfield and Murray, Utah, respectively, and the charges assessed by said American Smelting and Refining Company, will be greatly increased upon shipments of said non-ferrous ores and concentrates moving in interstate commerce, and may ultimately result in an increase in the said charges levied against ores and concentrates moving from points in Utah to the smelters at Garfield and Murray, Utah, respectively.

4. The findings of violations of the Interstate Commerce Act in said supplemental report, are findings confined solely to alleged violations of Section 6 (7) of that Act, which reads as follows:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of

passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or re-

159 mit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

5. That the conclusions and findings of the Interstate Commerce Commission in such supplemental report as to the Garfield Smelter, are (p. 360):

"We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting and Refining Company at Garfield, Utah, under the line-haul rates begin and end at the plant yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the plant yard as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of section 6 (7) of the Act."

The findings as to the Murray smelter are (pp. 363, 364):

"We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the hold tracks as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the American Smelting & Refining Company at Murray, Utah, under the line-haul rates begin and end at the hold tracks; and that

the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the hold tracks as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of Section 6 (7) of the act."

6. The evidence before the Interstate Commerce Commission in such proceedings shows that the principal traffic affected by the order here sought to be enjoined consists of inbound shipments of nonferrous ores and concentrates to the smelters of the American Smelting & Refining Company located respectively at Garfield and Murray, Utah. The movement of such ores and concentrates is predominantly intrastate, only 7% of such shipments to Garfield being interstate and only 33% to Murray. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

7. The order of the Interstate Commerce Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers in such proceedings to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Garfield Smelter termed in such order the "plant yard" are and the tracks at the Murray Smelter termed in such order the "hold tracks". No such charges in addition to the line-haul rates for movement beyond such tracks have ever been made or provided for by the tariffs of the plaintiff carriers for approximately fifty years during which such smelters have existed with the exception that since July 5, 1938, the tariffs have provided certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements from, the smelter."

The supplemental report of the Interstate Commerce Commission referred to in the order of that Commission here sought to be enjoined and by such order made a part thereof states (355) as follows:

"Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge but also charges which are not less than the full cost of service for those services for which they now publish charges."

161 As a result of said order here sought to be enjoined and the interpretation thereof made by the Interstate Commerce Commission as hereinbefore quoted, the transportation charges on shipments of all commodities to and from the Garfield and Murray Smelters of the American Smelting & Refining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on nonferrous ores and concentrates are ultimately borne by the mines producing such ores and concentrates either by direct charge back to such mines or indirectly through increases in treatment charges at such smelters.

The majority of mines in the State of Utah producing nonferrous ores are so-called "marginal" mines producing complex ores of low value and are small operations vitally affected by the transportation charge applicable to such ores and concentrates.

The imposition of any charge in addition to the present line-haul charges and such charges as are now provided by the effective tariffs for so called "interrupted movements" will have a serious effect on the ability of many such mines to continue production. The payment of war-time premium prices for nonferrous ores is a temporary expedient to increase the production and will terminate in the near future, while the increased switching charges ordered by the Interstate Commerce Commission would be of a permanent nature.

The record before the Interstate Commerce Commission shows without contradiction that the line-haul rates now in effect to Garfield and Murray on nonferrous ores and

concentrates include, and have always included, compensation for all switching services on such nonferrous ores and concentrates necessary to determine the value thereof. Therefore the additional charges which would be imposed by the order of the Interstate Commerce Commission, here sought to be enjoined would violate Section 1 of the Inter-

state Commerce Commission act by reason of the
162 fact that such additional charges would be unreasonable and excessive and would require the railroads to collect and the shipping interests to pay twice for the same services.

9. Under the tariffs presently in effect at Garfield and Murray, sampling in transit privileges are provided, and have for many years been provided, under which nonferrous ores and concentrates consigned to Garfield and Murray may either be sampled at public samplers to determine value before arrival at Garfield and Murray, or after arrival at Garfield and Murray may be sampled for value without charge in addition to the line-haul rates, and thereafter reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield and Murray to determine the value as are performed for that purpose on shipments on which final delivery is made at those smelters and on which latter shipments the order sought to be enjoined would impose additional switching charges for such switching movements. The Commission's supplemental report made part of the order sought here to be enjoined recognized on page 361 that the imposition of such additional switching charges at Garfield and Murray, on shipments upon which final delivery is made at those points, may result in violation of Section 2 of the Act, but suggests that in order to avoid such violations the plaintiff carriers cancel such sampling in transit privileges.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex nature of the ores produced by them. Since the Garfield Smelter is only a copper smelter and does not smelt lead, a shipment of ore or copper predominately lead would command a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower

163 prices at the Murray Smelter than at the Garfield Smelter. Therefore it is vitally important to the producers of such ores that they have the privilege of reconsigning such commodities to the smelters paying the highest return. It is also vitally important to the plaintiff railroads because of the higher freight charges received by them depending on the values of the ores at the smelter where the final delivery is made.

WHEREFORE, the State of Utah prays that it be allowed to intervene herein as a Plaintiff, and that it be permitted to adopt the allegations of the Complaint on file herein as its own.

Respectfully submitted,

THE STATE OF UTAH
By GROVER A. GILES

Grover A. Giles
Attorney General

S. D. HUFFAKER

S. D. Huffaker
Deputy Attorney General

164 In the District Court of The United States
For the District of Utah

Civil Action No. 1324

(Title Omitted)

(File Endorsement Omitted)

Petition in Intervention on behalf of The State of Colorado
—Filed June 18, 1947—

To: The Honorable, The Judges of the District Court of
the United States for the District of Utah:

Comes now the STATE OF COLORADO, by H. Lawrence Hinkley, its Attorney General, and respectfully prays that it be allowed to intervene herein as a party plaintiff, and as grounds therefor states:

1. That the State of Colorado, as one of the sovereign states of the United States, files this petition in intervention at the order of Honorable Lee Knous, Governor of the State of Colorado, by and through H. Lawrence Hinkley, its duly elected, qualified and acting Attorney-General.

165 2. That the State of Colorado has a vital interest in any final judgment or decree which might be entered in this cause, and appears herein on behalf of persons, firms and

corporations who are now and for a long period of time have been engaged not only in the mining of non-ferrous ores within the State of Colorado, but also the transporting of said Ores and concentrates from the mines where said ores are produced within the State of Colorado to the smelter of the American Smelter and Refining Company at Leadville, Colorado, herein called the "Leadville smelter", and in the smelting and refining of such ores; that the mining of non-ferrous ores is one of the basic and principal industries of the state; that any order or judgment of this Court which will change, and, particularly, increase, the cost of transporting, smelting or refining said ores will seriously affect the economic conditions of the State of Colorado as a whole, and in particular the economic condition of the mining, railroad and smelting industries of the State of Colorado.

3. That the testimony and exhibits in the proceeding (*Ex Parte* 104) before the Interstate Commerce Commission, upon which was entered the order of said Commission (266 I. C. C. 349), herein sought to be enjoined and reversed, show that the charges for transporting non-ferrous ores and concentrates from the mines to the Leadville smelter, and the charges assessed by said American Smelting and Refining Company, will be greatly increased upon shipments of said non-ferrous ores and concentrates moving in interstate commerce, and may ultimately
 166 result in an increase in the said charges levied against ores and concentrates moving from points in Colorado to the Leadville smelter.

4. That the conclusions and findings of the Interstate Commerce Commission in its said report (266 I. C. C. 349) relating to the smelter of the American Smelting and Refining Company at Leadville, Colorado, are as follows:

"We conclude that the service performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent (The Denver and Rio Grande Western Railroad Company) is not obligated to perform and for which it is not compensated under its line haul rates; and that performance of said service by respondent, without reasonable charge therefor, results in the industry receiving a preferential service not accorded to shipments generally." (Parentheses supplied)

• • •

"We find that respondent's interstate line haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the flat yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by respondent; that the transportation service which it is the duty of respondent to perform for the American Smelting & Refining Company at Leadville, Colo., under the line haul rates begin and end at the flat yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of respondent to perform. We further find that the performance of service beyond the flat yard as described, without reasonable compensatory charges in addition to the line haul rates, is a violation of section 6 (7) of the Act."

5. That the uncontradicted evidence shows that for more than fifty years past the line haul rates for the transportation of ore into said Leadville smelter has included compensation for services performed by The Denver and Rio Grande Western Railroad Company beyond the flat yard and within the plant of the American Smelting & Refining Company; that the line haul rates of the Denver and Rio Grande Western Railroad Company are based upon the valuation of the ore and concentrates transported, as fixed and determined at said smelter; that the determination of the values and weights of the ores and concentrates requires the switching of cars, both loaded and empty, to and from track scales maintained within the plant area, the switching of loaded cars to the samplers, and in the winter when the lading of loaded cars is frozen, the switching of loaded cars to and from the thaw houses maintained within the plant area.

6. That a large percentage of the ores now produced within the State of Colorado is what is commonly known as "low grade" ores; that the profit realized on said "low grade" ores has been greatly reduced in the past years, and that the United States Government has for a number of years past been paying a subsidy for the mining of said low grade ores.

7. That the result of the Commission's order, here under consideration, will be an excessive and unreasonable increase of rates charged for the transportation of said low grade ores without taking into consideration or account the value of said ores, and consequently the said transpor-

tation charges will be increased to a far greater extent on said low grade ores than upon ores having a higher value.

168 8. That only seven per cent of all inbound traffic at said Leadville smelter is interstate traffic, and ninety-three per cent of said inbound traffic is intrastate traffic; that the Commission's order here under consideration will not be applicable to said intrastate traffic, but will seriously affect said intrastate rates in that those interested in and required to pay said transportation and smelter charges will be under the apprehension that the Interstate Commerce Commission will proceed to require The Denver and Rio Grande Western Railroad Company to change its intrastate rates in accordance with any changes ordered in the interstate rates under and pursuant to Section 13 (4), Title 49, U. S. C. A.

WHEREFORE, the State of Colorado prays that it be allowed to intervene herein as a plaintiff, and that it be permitted to adopt the allegations of the complaint, on file herein, as its own.

Respectfully submitted,

THE STATE OF COLORADO
By H. LAWRENCE HINKLEY

H. Lawrence Hinkley
Attorney General

DUKE W. DUNBAR
Duke W. Dunbar
Deputy Attorney General

E. B. EVANS
E. B. Evans
Special Assistant Attorney General

169 In the District Court of the United States
For the District of Utah
Civil Action File No. 1324
(Title Omitted)
(File Endorsement Omitted)

Petition in Intervention—Filed June 18, 1947

Now comes the PUBLIC SERVICE COMMISSION OF UTAH and, as a matter of right pursuant to Section 45-A, Title 28, U. S. Code Annotated, files this its Petition In Intervention in support of Plaintiffs in the above entitled action.

The grounds upon which such Petition is based are as follows:

I

The Public Service Commission of Utah, hereinafter referred to as the Intervenor, is an administrative Commission of the State of Utah, and its Petition herein is filed pursuant to Section 76-4-6 Utah Code Annotated 1943, which provides as follows:

Id. Unlawful Interstate Rates—Petition to Interstate Commerce Commission.

"The Commission shall have the power, and it shall be the duty of the commission, to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory, or in violation of the act of congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, or of any other act of congress, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief. (C. L. 17, § 4802.)"

170

II

In an exercise of the authority above referred to, this Intervenor intervened in certain proceedings before the Interstate Commerce Commission (hereinafter referred to as the Commission) known as *Ex Parte* 104 Part II American Smelting & Refining Company. The order sought to be enjoined, annulled and set aside in this action was issued by the Interstate Commerce Commission in *Ex Parte* 104 above mentioned.

Intervenor's interest in the proceedings before and the order of the Commission which is herein sought to be enjoined, annulled and set aside, is as hereinafter stated.

III

The evidence before the Commission in such proceedings shows that the principal traffic affected by the order attacked herein consists of inbound shipments of nonferrous

ores and concentrates to the smelters of the American Smelting & Refining Company located at Garfield and Murray, Utah. The movement of such ores and concentrates is predominately intrastate, only 7% of such shipments to Garfield being interstate and only ~~33%~~ to Murray. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

IV

The order of the Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line haul rates, for any movement beyond tracks at the Garfield Smelter, termed in such order the "plant yard," and at the Murray Smelter termed in such order the "hold tracks," have never been made by or provided for in the tariffs of the plaintiff carriers for approximately fifty years during which such smelters have existed, except that since July 5, 1938
 171 the tariffs have provided for certain charges in addition to the line haul rates for so called interrupted movements, "resulting from orders from, or requirements of, the smelter."

The supplemental report of the Commission referred to in and made a part of the order herein sought to be enjoined states (355) as follows:

"Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as much unlawful as the performance of the service without charge.

"The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge but also charges which are not less than the full cost of service for those services for which they now publish charges."

V

As a result of the order herein sought to be enjoined and the above interpretation thereof by the Commission, the transportation charges on shipments of all commodities to and from the Garfield and Murray Smelters of the American Smelting & Refining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on shipments of nonferrous ores and concentrates are ultimately borne by the mines producing the ores either by direct charge to such mines or indirectly through increases in treatment charges at the smelters.

The majority of mines in the State of Utah producing nonferrous ores are so-called "marginal" mines producing complex ores of low value. They are for the most part small operations and would be vitally affected by an increase in transportation charges on shipments of ores and concentrates. The imposition of any charge in addition to the present haul charges and such charges as are now provided by the effective tariffs for so called "interrupted movements" will seriously impair the ability of many such mines to continue production. The payment of war-time premium prices for nonferrous ores is a temporary expedient to increase the production and will terminate in the near future, while the increased switching charges ordered by the Commission would be of a permanent nature.

172 The record before the Commission shows without contradiction that the line haul rates now in effect to Garfield and Murray on nonferrous ores and concentrates include, and have always included, charges for all switching services necessary to determine the value of such materials. Accordingly, imposition of the additional charges pursuant to the order of the Commission, herein sought to be enjoined, would violate Section 1 of the Interstate Commerce Act for the reason that such additional charges would be unreasonable and excessive and would require the carriers involved to collect and the shipping interests to pay twice for the same services.

VI

Under the tariffs presently in effect at Garfield and Murray, sampling in transit privileges are and for many years past have been provided for. Thus nonferrous ores and concentrates consigned to Garfield and Murray may

either be sampled without charge in addition to the line haul rates at public samplers to determine value before arrival at Garfield and Murray or after arrival at Garfield and Murray; thereafter shipments may be reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield and Murray to determine the value as are performed on shipments on which final delivery is made at those smelters. It is on this latter type of shipment that the order sought to be enjoined would impose additional switching charges for such switching movements. The Commission's supplemental report made part of the order herein sought to be enjoined recognized that the imposition of such additional switching charges at Garfield and Murray, on shipments upon which final delivery is made at those points, may result in violation of Section 2 of the Act, but suggests that in order to avoid such violations the plaintiff carriers cancel such sampling in transit privileges.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex composition of the ores produced by them. Since the Garfield Smelter is only a copper smelter and does not smelt lead, a shipment of ores predominately lead would command a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower prices at the Murray Smelter than at the Garfield Smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

WHEREFORE, this Intervenor respectfully prays, that upon the final hearing this Court cause a permanent injunction to issue decreeing that the above described order of the Commission, is contrary to law and is, therefore, null and void; that said order be annulled and set aside; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission,

against the evidence that the switching operations involved are the obligation of the smelters and not of the carriers in the face of the uncontradicted evidence that such operations are necessary for the assessment of freight charges; in that it failed to hold that line-haul charges include the switching movements as provided in the effective tariff, as disclosed by uncontradicted testimony; in that the imposition of switching charges in addition to line-haul charges under the Order will result in payment by producers and shippers of the same charges twice; and in that order affects from 93% to 98% of strictly intrastate inbound shipments at the Leadville Smelter, or it becomes meaningless except as to an almost infinitesimal portion of inbound shipments.

IX.

By virtue of the foregoing, the Association, its members and those whom it represents as aforesaid, will suffer great hardship and irreparable damage and injury if the Order of the Commission above referred to is not set aside and annulled.

WHEREFORE, Intervenor, being without adequate remedy at law respectfully prays:

First. That an interlocutory decree be issued staying and suspending said Order of the Interstate Commerce Commission pending final hearing and determination of this proceeding.

Second. That upon final hearing, a permanent injunction issue decreeing that the said Order of the Interstate Commerce Commission is beyond the lawful authority of said Commission and null and void; that said Order be set aside and annulled and that its enforcement, execution and operation be enjoined forever; and that the United States of America the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said Order.

That this Court grant such other and further relief as may be deemed proper.

HENRY S. SHERMAN

Henry S. Sherman

Attorney for Intervenor

514 Equitable Building,

Denver 2, Colorado

Cherry 4541

their respective officers, agents or others acting for them be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said order; and for such other, further and additional relief as to the Court may seem meet and just in the premises.

CHAS. A. ROOT

Attorney for Intervenor

Duly sworn to by Donald Hacking.

Jurat omitted in printing. (All in italics.)

(File Endorsement Omitted) 1

174 In the District Court of the United States
For the District of Utah

Civil Action File No. 1324

(Title Omitted)

(File Endorsement Omitted)

Motion of the Public Utilities Commission of the State of Colorado to Intervene in support of Complainants in above proceedings—Filed June 18, 1947.

The Public Utilities Commission of the State of Colorado moves the Court for leave to intervene as a matter of right in the above proceedings, pursuant to Section 45-A, Title 28, U. S. Code.

The grounds for such motion are the following:

I.

The Public Utilities Commission of the State of Colorado, hereinafter referred to as the Intervener, is an administrative Commission, existing under and by virtue of the laws of the State of Colorado (Chapter 137, Colorado Statutes Annotated, 1935.)

The pertinent provisions of the statutes provide:

"It is the duty of said Commission to adopt all necessary rates, charges and regulations to govern and regulate all rates, charges and tariffs of every public utility of this State as herein defined, the power to correct abuses, and prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this State, and to generally supervise

175 and regulate every public utility in this State, and to do all things whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of such power . . . (Sec. 15, Chapter 137, *supra*.)

"The Commission shall have power to appear and represent the interests and welfare of the people of the State of Colorado in all matters and proceedings involving any public utility or carrier now or hereafter pending before any officer, department, board, Commission or Court of the United States, of any other state, or of this state, and to intervene in, protest, resist, or advocate the granting or denial of any petition, application, complaint, or other proceeding, to examine witnesses and offer evidence in any proceeding affecting the people of this state or some portion thereof, as the public interest, convenience, or necessity may appear, and to initiate or participate in judicial proceedings involving the order or decision of any such officer, department, board or Commission." (Sec. 66, Chapter 137, *supra*, as amended.)

A railroad company is classed as a public utility under the statute.

II.

Pursuant to the foregoing authority, the Intervener participated in certain proceedings before the Interstate Commerce Commission known as *Ex Parte* 104, Part II—American Smelting & Refining Company,—in which was made the order sought to be enjoined, annulled, and set aside in the above entitled proceedings: before this Court.

III.

Intervener adopts and makes a part hereof by reference all and singular the allegations, statements, and references contained in plaintiffs' complaint in this action, and the exhibits attached to and made a part of said complaint.

IV.

Intervener's interest in the proceedings before the Interstate Commerce Commission, and in the order thereof sought to be enjoined, is as hereinafter set forth.

176

V.

The evidence before the Interstate Commerce Commission in such proceedings shows that the principal traffic affected by the order here sought to be enjoined, so far as the State of Colorado is concerned, consists of inbound shipments of non-ferrous ores and concentrates to the smelter of the American Smelting & Refining Company, located at Leadville, Colorado. The movement of such ores and concentrates is predominantly intra-state, only

seven per cent of such shipments being interstate. Of that seven per cent, five per cent originates and terminates in Colorado, and was formerly completely intrastate, although it is now technically interstate because of a rockslide on the tracks of the Rio Grande Southern Railway Company in southern Colorado, which necessitated the re-routing of ore shipments from Silverton, Colorado, into New Mexico for a short distance and then back into Colorado to Leadville. This leaves but two per cent of the inbound shipments factually interstate. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must, therefore, be determined before the carrier can determine its lawful charges. The only carrier interested in the Colorado shipments is The Denver and Rio Grande Western Railroad Company, one of the plaintiffs herein.

The terminal switching movements to determine the values and weights upon which the rates are based, are those principally affected by the order herein sought to be enjoined.

VI.

The order of the Interstate Commerce Commission sought to be enjoined in the proceedings before this Court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line haul rates, not only on all such inbound shipments of ores and concentrates but on all inbound and outbound shipments of other commodities as well. Switching charges, in addition to the line haul rates, are to be assessed upon any movement beyond the tracks at Leadville, Colorado, termed in such order the "flat yard."

VII.

The tariffs filed by The Denver and Rio Grande Western Railroad Company with the intervener, and applying to intrastate shipments, are identical with those filed by the carrier with the Interstate Commerce Commission and applying to interstate shipments. The proceedings of the Interstate Commerce Commission, and the order complained of, were initiated and entered under Section 6 (7) of the Interstate Commerce Act, and the order can affect only seven per cent of the inbound shipments to the Leadville smelter. Should the order prevail, the present tariff, approved by the intervener, would remain effective on ninety-three per cent of the inbound shipments, and the additional

switching rates prescribed by the order would apply to but seven per cent of such shipments. The carriers and the industry agree, and the evidence before the Interstate Commerce Commission to that effect is uncontradicted, that the line-haul rates have included the switching movements during the almost fifty years the Leadville smelter has been in operation. There would be no justification for the intervenor to approve rates for the intrastate traffic equivalent to the rates on interstate traffic imposed by the order complained of. The practical impossibility of segregating the shipments subject to the different rates and the discrimination resulting to the shippers—only part of whom would be charged with the additional switching charges—would wreak confusion and havoc upon the industry.

VIII.

The Denver and Rio Grande Western Railroad Company owns and maintains all standard gauge tracks within the plant area at Leadville. The majority report of the Interstate Commerce Commission, upon which is based the order complained of, finds that "the providing and maintaining of tracks under such circumstances result in a violation of Section 6 (7) of the Act." Should the order prevail, the natural consequences would be a final order requiring the carrier to cease and desist from such ownership and maintenance. Removal of the tracks, purchase or lease of same by the industry, would disrupt the present rate structure on intrastate shipments.

IX.

As a result of the order here sought to be enjoined,—and the interpretation thereof made by the Interstate Commerce Commission to the effect that the switching charges assessed should be ~~be~~ not less than the full cost of service,—the transportation charges on shipments of all commodities to and from the Leadville smelter will be substantially increased, particularly on inbound shipments of non-ferrous ores and concentrates, which transportation charges are ultimately borne by the mines producing such ores and concentrates, either by direct charge back to such mines or indirectly through increases in treatment charges at the smelter.

The majority of mines in the State of Colorado producing non-ferrous ores are so-called "marginal" mines, producing complex ores of low value, and are small operations vitally affected by the transportation charge applicable to such ores and concentrates. The imposition of any charge in

addition to the present line haul charges will have a serious effect on the ability of any such mines to continue production. The payment of war-time premium prices for non-ferrous ores is a temporary expedient to increase the production, and will terminate in the near future, while the increase switching charges prescribed by the order of the Interstate Commerce Commission would be of a permanent nature.

X.

The record before the Interstate Commerce Commission shows, without contradiction, that the line-haul rates now in effect to Leadville on non-ferrous ores and concentrates include, and have always included, compensation for all switching services on such non-ferrous ores and concentrates necessary to determine the value thereof. The tariff provisions effective at Leadville differ from those effective at the Utah smelters, in that, since November 27, 1920, and now, the effective tariffs at Leadville expressly provide that line-haul carload shipments "will include movement of a commodity within a smelter plant over track scales to and from thaw house, to and from a smelter sampler, or to and from a combination sampler and concentrator to a designated loading point designated by the sampling company. Therefore, the additional charges which would be imposed by the order of the Interstate Commerce Commission, here sought to be enjoined, would violate Section 1 of the Interstate Commerce Commission Act, by reason of the fact that such additional charges would be unreasonable and excessive, and would require the railroads to collect, and the shipping interests to pay, twice for the same service. Commissioner Miller, in his dissenting opinion, well expresses the view of the intervenor in the following words:

... the line-haul rates were made with full knowledge that respondents, for a number of years, had been performing the intraplant switching; and that those rates were made sufficiently high to compensate them for such services. If we accept that contention as correct—and the record does not contradict it—it is my view that since we are here prohibiting the performance by respondent of such switching services without charge, the line-haul rates should be adjusted so as to eliminate that part of such rates which was included as compensation for the intraplant switching.

XI.

Intervener submits, accordingly, that the order herein sought to be enjoined is arbitrary and without authority in law and beyond the power of the Interstate Commerce Commission, in the following respects:

1. Such order is made without adequate findings.
2. The findings upon which such order purports to be based are without any evidence in support thereof
180 and contrary to the only evidence of record.
3. Such order was made and entered in proceedings to which parties vitally affected by such order have not been made parties by the Interstate Commerce Commission.
4. Said order, while in terms applicable only to interstate commerce, is, in fact, directed to traffic predominantly intrastate.
5. The order complained of, if it should prevail, would result in an unjust discrimination between shippers in interstate and intrastate commerce, and would be impossible of enforcement and result in irreparable injury to the mining industry of the State of Colorado.

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF COLORADO

Intervener

By JOSEPH W. HAWLEY

Attorney

318 State Office Building

Denver 2, Colorado

181 *Duly sworn by E. E. Pollock*

Jurat omitted in printing. (All in italics)

182 In The District Court of The United States for
The District of Utah

Civil Action File No. 1324

(Title Omitted)

(File Endorsement Omitted)

Petition in Intervention—Filed June 18, 1947

Now comes the Utah Mining Association and as a matter of right pursuant to Section 45-A, Title 28, U. S. Code Annotated, files this its Petition In Intervention in support of Plaintiffs in the above entitled action.

I.

The Utah Mining Association (hereinafter referred to as the Intervenor) is an unincorporated association with its principal office at Salt Lake City, Utah.

II.

Intervenor's interest in this matter arises out of the fact that it has been formed to advance metal mining and its related industries within the State of Utah, and in general to support activities in behalf of metal mining and metallurgy within the state. In that the Interstate Commerce Commission (hereinafter referred to as the Commission) entered an order entitled **Ex Parte No. 104, Part II, American Smelting and Refining Company**, which order, if placed in full force and effect, will be injurious to the mining industry of the State of Utah, Intervenor becomes and is an interested party in these proceedings.

III.

The evidence before the Commission in such proceedings shows that the principal traffic affected by the order attacked herein consists of inbound shipments of non-ferrous ores and concentrates to the smelters of American Smelting & Refining Company located at Garfield and Murray, Utah. The movement of such ores and concentrates is predominately intrastate, only 7% of such shipments to Garfield being interstate and only 33% to Murray. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weight are those principally affected by the order sought to be enjoined.

IV.

The order of the Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Garfield Smelter, termed in such order the "plant yard," and at the Murray Smelter termed in such order the "hold tracks," have never been made by or provided for in the tariffs of the plaintiff car-

riers for approximately fifty years during which such smelters have existed, except that since July 5, 1938, the tariffs have provided for certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements of, the smelter."

The supplemental report of the Commission referred to in and made a part of the order herein sought to be enjoined states (355) as follows:

"Our findings, in these proceedings, while primarily relating to instances in which switching service is being performed without any charge in addition to the line-haul rates, would apply equally to instances where only a nominal charge is made. The performance of a service at unreasonably low charges is just as such unlawful as the performance of the service without charge.

"The carriers, therefore, will not only be expected to establish reasonable charges for the service for which they do not now maintain any charge but also charges which are not less than the full cost of service for those services for which they now publish charges."

V.

As a result of the order herein sought to be enjoined and the above interpretation thereof by the Commission, the transportation charges on shipments of all commodities to and from Garfield and Murray Smelters of the American Smelting & Refining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of non-ferrous ores and concentrates.

The transportation charges on shipments of non-ferrous ores and concentrates are ultimately borne by the mines producing the ores either by direct charge to such mines or indirectly through increases in treatment charges at the smelters.

The majority of mines in the State of Utah producing non-ferrous ores are so-called "marginal" mines producing complex ores of low value. They are for the most part small operations and would be vitally affected by an increase in transportation charges on shipments of ores and concentrates. The imposition of any charge in addition to the present line-haul charges and such charges as are now provided by the effective tariffs for so-called "interrupted movements" will seriously impair the ability of many such mines to continue production. The payment of war-time premium prices for non-ferrous ores is a temporary expedi-

ent to increase the production and will terminate in the near future, while the increased switching charges ordered by the Commission would be of a permanent nature.

The record before the Commission shows without contradiction that the line-haul rates now in effect to Garfield and Murray on nonferrous ores and concentrates include, and have always included, charges for all switching services necessary to determine the value of such materials. Accordingly, imposition of the additional charges pursuant to the order of the Commission, herein sought to be enjoined, would violate Section 1 of the Interstate Commission Act for the reason that such additional charges would be unreasonable and excessive and would require the carriers involved to collect and the shipping interests to pay twice for the same services.

VI.

During the twelve-year period from 1935 to 1946, there has been a decrease in the number of producing lode mines within the State of Utah from 203 to 89, this reduction within the state was due to increased operating cost which include labor, materials, taxes and transportation, and to impose at this time additional transportation charges upon the mining industry will affect many other so-called
 185 "marginal" mines to the extent of curtailing their production and ability to continue to produce.

VII.

On January 1, 1947, through an order of the Commission, all interstate line-haul rates on ores and concentrates were increased 20%, and on February 25, 1947, by an order of the Public Service Commission of Utah, all intrastate line-haul rates on ores and concentrates were increased 20%, except on ores and concentrates whose values did not exceed \$25 per ton; that the mining industry, pursuant to said order, has already had imposed on it increased transportation costs, and to again increase those costs within so short a time, will prove in some instances disastrous.

VIII.

Under the tariffs presently in effect at Garfield and Murray, sampling in transit privileges and for many years past have been provided for. Thus nonferrous ores and concentrates consigned to Garfield and Murray may either be sampled without charge in addition to the line-haul rates at public samplers to determine value before arrival at Garfield and Murray or after arrival at Garfield and Murray;

thereafter shipments may be reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield and Murray to determine the value as are performed on shipments on which final delivery is made at those smelters. It is on this latter type of shipment that the order sought to be enjoined would impose additional switching charges for such switching movements. The Commission's supplemental report made part of the order herein sought to be enjoined recognized that the imposition of such additional switching charges at Garfield and Murray, on shipments upon which final delivery is made at those points, may result in violation of Section 2 of the Act, but suggests that in order to avoid such violations the plaintiff carriers cancel such sampling in transit privileges.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex composition of the ores produced by them. Since the Garfield Smelters is only a copper smelter and does not smelt lead, a shipment of ores predominately lead would command a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower prices at the Murray Smelter than at the Garfield Smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

WHEREFORE, this Intervenor respectfully prays, that upon final hearing this Court cause a permanent injunction to issue decreeing that the above described order of the Commission, is contrary to law and is; therefore, null and void; that said order be annulled and set aside; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission, their respective officers, agents or others acting for them be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said order; and for such

other, further and additional relief as to the Court may seem meet and just in the premises.

MITCHELL MELICH
Attorney for Intervenor

*Duly sworn to by James K. Richardson.
Jurat omitted in printing. (All in italics.)*

187 In The District Court of The United States
For The District of Utah
Civil Action File No. 1324
(Title Omitted)
(File Endorsement Omitted)

Petition in Intervention of The Colorado Mining Association—Filed June 18, 1947

To the Honorable, the Judges of the District Court of the United States for the District of Utah:

Comes now The Colorado Mining Association, hereinafter called the "Association", acting in its own behalf, in behalf of its members and in behalf of the mining industry and the producers and shippers of minerals in Colorado, and Leave of Court having first been obtained, files this, its PETITION in INTERVENTION, in the above entitled matter, and alleges:

188

I.

This Intervention is in the nature of a Complaint against the United States of America and the Interstate Commerce Commission, hereinafter called "Commission" and is for the purpose of enjoining, setting aside and annulling an order of the Commission entered October 14, 1946, in proceedings instituted by an order of investigation initiated by the Commission on its own motion, entitled "American Smelting & Refining Company, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services".

II.

Intervenor adopts and makes a part hereof by reference the allegations set forth in paragraphs I, II and III of the Motion of the Association, heretofore, filed, for Leave to Intervene.

III.

Intervenor adopts and makes a part hereof by reference all and singular the allegations, statements and references

contained in Plaintiff's Complaint in this action and Exhibits attached to, and made a part of said Complaint.

INTERVENOR IS REAL PARTY IN INTEREST AND
HAD NO OPPORTUNITY TO BE HEARD.

IV.

The additional switching or terminal charges, as required by the Order of Commission entered October 14, 1946, above line-haul charges heretofore imposed under 189 tariffs of The Denver and Rio Grande Western Railroad Company, (hereafter called "Railroad Company") will be borne definitely and ultimately by the producers and shippers of minerals to the smelter of Plaintiff, American Smelting and Refining Company (hereafter called "Smelting Company") at Leadville, Colorado, and will not be absorbed by the Smelting Company. As a result, the members of the Association and those others in whose behalf it appears, have a real, vital and legal interest in this action, and in fact are real parties in interest herein. Neither Intervenor nor those on whose behalf it appears, nor any producers or shippers as aforesaid, nor the mining industry of Colorado in whole or in part were made parties to the investigation, were notified or made cognizant of the investigation and hearing upon which said Order was based, or were extended the opportunity to be present and be heard at such hearing, nor were any witnesses called by the Commission to testify in behalf of such producers or shippers or in connection with the interest of such producers or shippers, or the mining interests of Colorado. Intervenor contends as a result thereof that said order invades the rights of such producers, shippers and mining interests, and should be set aside.

LINE-HAUL CHARGES INCLUDE SWITCHING CHARGES
AND

FINDINGS OF THE COMMISSION ARE AGAINST THE
LAW AND THE EVIDENCE.

V.

A. Line-haul charges to destination Leadville, for approximately 50 years, has included switching move-
190 ments within the plant. O. W. Tuckwood, General Traffic Manager of the Smelting Company testified that between 1908 and 1920 all of the applicable tariffs provided under the line-haul rate not only switching in connection with road hauls such as weighing, thaw house,

sampler and final spotting, but also for switching without charge between tracks in the plant itself—purely intra-plant switching. (p. 128-129). This testimony was uncontradicted. It should be noted especially that the tariff provisions effective at Leadville differ from those effective at Garfield and Murray, in that since November 27, 1920, and now the effective tariffs at Leadville expressly provide that line-haul carload shipments

“will include movement of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.” Item #15-A.

This tariff provision is still in effect, and as proceedings were brought under Section 6 (7) of the Act there is no authority for the Commission under said Section to require the cancellation of the published tariff. Nor can compliance with the published tariffs be deemed a violation of Section 6 (7) of the Act.

The tariff itself defines what shall be included in a line-haul shipment and the attempted imposition by the Commission of additional switching charges for operations included by the tariff in the line-haul movement would force a violation of Section 6 (7) of the Act, and would result in shippers paying for the same services twice, in violation of Section 1 of the Act.

B. The Majority Report states (352):

“For the purpose of determining the freight charges, the value of the ore and concentrates, based on the dry weight is converted to a wet weight basis and applied to the shipping weight.”

191 Contrary to the conclusion of the Commission that “the furnishing of the values is the obligation only of the smelters and not of the carriers”, (p. 357) the ascertainment of values, under the approved practice of assessment of freight charges based upon value, (p. 356 of Order), is for the benefit of the railroad company in its assessment of charges, and in the absence of being furnished with such values by the Smelter Company, the ascertainment thereof would become the duty of the Railroad Company. In the acceptance of ordinary freight for shipment by railroad, the freight is weighed by the railroad and charge is made accordingly. When freight charges are based upon value it would seem that it is likewise the duty

of the Railroad Company to determine value. This has been the practical interpretation by the Smelter Company, the Railroad and the shippers since the tariff provision of November 27, 1920, and for many years previous thereto. Thus, if the order of the Commission is not set aside, and cancelled, a practical interpretation of long standing and the express provisions of the tariff since November 27, 1920, will be annulled, and the producers and shippers will bear a double charge, in violation of Section 1 of the Act, and all without any opportunity whatsoever to appear and present their case.

The Commission states (p. 357):

"When a car is so weighed and reweighed at destination at the request of the consignee *or for his benefit or purpose*, a charge should be made for switching to and from the scales as well as for the actual weighing" * * *

and again at page 357:

192 "The weighing of cars at destination as a step in ascertaining the moisture content and to ascertain invoice weights or for any *other industrial purpose, and the reweighing of cars after thawing and the weighing of the empty cars at the smelter is for the benefit of the industry* and constitutes an interruption in switching, prevents the placement and removal of cars in a continuous movement, and are services not embraced in the line-haul rates."

The underscoring above indicates that the Commission took the view that the switching movements involved were solely for the benefit of the Smelter Company, when in fact such movements are also necessary for the assessment of freight charges, in which the interests of the Railroad and the shippers are paramount.

W. M. Carey, Freight Traffic Manager of the Railroad Company testified that the railroads must have the valuation of ore and concentrates before freight charges can be assessed (p. 70); that the railroad would have to supply scales, thaw houses and samplers for their own purposes if the smelters did not (p. 71); and that if such facilities were not provided for in the plant the carrier would have to provide them elsewhere under the present method of rates on ore, based on graded ore valuations. The witness Carey's testimony in this regard was uncontradicted.

Witness Tuckwood testified that the railroads cannot compel the Smelting Company by tariff publication or otherwise to reveal its assays or supply weights secured

on private scales in the absence of a specific agreement (there being a specific agreement in this case and the Smelting Company making no charge therefor.) (p. 135). This testimony also was uncontradicted.

193 Thus the findings of the Commission, based as they are, upon the purpose of the switching operations involved in this proceeding, are against the law and the evidence.

EFFECT OF ORDER UPON MINING INDUSTRY OF COLORADO.

VI.

Most of the mines of Colorado are now so-called marginal in character, there being at least 300 marginal mines in Colorado and this entire number depends upon subsidies from the Federal Government in order to operate. When these subsidies are removed, as they may be at any time, it is questionable whether or not these mines can operate. At one time there were 25 smelters on the line of the Denver and Rio Grande Western Railroad Company in Colorado, but due to economic difficulties there is now only one, namely the Smelter at Leadville, which is involved in this proceeding. These marginal mines of Colorado cannot survive any appreciable increase in freight rates and the order of the Commission does impose an appreciable increase in rates, which is arbitrary and unreasonable. The mining industry of Colorado as a whole is critically and perhaps vitally interested in the outcome of this proceeding, as the Order of the Commission as it now stands affects seriously the life and economy of the entire industry.

ORDER OF COMMISSION IS MEANINGLESS, OR IT AFFECTS INTRASTATE MOVEMENTS.

VII.

194 Practically all the traffic handled at the Leadville Smelter is intrastate (Witness F. C. MacDonald for the Commission, p. 409). For the twelve months ending March 31, 1944, of the total number of inbound shipments received at the Leadville Smelter, 93% was intrastate. Of the remaining 7%, 5% (thus leaving only 2% as factually interstate) originates and terminates in Colorado, although it is technically interstate commerce (Witness Hannebach, p. 423) because of the occurrence of a rock-slide on the tracks of the Rio Grande Southern Railway Company in southern Colorado, thus re-routing all movements of ore from Silverton, Colorado into New Mexico for a short distance and back into Colorado to Leadville, where

it had formerly moved completely intra-state from Silverton over Rio Grande Southern through Montrose and Grand Junction to Leadville (Witness W. M. Carey, p. 398-399). Thus this 5% has origin and destination at Leadville in Colorado and becomes technically interstate only because it cannot move expeditiously by rail without traversing a small portion of New Mexico by way of in and out movement.

Charles A. Root, Counsel for Public Service Commission of Utah, Intervenor before the Interstate Commerce Commission asked Leonard Way, Examiner, "if whatever was done in the proceeding would be confined to interstate business," to which Examiner Way replied: "That is my understanding." p. 238.

The movements involved are thus almost entirely intra-state and the order of the Commission is either meaningless or else it operates upon purely intrastate business. It should not be maintained that the Order should become effective on 5% of the ores and concentrates moving from Colorado through New Mexico back to Colorado, while 195 ineffective as to 93% of such ores and concentrates moving solely intrastate in Colorado, thus imposing discriminatory rates upon the shippers of the 5% of the ores and concentrates originating in Colorado. Based on 1944 movements, the order would thus be left effective only as to 2 % of the traffic, which is strictly interstate and thus it becomes without practical efficacy.

ORDER OF THE COMMISSION IS ARBITRARY, UNREASONABLE,
UNLAWFUL AND VOID.

VIII.

The action of the Commission was hasty, ill-advised, arbitrary and unreasonable: in that it pursued a policy of adhering to general practices for other and unrelated industries, when the assessment of freight charges for ores and concentrates is peculiar unto itself and requires, in order to be fair and reasonable, a method of assessment different from that pursued in almost every other instance, namely the assessment of charges upon value, which necessitates the translation of dry weight into wet weight; in that it failed to consider the real and vital interests and rights of producers and shippers of minerals; in that it failed to consider the effect of its order upon the economy of the mining industry and upon the very considerable segment of marginal mines comprising that industry; in that it found

197 In the District Court of the United States
 For the District of Utah

Civil Action No. 1325

(Title Omitted)

(File Endorsement Omitted)

Petition in Intervention—Filed June 18, 1947

Now comes the Utah Mining Association and as a matter of right pursuant to Section 45-A, Title 28, U. S. Code Annotated, files this its Petition In Intervention in support of Plaintiffs in the above entitled action.

I.

The Utah Mining Association (hereinafter referred to as the Intervenor) is an incorporated association with its principal office at Salt Lake City, Utah.

II.

Intervenor's interest in this matter arises out of the fact that it has been formed to advance metal mining and its related industries within the State of Utah, and in general to support activities in behalf of metal mining and metallurgy within the state. In that the Interstate Commerce Commission (hereinafter referred to as the Commission) entered an order entitled "United States Smelting Refining and Mining Company, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Service," which order, if placed in full force and effect, will be injurious to the mining industry of the State of Utah, Intervenor becomes and is an interested party in these proceedings.

III.

The evidence before the Commission in these proceedings shows that the principal traffic affected by the order attacked herein consists of inbound shipments of nonferrous ores and concentrates to the smelter of the
 198 United States Smelting Refining and Mining Company, located at Midvale, Utah. The movement of such ores and concentrates is predominately intrastate, only 10% of such shipments to Midvale being interstate. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges.

The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

IV.

The order of the Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Midvale smelter, termed in such order the "assembly yard" have never been made by or provided for in the tariffs of the plaintiff carriers for approximately thirty-eight years during which this smelter has been in existence, except that since July 5, 1938, the tariffs provided for certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements of, the smelter."

The supplemental report of the Commission referred to in and made a part of the order herein sought to be enjoined states:

"We find that respondents' interstate line-haul rates cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard, as described herein, constitutes such a reasonable point for the delivery and receipt of cars by respondents; that the transportation services which it is the duty of respondents to perform for the United States Smelting Refining and Mining Company at Midvale, Utah, under the line-haul rates, begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the assembly yard, as described, without reasonable and compensatory charges in addition to the line-haul rates, is a violation of Section 6 (7) of the Interstate Commerce Act."

V.

As a result of the order herein sought to be enjoined and the supplemental findings of the Commission referred to above, the transportation charges on shipments of all commodities to and from the Midvale

smelter of the United States Smelting Refining and Mining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

VI.

During the twelve-year period from 1935 to 1946, there has been a decrease in the number of producing lode mines within the State of Utah from 203 to 89. This reduction within the state was due to increased operating costs which include labor, materials, taxes and transportation, and to impose at this time additional transportation charges upon the mining industry will affect many other so-called "marginal" mines to the extent of curtailing their production and ability to continue to produce.

VII.

On January 1, 1947, through an order of the Commission, all interstate line-haul rates on ores and concentrates were increased 20%, and on February 25, 1947, by an order of the Public Service Commission of Utah, all intrastate line-haul rates on ores and concentrates were increased 20%, except on ores and concentrates whose values did not exceed \$25 per ton; that the mining industry, pursuant to said order, has already had imposed on it increased transportation costs, and to again increase those costs within so short a time, will prove in some instances disastrous.

VIII.

Under the tariffs presently in effect at Midvale, sampling in transit privileges are and for many years past have been provided for. Thus non-ferrous ores and concentrates consigned to Midvale may either be sampled without charge in addition to the line-haul rates at public samplers to determine value before arrival at Midvale or after arrival at Midvale; thereafter shipments may be reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Midvale to determine the value as are performed on shipments on which final delivery is made at that smelter. It is on this latter type of shipment that the order sought to be enjoined would impose additional switching charges for such switching movements. The Commission's supplemental report made part of the order herein sought to be enjoined recognized that the

imposition of such additional switching charges at Midvale, on shipments upon which final delivery is made at that point, may result in violation of Section 2 of the Act, but suggests that in order to avoid such violations the plaintiff carriers cancel such sampling in transit privileges.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex composition of the ores produced. Since the Midvale smelter is only a lead and zinc smelter, and does not smelt copper, a shipment of ores predominantly copper would command a lower price at the Midvale smelter than at the Garfield smelter which smelts copper. On the other hand, a shipment of ores to the Garfield smelter, which on sampling proves to be predominantly lead and zinc would command lower prices at the Garfield smelter than at the Midvale smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

WHEREFORE, this Intervenor respectfully prays, that upon final hearing this Court cause a permanent injunction to issue decreeing that the above described order of the Commission, is contrary to law and is, therefore, null and void; that said order be annulled and set aside; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission, their respective officers, agents or others acting for them be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said order; and for such other, further and additional relief as to the Court may seem meet and just in the premises.

MITCHELL MELICH,
Attorney for Intervenor.

*Duly sworn to by James K. Richardson
Jurat omitted in printing (All in italics)*

202 In the District Court of the United States
 For the District of Utah
 Central Division
 Civil Action File No. 1525
 Civil Action File No. 1524
 (Titles Omitted)

*Petition in Intervention on Behalf of the Utah Mining
 Association—Filed Oct. 11, 1948*

To the Honorable, the Judges of the District Court of the
 United States for the District of Utah:

Now comes the Utah Mining Association and as a mat-
 ter of right pursuant to Section 45-A, Title 28, U. S. Code
 Annotated, files this its Petition in Intervention in support
 of Plaintiffs in the above entitled action.

I.

The Utah Mining Association (hereinafter referred to as
 the Intervenor) is an association with its principal office at
 Salt Lake City, Utah.

203

II.

Intervenor's interest in this matter arises out of
 the fact that it has been formed to advance metal mining
 and its related industries within the State of Utah, and in
 general to support activities in behalf of metal mining and
 metallurgy within the state. In that the Interstate Com-
 merce Commission (hereinafter referred to as the Com-
 mission) entered orders on May 18, 1948 in the proceed-
 ings entitled "United States Smelting Refining and Mining
 Company, Ex Parte No. 104, practices of carriers affect-
 ing operating revenues or expenses, Part II, terminal serv-
 ices", and also in the proceedings entitled "American
 Smelting & Refining Company Ex Parte No. 104, practices
 of carriers affecting operating revenues or expenses, Part
 II, terminal services", which orders, if placed in full force
 and effect, will be injurious to the mining industry of the
 State of Utah, Intervenor becomes and is an interested
 party in these proceedings.

III.

The evidence before the Commission in such proceedings
 shows that the principal traffic affected by the orders at-
 tacked herein consists of inbound shipments of nonferrous
 ores and concentrates to the smelters of the American

Smelting and Refining Company located at Garfield and Murray, Utah, and to the smelter of the United States Smelting Refining and Mining Company located at Midvale, Utah. The movement of such ores and concentrates is predominately intrastate, only 7% of such shipments to Garfield being interstate, only 33% to Murray and only 10% to Midvale. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weights are those principally affected by the orders herein sought to be enjoined.

204

IV.

The orders of the Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Garfield Smelter, termed in such order the "plant yard", and at the Murray Smelter termed in such order the "hold tracks", and at the Midvale Smelter termed in such order the "assembly yard", have never been made by or provided for in the tariffs of the plaintiff carriers during the time such smelters have existed, except that since July 5, 1938, the tariffs have provided for certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements of, the smelter."

V.

As a result of the orders herein sought to be enjoined and the above interpretation thereof by the Commission, the transportation charges on shipments of all commodities to and from the Garfield and Murray Smelters of the American Smelting & Refining Company and the Midvale Smelter of the United States Smelting Refining and Mining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on shipments of nonferrous ores and concentrates are ultimately borne by the mines producing the ores either by direct charge to such mines

or indirectly through increases in treatment charges at the smelters.

The majority of mines in the State of Utah producing nonferrous ores are so-called "marginal" mines 205 — producing complex ores of low value. They are for the most part small operations and would be vitally affected by an increase in transportation charges on shipments of ores and concentrates. The imposition of any charge in addition to the present line-haul charges and such charges as are now provided by the effective tariffs for so-called "interrupted movements" will seriously impair the ability of many such mines to continue production. The payment of war-time premium prices for nonferrous ores has been terminated by the United States Government and as a result thereof, many "marginal" mines have been closed and to increase switching charges at this time might be a further obstacle in the ability of many of such mines to continue production.

The record before the Commission shows without contradiction that the line-haul rates now in effect to Garfield and Murray and Midvale on nonferrous ores and concentrates include, and have always included, charges for all switching services necessary to determine the value of such materials. Accordingly, imposition of the additional charges pursuant to the order of the Commission, herein sought to be enjoined, would violate Section 1 of the Interstate Commerce Act for the reason that such additional charges would be unreasonable and excessive and would require the carriers involved to collect and the shipping interests to pay twice for the same services.

VI.

During the twelve-year period from 1935 to 1946, there has been a decrease in the number of producing lode mines within the State of Utah from 203 to 89, this reduction within the state was due to increased operating costs which include labor, materials, taxes and transportation, and to impose at this time additional transportation charges upon the mining industry will affect many other so-called "marginal" mines to the extent of curtailing their production and ability to continue to produce.

206

VII.

On January 1, 1947, through an order of the Commission, all interstate line-haul rates on ores and concentrates were increased 20%, and on February 25, 1947, by

an order of the Public Service Commission of Utah, all intrastate line-haul rates on ores and concentrates were increased 20%, except on ores and concentrates whose values did not exceed \$25 per ton; that the mining industry, pursuant to said order, has already had imposed on it increased transportation costs, and to again increase those costs within so short a time, will prove in some instances disastrous.

VIII.

Under the tariffs presently in effect at Garfield, Murray and Midvale, sampling in transit privileges are and for many years past have been provided for. Thus nonferrous ores and concentrates consigned to Garfield, Murray and Midvale may either be sampled without charge in addition to the line-haul rates at public samplers to determine values before arrival at Garfield, Murray and Midvale or after arrival at Garfield, Murray and Midvale; thereafter shipments may be recognized without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield, Murray and Midvale to determine the value as are performed on shipments on which final delivery is made at those smelters. It is on this latter type of shipment that the orders sought to be enjoined would impose additional switching charges for such switching movements.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex composition of the ores produced by them. Since the Garfield Smelter is only a copper smelter and does not smelt lead, a shipment of ores predominately lead would command a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower prices at the Murray Smelter than at the Garfield Smelter and since the Midvale smelter is only a lead and zinc smelter, and does not smelt copper, a shipment of ores predominately copper would command a lower price at the Midvale Smelter than at the Garfield Smelter which smelts copper. On the other hand, a shipment of ores to the Garfield Smelter, which on sampling proves to be predominately lead and zinc would command lower prices at the Gar-

field smelter than at the Midvale Smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

Wherefore, this Intervenor respectfully prays, that upon final hearing this Court cause a permanent injunction to issue decreeing that the above described orders of the Commission, are contrary to law and are, therefore, null and void; that said orders be annulled and set aside; that their enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission, their respective officers, agents or others acting for them be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said orders; and for such other, further and additional relief as to the Court may seem meet and just in the premises.

MITCHELL MELICH,

MITCHELL MELICH,

Attorney for Intervenor,

Moab, Utah.

Dated October 11, 1948

208 In the District Court of the United States

For the District of Utah

Civil Action File No. 1524

(Title Omitted)

(File Endorsement Omitted)

Petition in Intervention—Filed Oct. 18, 1948

Now comes the Public Service Commission of Utah and, as a matter of right pursuant to Section 45-A, Title 28, U.S. Code Annotated, files this its Petition In Intervention in support of Plaintiffs in the above entitled action.

The grounds upon which such Petition is based are as follows:

I. 1

The Public Service Commission of Utah, hereinafter referred to as the Intervenor, is an administrative Commission of the State of Utah, and its Petition herein is filed

pursuant to Section 76-4-6 Utah Code Annotated 1943, which provides as follows:

Id. Unlawful Interstate Rates—Petition to Interstate Commerce Commission.

"The Commission shall have the power, and it shall be the duty of the commission, to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations, where any act in relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory, or in violation of the act of congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, or of any other act of congress, or in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief." (C.L. 17, § 4802.)"

209a

II.

In an exercise of the authority above referred to, this Intervenor intervened in certain proceedings before the Interstate Commerce Commission (hereinafter referred to as the Commission) known as *Ex Parte* 104 Part II, American Smelting & Refining Company. Thereafter, an order was entered by the Commission dated October 14, 1946, following which an action was filed before this Court, which action was numbered Civil 1325, in which action this petitioner intervened; that thereafter this Court issued a temporary injunction enjoining the enforcement of the order of the Interstate Commerce Commission dated October 14, 1946, after which the Interstate Commerce Commission set aside and annulled said order of October 14, 1946. Said Commission thereafter entered a new order dated May 18, 1948, and it is such order that petitioner now seeks to enjoin and set aside.

Intervenor's interest in the proceedings before and the order of the Commission which is herein sought to be enjoined, annulled and set aside, is as hereinafter stated.

III.

The evidence before the Commission in such proceedings shows that the principal traffic affected by the order at

tacked herein consists of inbound shipments of nonferrous ores and concentrates to the smelters of the American Smelting & Refining Company located at Garfield and Murray, Utah. The movement of such ores and concentrates is predominately intrastate, only 7% of such shipments to Garfield being interstate and only 33% to Murray. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

210

IV.

The order of the Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Garfield Smelter, termed in such order the "plant yard," and at the Murray Smelter termed in such order the "hold tracks," have never been made by or provided for in the tariffs of the plaintiff carriers for approximately fifty years during which such smelters have existed, except that since July 5, 1938, the tariffs have provided for certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements of, the smelter."

The supplemental report of the Commission referred to in and made a part of the order herein sought to be enjoined states as follows:

"(1) That it is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values.

"(2) That the 'plant yard' at the Garfield plant, the 'hold tracks' at the Murray plant and the 'flat yard' at the Leadville plant, hereinafter referred to

collectively as the 'convenient points' as described in the prior supplemental reports herein, are reasonably convenient points for the delivery and receipt of carload traffic moving to and from the plants of the American Smelting & Refining Company.

"(3) That the several respondents serving said plants move loaded and empty freight cars from said convenient points to points within the plant areas, from such points within the plant areas to the convenient points, and between points within the plant areas.

"(4) That the said services rendered within the plant areas to and from the convenient points are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(5) That the said services rendered between points within the plant areas are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(6) That the services from and to the convenient points and between points within the plant areas are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plants, including the manner in which the industrial operations are conducted, all as explained in the prior supplemental reports.

"(7) That the said services rendered between the convenient points and points in the plant areas and between points within the plant areas are in excess of those performed in simple switching and team-track delivery and are industrial or plant services which respondents are not obligated to and should not perform at the line-haul rates.

"(8) That the common carrier transportation which respondents are obligated to perform begins and ends at the convenient points and that all services beyond those points in the plant areas are industrial or plant services for which respondents should make reasonably compensatory charges.

"(9) That the performance by respondents without reasonably compensatory charges in addition to the line haul rates of the described services within the

plant areas beyond the convenient points at any and all of the said plants results in the American Smelting & Refining Company receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6(7) of the act."

V.

As a result of the order herein sought to be enjoined and the above interpretation thereof by the Commission, the transportation charges on shipments of all commodities to and from the Garfield and Murray Smelters of the American Smelting & Refining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on shipments of nonferrous ores and concentrates are ultimately borne by the mines producing the ores either by direct charge to such mines or indirectly through increases in treatment charges at the smelters.

The majority of mines in the State of Utah producing nonferrous ores are so-called "marginal" mines producing complex ores of low value. They are for the most part small operations and would be vitally affected by an increase in transportation charges on shipments of ores and concentrates. The imposition of any charge in addition to the present line haul charges and such charges as are now provided by the effective tariffs for so-called "interrupted movements" will seriously impair the ability of many such mines to continue production.

The record before the Commission shows without contradiction that the line haul rates now in effect to Garfield and Murray on nonferrous ores and concentrates include, and have always included, charges for all switching services necessary to determine the value of such materials. Accordingly, imposition of the additional charges pursuant to the order of the Commission, herein sought to be enjoined, would violate Section 1 of the Interstate Commerce Act for the reason that such additional charges would be unreasonable and excessive and would require the carriers involved to collect and the shipping interests to pay twice for the same services.

VI.

Under the tariffs presently in effect at Garfield and Murray, sampling in transit privileges are and for many years past have been provided for. Thus nonferrous ores and concentrates consigned to Garfield and Murray may either be sampled without charge in addition to the line haul rates at public samplers to determine value before arrival at Garfield and Murray or after arrival at Garfield and Murray; thereafter shipments may be reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield and Murray to determine the value as are performed on shipments on which final delivery is made at those smelters. It is on this latter type of shipment that the order sought to be enjoined would impose additional switching charges for such switching movements.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah because of the complex composition of the ores produced by them. Since the Garfield Smelter is only a copper smelter and does not smelt lead, a

shipment of ores predominately lead would command
213 a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other

hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower prices at the Murray Smelter than at the Garfield Smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

WHEREFORE, this Intervenor respectfully prays, that upon final hearing this Court cause that a permanent injunction issue decreeing that the order of the Commission, dated May 18, 1948, is contrary to law and is, therefore, null and void; that said order be annulled and set aside; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission, their respective officers, agents or others acting for them be restrained from taking any steps or instituting

or prosecuting any proceedings to enforce said order; and for such other, further and additional relief as to the Court may seem meet and just in the premises.

QUENTIN L. R. ALSTON,
Attorney for Intervenor.

Duly sworn to by Donald Hacking.

Jurat omitted in printing. (All in italics)

214 In the District Court of the United States
For the District of Utah
Civil Action No. 1525
(Title Omitted)

*Petition in Intervention on Behalf of the State of
Utah—Filed Oct. 18, 1948*

To: The Honorable, the Judges of the District Court of the United States for the District of Utah:

Comes now the STATE OF UTAH, by Grover A. Giles, its Attorney General, and respectfully prays that it be allowed to intervene herein as a party plaintiff, and as grounds therefor states:

1. That the State of Utah, as one of the sovereign states of the United States, files this petition in intervention at the order of Honorable Herbert B. Maw, Governor of the State of Utah, by and through Grover A. Giles, its duly elected, qualified and acting Attorney General:

2. That the State of Utah has a vital interest in any final judgment or decree which might be entered in this cause, and appears herein on behalf of persons, firms and corporations who are now and for a long period of time have been engaged not only in the mining of non-ferrous ores within the State of Utah, but also the transporting of said ores and concentrates from the mines where said ores are produced within the State of Utah to the smelters

215 of the American Smelter and Refining Company at Garfield and Murray, Utah, respectively, and in the smelting and refining of such ores; that the mining of non-ferrous ores is one of the basic and principal industries of the State of Utah; that any order or judgment of this Court which will change, and, particularly, increase the cost of transporting, smelting or refining said ores will seriously affect the economic conditions of the State of Utah as a whole, and in particular the economic condition of the mining, railroad and smelting industries of the State of Utah.

3. That the testimony and exhibits in the proceeding before the Interstate Commerce Commission, upon which was entered the order of said Commission, herein sought to be enjoined and reversed, show that the charges for transporting non-ferrous ores and concentrates from the mines to the smelters at Garfield and Murray, Utah, respectively, and the charges assessed by said American Smelting and Refining Company, will be greatly increased upon shipments of said non-ferrous ores and concentrates moving in interstate commerce, and may ultimately result in an increase in the said charges levied against ores and concentrates moving from points in Utah to the smelters at Garfield and Murray, Utah, respectively.

4. The evidence before the Interstate Commerce Commission in such proceedings shows that the principal traffic affected by the order here sought to be enjoined consists of inbound shipments of non-ferrous ores and concentrates to the smelters of the American Smelting & Refining Company located respectively at Garfield and Murray, Utah. The movement of such ores and concentrates is predominately intrastate, only 7% of such shipments to Garfield being interstate and only 33% to Murray. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charge. The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

216 5. The order of the Interstate Commerce Commission sought to be enjoined in the proceedings before this court would require the plaintiff carriers in such proceedings to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movements beyond tracks at the Garfield Smelter termed in such order the "plant yard" are and the tracks at the Murray Smelter termed in such order the "hold tracks." No such charges in addition to the line-haul rates for movement beyond such tracks have ever been made or provided for by the tariffs of the plaintiff carriers for approximately fifty years during which such smelters have existed with the exception that since July 5, 1928, the tar-

iffs have provided certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements from, the smelter."

As a result of said order here sought to be enjoined and the interpretation thereof made by the Interstate Commerce Commission as hereinbefore quoted, the transportation charges on shipments of all commodities to and from the Garfield and Murray Smelters of the American Smelting & Refining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on nonferrous ores and concentrates are ultimately borne by the mines producing such ores and concentrates either by direct charge back to such mines or indirectly through increases in treatment charges at such smelters.

The majority of mines in the State of Utah producing non-ferrous ores are so-called "marginal" mines producing complex ores of low value and are small operations vitally affected by the transportation charge applicable to such ores and concentrates.

217 The imposition of any charge in addition to the present line-haul charges and such charges as are now provided by the effective tariffs for so-called "interrupted movements" will have a serious effect on the ability of many such mines to continue production. The payment of war-time premium prices for non-ferrous ores is a temporary expedient to increase the production and will terminate in the near future, while the increased switching charges ordered by the Interstate Commerce Commission would be of a permanent nature.

The record before the Interstate Commerce Commission shows without contradiction that the line-haul rates now in effect to Garfield and Murray on non-ferrous ores and concentrates include, and have always included, compensation for all switching services on such non-ferrous ores and concentrates necessary to determine the value thereof. Therefore the additional charges which would be imposed by the order of the Interstate Commerce Commission, here sought to be enjoined would violate Section 1 of the Interstate Commerce Commission act by reason of the fact that such additional charges would be unreasonable and excessive and would require the railroads to collect and the shipping interests to pay twice for the same services.

6. Under the tariffs presently in effect at Garfield and Murray, sampling in transit privileges are provided, and have for many years been provided, under which non-ferrous ores and concentrates consigned to Garfield and Murray may either be sampled at public samplers to determine value before arrival at Garfield and Murray, or after arrival at Garfield and Murray may be sampled for value without charge in addition to the line-haul rates, and thereafter reconsigned without additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Garfield and Murray to determine the value as are performed for that purpose on shipments on which final delivery is made at those smelters and on which latter shipments the order sought

218 to be enjoined would impose additional switching charges for such switching movements. The Commission's supplemental report made part of the order sought here to be enjoined recognized on page 361 that the imposition of such additional switching charges at Garfield and Murray, on shipments upon which final delivery is made at those points, may result in violation of Section 2 of the Act, but suggests that in order to avoid such violations the plaintiff carriers cancel such sampling in transit privileges.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the state of Utah because of the complex nature of the ores produced by them. Since the Garfield Smelter is only a copper smelter and does not smelt lead, a shipment of ore or copper predominately lead would command a lower price at the Garfield Smelter than at the Murray Smelter, which smelts lead. On the other hand, a shipment of ores to the Murray Smelter, which on sampling proves to be predominately copper would command lower prices at the Murray Smelter than at the Garfield Smelter. Therefore it is vitally important to the producers of such ores that they have the privilege of reconsigning such commodities to the smelters paying the highest return. It is also vitally important to the plaintiff railroads because of the higher freight charges received by them depending on the values of the ores at the smelter where the final delivery is made.

WHEREFORE, the State of Utah prays that it be allowed to intervene herein as a Plaintiff, and that it be permitted to

adopt the allegations of the Complaint on file herein as its own.

Respectfully submitted,

THE STATE OF UTAH

GROVER A. GILES,

Grover A. Giles

Attorney General.

S. D. HUFFAKER,

S. D. Huffakher,

Deputy Attorney General.

219 In The District Court of The United States
For The District of Utah
Civil Action File No. 1525
(Title Omitted)

(File Endorsement Omitted)

Petition in Intervention—Filed Oct. 18, 1948

Now comes the Public Service Commission of Utah and, as a matter of right pursuant to Section 45-A, Title 28, U.S. Code Annotated, files this its Petition in Intervention in support of Plaintiffs in the above entitled action.

The grounds upon which such Petition is based are as follows:

I.

The Public Service Commission of Utah, hereinafter referred to as the Intervenor, is an administrative Commission of the State of Utah, and its Petition herein is filed pursuant to Section 76-4-6, Utah Code Annotated 1943, which provides as follows.

Id. Unlawful Interstate Rates—Petition to Interstate Commerce Commission.

“The Commission shall have the power, and it shall be the duty of the commission, to investigate all existing or proposed interstate rates, fares, tolls, charges and classifications, and all rules and practices in relation thereto, or in relation to the transportation of persons or property or the transmission of messages or conversations, where any action relation thereto shall take place within this state; and when the same are, in the opinion of the commission, excessive or discriminatory, or in violation of the act of congress entitled ‘An Act to Regulate Commerce,’ approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, or of any other act of congress, or

in conflict with the rulings, orders or regulations of the interstate commerce commission, the commission shall apply by petition or otherwise to the interstate commerce commission or to any court of competent jurisdiction for relief. (C. L. 17, § 4802.)"

220

II.

In an exercise of the authority above referred to, this Intervenor intervened in certain proceedings before the Interstate Commerce Commission (hereinafter referred to as the Commission) known as "United States Smelting Refining and Mining Company Ex Parte No. 104, practices of carriers affecting operating revenues or expenses, Part II, terminal services." Thereafter, an order was entered by the Commission dated October 14, 1946, following which an action was filed before this Court, which action was numbered Civil 1325, in which action this petitioner intervened; that thereafter this Court issued a temporary injunction enjoining the enforcement of the order of the Interstate Commerce Commission dated October 14, 1946, after which the Interstate Commerce Commission set aside and annulled said order of October 14, 1946. Said Commission thereafter entered a new order dated May 18, 1948, and it is such order that petitioner now seeks to enjoin and set aside. Intervenor's interest in the proceedings before and the order of the Commission which is herein sought to be enjoined, annulled and set aside, is as hereinafter stated.

III.

The evidence before the Commission in these proceedings shows that the principal traffic affected by the order attacked herein consists of inbound shipments of non-ferrous ores and concentrates to the smelter of the United States Smelting Refining and Mining Company, located at Midvale, Utah. The movement of such ores and concentrates is predominately intrastate, only 10% of such shipments to Midvale being interstate. Such commodities move under tariffs providing rates based on actual value and destination weights. The values and weights of such shipments must therefore be determined before the carriers can determine their lawful charges. The terminal switching movements to determine such values and weights are those principally affected by the order herein sought to be enjoined.

221

IV.

The order of the Commission sought to be enjoined in the proceedings before this court would require

the plaintiff carriers to publish tariffs assessing switching charges in addition to the line-haul rates not only on all such inbound shipments of ores and concentrates, but on all inbound and outbound shipments of other commodities as well. Switching charges in addition to the line-haul rates, for any movement beyond tracks at the Midvale smelter, termed in such order the "assembly yard" have never been made by or provided for in the tariffs of the plaintiff carriers for approximately thirty-eight years during which this smelter has been in existence, except that since July 5, 1938, the tariffs provided for certain charges in addition to the line-haul rates for so-called interrupted movements, "resulting from orders from, or requirements of, the smelter."

The supplemental report of the Commission referred to in and made a part of the order herein sought to be enjoined states:

"(1) That it is the duty and obligation of the smelter to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining or assisting the smelter in ascertaining such values.

"(2) That the assembly yard, as described in the prior supplemental reports herein, is a reasonably convenient point for the delivery and receipt of car-load traffic moving to and from the plant of the United States Smelting, Refining and Mining Company.

"(3) That the respondents serving the plant move loaded and empty freight cars from said convenient point to points within the plant area, from such points within the plant area to the convenient point, and between points within the plant area.

"(4) That the said services rendered within the plant area to and from the assembly yard are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(5) That said services rendered between points within the plant area are in excess of those rendered shippers generally in the receipt and delivery of traffic on team tracks or industrial sidings or spurs.

"(6) That the services to and from the assembly yard and between points within the plant area are

not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plant, including the manner in which industrial operations are conducted, all as explained in the prior supplemental reports herein.

"(7) That said services rendered between the assembly yard and points in the plant area and between points within the plant area are in excess of those performed in simple switching and team-track delivery, and are industrial or plant services which respondents are not obliged to and should not perform at the line-haul rates.

"(8) That common-carrier transportation which respondents are obliged to perform begins and ends at the assembly yard and that all services beyond that point in the plant area are industrial or plant services for which respondents should make reasonably compensatory charges.

"(9) That the performance by respondents without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant area beyond the convenient point results in the United States Smelting, Refining and Mining Company receiving a preferential service not accorded shippers generally and results in the refunding or remitting of a portion of the rates and charges collected in violation of section 6(7) of the act."

V.

As a result of the order herein sought to be enjoined and the supplemental findings of the Commission referred to above, the transportation charges on shipments of all commodities to and from the Midvale smelter of the United States Smelting Refining and Mining Company will be substantially increased, and this is particularly true in connection with charges on inbound shipments of nonferrous ores and concentrates.

The transportation charges on shipments of nonferrous ores and concentrates are ultimately borne by the mines producing the ores either by direct charge to such mines or indirectly through increases in treatment charges at the smelters.

The majority of mines in the State of Utah producing nonferrous ores are so-called "marginal" mines producing

complex ores of low value. They are for the most part small operations and would be vitally affected by an
 223 increase in transportation charges on shipments of ores and concentrates. The imposition of any charge in addition to the present line-haul charges and such charges as are now provided by the effective tariffs for so-called "interrupted movements" will seriously impair the ability of many such mines to continue production.

The record before the Commission shows without contradiction that the line-haul rates now in effect at Midvale on non ferrous ores and concentrates include, and have always included, charges for all switching services necessary to determine the value of such materials. Accordingly, imposition of the additional charges pursuant to the order of the Commission, herein sought to be enjoined, would violate Section 1 of the Interstate Commerce Act for the reason that such additional charges would be unreasonable and excessive and would require the carriers involved to collect and the shipping interests to pay twice for the same services.

VI.

Under the tariffs presently in effect at Midvale, sampling in transit privileges are and for many years past have been provided for. Thus non-ferrous ores and concentrates consigned to Midvale may either be sampled without charge in addition to the line-haul rates at public samples to determine value before arrival at Midvale or after arrival at Midvale; thereafter, shipments may be reconsigned without any additional transportation charge to other smelters within the State of Utah. Under such sampling in transit tariffs, exactly the same terminal switching operations are performed at Midvale to determine the value as are performed on shipments on which final delivery is made at that smelter. It is on this latter type of shipment that the order sought to be enjoined would impose additional switching charges for such switching movements.

The record before the Commission shows that such sampling in transit privileges are of vital importance to mines in the State of Utah of the complex composition of the ores produced. Since the Midvale smelter is
 224 only a lead and zinc smelter, and does not smelt copper, a shipment of ores predominately copper would command a lower price at the Midvale smelter than at the Garfield smelter which smelts copper. On the other hand, a shipment of ores to the Garfield smelter, which on sampl

ing proves to be predominately lead and zinc would commend lower prices at the Garfield smelter than at the Midvale smelter. It is, therefore, vitally important to the producers of ores that they have the privilege of reconsigning shipments to the smelter paying the highest return. Further, discontinuance of this privilege would adversely affect the carriers involved in that it would deny them receipt of the higher freight charges which result when shipments are reconsigned for the purpose of obtaining a higher value for the ores.

Wherefore, this Intervenor respectfully prays that upon final hearing this Court cause that a permanent injunction issue decreeing that the order of the Commission, dated May 18, 1948, is contrary to law and is, therefore, null and void; that said order be annulled and set aside; that its enforcement, execution and operation be forever enjoined; and that the United States of America and the Commission, their respective officers, agents or others acting for them be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said order; and for such other, further and additional relief as to the Court may seem meet and just in the premises.

QUENTIN L. R. ALRTON
Attorney for Intervenor

Duly sworn to by Donald Hacking.

Jurat omitted in printing. (All in italics.)

225 In the District Court of the United States
For The District of Utah

Civil Action File No. 1525

(Title Omitted)

(File Endorsement Omitted)

*Petition in Intervention of The Colorado Mining Association
Filed Oct. 18, 1948*

To the Honorable, the Judges of the District Court of the United States for the District of Utah:

Comes now The Colorado Mining Association, hereinafter called the "Association", acting in its own behalf, in behalf of its members and in behalf of the mining industry and the producers and shippers of minerals in Colorado, and Leave of Court having first been obtained, files this, its PETITION IN INTERVENTION, in the above entitled matter, and alleges:

226

I.

This Intervention is in the nature of a Complaint against the United States of America and the Interstate Commerce Commission, hereinafter called "Commission" and is for the purpose of enjoining, setting aside and annulling an order of the Commission entered May 18, 1948, in proceedings instituted by an order of investigation made by the Commission on its own motion, entitled "American Smelting & Refining Company, *Ex Parte* No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services".

II.

Intervenor adopts and makes a part hereof by reference the allegations set forth in paragraphs I, II and III of the Motion of the Association, heretofore filed, for Leave to Intervene.

III.

Intervenor adopts and makes a part hereof by reference all and singular the allegations, statements and references contained in Plaintiff's Complaint in this action and Exhibits attached to and made a part of said Complaint.

INTERVENOR IS REAL PARTY IN INTEREST AND
HAD NO OPPORTUNITY TO BE HEARD.

IV.

The additional switching or terminal charges, as required by the Order of Commission entered May 18, 1948, above line-haul charges heretofore imposed under tariffs of The Denver and Rio Grande Western Railroad Company,

227 (hereafter called "Railroad Company") will be borne definitely and ultimately by the producers and shippers of minerals to the smelter of Plaintiff, American Smelting and Refining Company (hereafter called "Smelting Company") at Leadville, Colorado, and will not be absorbed by the Smelting Company. As a result, the members of the Association and those others in whose behalf it appears, have a real, vital and legal interest in this action, and in fact are real parties in interest herein. Neither Intervenor nor those on whose behalf it appears, nor any producers or shippers as aforesaid, nor the mining industry of Colorado in whole or in part were made parties to the investigation, were notified or made cognizant of the investigation and hearing upon which said Order was based, or were extended the opportunity to be present and be heard.

at such hearing, nor were any witnesses called by the Commission to testify in behalf of such producers or shippers or in connection with the interests of Colorado. Intervenor contends as a result thereof that said order invades the rights of such producers, shippers and mining interests, and should be set aside.

LINE-HAUL CHARGES INCLUDE SWITCHING CHARGES
AND
FINDINGS OF THE COMMISSION ARE AGAINST THE
LAW AND THE EVIDENCE.

V.

A. Line-haul charges to destination Leadville, for approximately 50 years, have included switching movements within the plant. O. W. Tuckwood, General Traffic Manager of the Smelting Company testified that between 1908 and 1920 all of the applicable tariffs provided under the line-haul rate not only switching in connection with road hauls such as weighing, thaw house, sampler and final spotting, but also for switching without charge between tracks in the plant itself—purely intra-plant switching. (p. 128-129). This testimony was uncontradicted. It should be noted especially that the tariff provisions effective at Leadville differ from those effective at Garfield and Murray, in that since November 27, 1920, and now the effective tariffs at Leadville expressly provide that line-haul carload shipments

"will include movement of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company."

Item #15-A.

This tariff provision is still in effect, and as proceedings were brought under Section 6 (7) of the Act there is no authority for the Commission under said Section to require the cancellation of the published tariff. Nor can compliance with the published tariffs be deemed a violation of Section 6 (7) of the Act.

The tariff itself defines what shall be included in a line-haul shipment and the attempted imposition by the Commission of additional switching charges for operations included by the tariff in the line haul movement would force a violation of Section 6 (7) of the Act, and would result in shippers paying for the same services twice, in violation

229

Contrary to the conclusion of the Commission that "It is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values", the ascertainment of values, under the approved practice of assessment of freight charges based upon value, is for the benefit of the railroad company in its assessment of charges, and in the absence of being furnished with such values by the Smelter Company, the ascertainment thereof would become the duty of the Railroad Company. In the acceptance of ordinary freight for shipment by railroad, the freight is weighed by the railroad and charge is made accordingly. When freight charges are based upon value it would seem that it is likewise the duty of the Railroad Company to determine value. This has been the practical interpretation by the Smelter Company, the Railroad and the shippers since the tariff provision of November 27, 1920, and for many years previous thereto. Thus, if the order of the Commission is not set aside, and cancelled, a practical interpretation of long standing and the express provisions of the tariff since November 27, 1920, will be annulled, and the producers and shippers will bear a double charge, in violation of Section 1 of the Act, and all without any opportunity whatsoever to appear and present their case.

The Commission (p. 362) expressly eliminated any finding as to whether the line-haul rates do or do not include compensation for the terminal switching services, and expressly repudiated the finding in its former report that the line-haul rates do not include such compensation. In so expressly eliminating in the making of its order any finding that the line-haul rates do or do not include compensation for terminal switching services, and in expressly repudiating its former finding that the line-haul rates do not include such compensation, the Commission thereby deprived its order of a basic finding of fact essential to support it, since the finding of fact that the line-haul rates do not include compensation for the terminal switching services is essential in the finding of a violation of Section 6 (7), upon a violation of which section the Commission's order is solely based.

Extra compensation for terminal switching services, if and when imposed, would not be for the benefit of the smelter. Smelter charges for terminal switching charges for the

assessment of freight in which the interests of the shippers are paramount.

Thus the findings of the Commission, based as they are upon the purpose of the switching operations involved in this proceeding, are contrary to the law and the facts.

EFFECT OF ORDER UPON MINING INDUSTRY OF COLORADO

VI.

Most of the mines of Colorado, producing non-ferrous ores, are small mines and marginal in character and will, in many instances, be forced to close with the imposition of additional costs. In 1935 there were 1,317 producing mines in Colorado. There are now less than 300 such mines operating. These mines have incurred heavy losses recently by reason of the discontinuation of government subsidies which forced many to close and others to continue operations on very slim margins. The imposition of increased charges at this time would further hamper the ability of those marginal mines remaining in operation to continue production. The mining industry is paying higher rates to carriers by reason of increased tariffs due to graduated scales provided in published tariffs based on metal values. The mining industry is suffering under heavy operating costs and any additional burdens will force decreased production and numerous close-downs. There were formerly more than 25 smelters on the line of the Denver and Rio Grande Western Railroad Company in Colorado, but because of economic difficulties there is remaining only one, namely, the smelter at Leadville which is involved in this proceeding. These marginal mines of Colorado cannot survive any appreciable increases in freight rates, and the order of the Commission does impose an appreciable increase in rates which is a duplication and is arbitrary and unreasonable. The mining industry of Colorado as a whole is seriously and vitally interested in the outcome of this proceeding, and moreover, the outcome of the proceeding involves the economy of the State of Colorado as a whole as affected by the economy of the mining industry.

ORDER OF COMMISSION IS MEANINGLESS OR IT AFFECTS INTRASTATE MOVEMENTS.

VII.

Practically all the traffic handled at the Leadville Smelter is interstate. Witness F. C. MacDonald for the Commission, p. 4000. For the twelve months ending March 31, 1944, of the total number of inbound

shipments received at the Leadville Smelter, 93% was intrastate. Of the remaining 7%, 5% (thus leaving only 2% as factually interstate) originates and terminates in Colorado, although it is technically interstate commerce (Witness Hannebach, p. 423) because of the occurrence of a rockslide on the tracks of the Rio Grande Southern Railway Company in southern Colorado, thus re-routing all movements of ore from Silverton, Colorado into New Mexico for a short distance and back into Colorado to Leadville, where it had formerly moved completely intrastate from Silverton over Rio Grande Southern through Montrose and Grand Junction to Leadville (Witness W. M. Carey, pp. 398-399). Thus this 5% has origin and destination at Leadville in Colorado and becomes technically interstate only because it cannot move expeditiously by rail without traversing a small portion of New Mexico by way of in and out movement.

Charles A. Root, Counsel for Public Service Commission of Utah, Intervenor before the Interstate Commerce Commission asked Leonard Way, Examiner, "if whatever was done in the proceeding would be confined to interstate business," to which Examiner Way replied: "That is my understanding" p. 238.

The movements involved are thus almost entirely intrastate and the order of the Commission is either meaningless or else it operates upon purely intrastate business. It should not be maintained that the Order should become effective on 5% of the ores and concentrates moving from

233 Colorado through New Mexico back to Colorado, while ineffective as to 93% of such ores and concentrates moving solely intrastate in Colorado, thus imposing discriminatory rates upon the shippers of the 5% of the ores and concentrates originating in Colorado. Based on 1944 movements, the order would thus be left effective only as to 2% of the traffic, which is strictly interstate and thus it becomes without practical efficacy.

ORDER OF THE COMMISSION IS ARBITRARY, UNREASONABLE,
UNLAWFUL AND VOID.

VIII

The action of the Commission was ill-advised, arbitrary and unreasonable in that it pursued a policy of adhering to general practices for other and unrelated industries, when the assessment of freight charges for ores and concentrates is peculiar unto itself and requires, in order to be fair and reasonable, a method of assessment different from that pursued in almost every other instance, namely the as-

assessment of charges upon value, which necessitates the translation of dry weight into wet weight; in that it failed to consider the real and vital interests and rights of producers and shippers of minerals; in that it failed to consider the effect of its order upon the economy of the mining industry and upon the very considerable segment of marginal mines comprising that industry; in that it found against the evidence that the switching operations involved are the obligation of the smelters and not of the carriers in the face of the uncontradicted evidence that such operations are necessary for the assessment of freight charges; in that

234 it failed to hold that line-haul charges include the switching movements as provided in the effective tariff, as disclosed by uncontradicted testimony; in that the imposition of switching charges in addition to line-haul charges under the Order will result in payment by producers and shippers of the same charges twice; and in that the order affects from 93% to 98% of strictly intrastate inbound shipments at the Leadville Smelter, or it becomes meaningless except as to an almost infinitesimal portion of inbound shipments.

IX.

By virtue of the foregoing, the Association, its members and those whom it represents as aforesaid, will suffer great hardship and irreparable damage and injury if the Order of the Commission above referred to is not set aside and annulled.

WHEREFORE, Intervenor, being without adequate remedy at law respectfully prays:

That upon final hearing, a permanent injunction issue decreeing that the said Order of the Interstate Commerce Commission is beyond the lawful authority of said Commission and null and void; that said Order be set aside and annulled and that its enforcement, execution and operation be enjoined forever; and that the United States of America and the Interstate Commerce Commission, their respective officers and agents and others acting for them, be restrained from taking any steps or instituting or prosecuting any proceedings to enforce said Order.

That this Court grant such other and further relief as may be deemed proper.

ROBERT S. PALMER

Robert S. Palmer

Attorney for Intervenor

2nd State Office Building

Denver 2, Colorado

TA 2757

235 In the District Court of the United States
For the District of Utah

Central Division

Civil No. 1524

(Title Omitted)

Answer of the United States—Filed Oct. 18, 1948

Now comes the United States of America, defendant in the above entitled cause, and in response to the complaint filed herein answers and says:

1. Defendant admits the jurisdiction of this Court over this cause and the parties thereto.

2. Defendant admits and alleges that the Interstate Commerce Commission, in the due course of administrative procedure, duly made and issued its report and order of May 14, 1948, attacked in the present suit.

3. Defendant alleges that said report and order were duly made, in accordance with this Court's decision of November 14, 1947, in Civil No. 1325 and in accordance with applicable law and in the valid exercise of the said Commission's legal authority and statutory powers, and were not arbitrary or capricious.

4. Defendant alleges that said report was based upon adequate findings, supported by substantial evidence, and was and is valid and lawful in all respects.

5. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

236. WHEREFORE defendant prays that the relief prayed for by plaintiffs be denied and the suit dismissed, plaintiffs to pay the costs.

Edward Dumbauld

EDWARD DUMBAULD

Special Assistant to

the Attorney General

Department of Justice

Washington 25, D. C.

HERBERT A. BERGSON

Assistant Attorney General

DAN R. SHIELDS

United States Attorney

I certify that a copy of the foregoing answer was,
this day mailed to the following persons:

PAUL B. CANNON, Esq.
CHENEY, JENSEN, MARR & WILKINS
120 Continental National Bank Bldg.
Salt Lake City, Utah
ELMER B. COLLINS, Esq.
Union Pacific Railroad Building
Omaha, Nebraska
H. B. THOMPSON, Esq.
Union Pacific Building
Salt Lake City, Utah
OTIS J. GIBSON, Esq.
Denver & Rio Grande Railroad Building
Denver, Colorado
HONORABLE H. LAWRENCE HINKLY
Attorney General of Colorado
Denver, Colorado
JOSEPH W. HAWLEY, Esq.
*The Public Utility Commission
of the State of Colorado*
Denver, Colorado
HENRY S. SHERMAN, Esq.
Colorado Mining Association
514 Equitable Building
Denver 2, Colorado
HONORABLE GROVER A. GILES
Attorney General of Utah
Salt Lake City, Utah
CHARLES A. ROOT, Esq.
Public Service Commission of Utah
Salt Lake City, Utah
UTAH MINING ASSOCIATION
Salt Lake City, Utah
ALLEN CRESSHAW, Esq.
Interstate Commerce Commission
Washington 25, D. C.

This 14th day of October, 1948

EDWARD DUMBAULD
Edward Dumbauld
*Special Assistant
to the Attorney General*

(File Enforcement Omitted)

238

In the District Court of the United States
For the District of Utah
Central Division
Civil No. 1525
(Title Omitted)

Answer of the United States—Filed Oct. 18, 1948

Now comes the United States of America, defendant in the above entitled cause, and in response to the complaint filed herein answers and says:

1. Defendant admits the jurisdiction of this Court over this cause and the parties thereto.

2. Defendant admits and alleges that the Interstate Commerce Commission, in the due course of administrative procedure, duly made and issued its report and order of May 14, 1948, attacked in the present suit (Exhibit N-1 to Complaint).

3. Defendant alleges that said report and order were duly made, in accordance with this Court's decision of November 14, 1947, in Civil No. 1324 (Exhibit N-7 to Complaint) and in accordance with applicable law and in the valid exercise of the said Commission's legal authority and statutory powers, and were not arbitrary or capricious.

4. Defendant alleges that said report was based upon adequate findings, supported by substantial evidence, and was and is valid and lawful in all respects.

239 5. Except as hereinabove expressly admitted, defendant denies each and every allegation in the complaint contained.

WHEREFORE defendant prays that the relief prayed for by plaintiffs be denied and the suit dismissed, plaintiffs to pay the costs.

EDWARD DUMBAULD
Edward Dumbauld
Special Assistant to the
Attorney General,
Department of Justice
Washington 25, D. C.

HERBERT A. BERGSON
Assistant Attorney General

DAN R. SHIELDS
United States Attorney

(File Endorsement Omitted)

240

I certify that a copy of the foregoing answer was
this day mailed to the following persons:

JOHN F. FINERTY, Esq.
120 Broadway
New York 5, New York

ELMER B. COLLINS, Esq.
Union Pacific Railroad Building
Salt Lake City, Utah

H. B. THOMPSON, Esq.
Union Pacific Building
Salt Lake City, Utah

ORIS J. GIBSON, Esq.
Denver & Rio Grande Railroad Building
Denver, Colorado

W. Q. VAN COTT, Esq.
Walker Bank Building
Salt Lake City, Utah

HONORABLE H. LAWRENCE HINKLY
Attorney General of Colorado
Denver, Colorado

JOSEPH W. HAWLEY, Esq.
*The Public Utility Commission
of the State of Colorado*
Denver, Colorado

HENRY S. SHERMAN, Esq.
Colorado Mining Association
514 Equitable Building
Denver 2, Colorado

HONORABLE GROVER A. GILES
Attorney General of Utah
Salt Lake City, Utah

CHARLES A. ROOT, Esq.
Public Service Commission of Utah
Salt Lake City, Utah

UTAH MINING ASSOCIATION
Salt Lake City, Utah

ALLEN CHENSHAW, Esq.
Interstate Commerce Commission
Washington 25, D. C.

This 14th day of October, 1948

EDWARD DUMBAULD
Edward Dumbauld

Special Assistant

Attorney General

241 In the District Court of the United States
For the District of Utah
Central Division
Civil Action No. 1524
(Title Omitted)

*Answer of Interstate Commerce Commission—Filed
Oct. 78, 1948*

Action herein relates to the same subject matter which was heard and considered in the previous action in this Court, under Civil Action No. 1325, which remanded the order there reviewed for reconsideration, under the Court Findings of Fact, Conclusions of Law and Decree. It has been agreed that the entire record in the prior action will be incorporated in the new action.

In this situation and in the interest of time and space, the Commission adopts its answer in the prior action as its answer herein with the following amendment to paragraph III of said answer:

That thereafter plaintiffs filed Civil Action No. 1325 in this Court, which was heard and decided, and the said order of October 14, 1946, was temporarily enjoined and remanded to said Commission for reconsideration, and the Commission did thereafter vacate and set aside said order of October 14, 1946, and reconsider the proceedings there involved, and did enter a second report and order upon reconsideration on May 18, 1948, effective under extension, on December 23, 1948, and which said order is the subject of the action herein.

INTERSTATE COMMERCE COMMISSION

By: /s/ ALLEN CRENSHAW

Attorney

/s/ DANIEL W. KNOWLTON
Chief Counsel
Of counsel

(File Endorsement Omitted)

243 In the District Court of the United States
For the District of Utah
Central Division
Civil Action No. 1525
(Title Omitted)

*Answer of Interstate Commerce Commission—Filed
Oct. 16, 1948*

Action herein relates to the same subject matter which was heard and considered in the previous action in this

Court, under Civil Action No. 1324, which remanded the order there reviewed for reconsideration, under the Court Findings of Fact, Conclusions of Law, and Decree. It has been agreed that the entire record in the prior action will be incorporated in the new action.

In this situation and in the interest of time and space, the Commission adopts its answer in the prior action as its answer herein with the following amendment to paragraph III of said answer:

That thereafter plaintiffs filed Civil Action No. 1324 in this Court, which was heard and decided, and the said order of October 14, 1946, was temporarily enjoined and remanded to said Commission for reconsideration, and the Commission did thereafter vacate and set aside said order of October 14, 1946, and reconsider the proceedings there involved, and did enter a second report and order upon reconsideration on May 18, 1948, effective
244 under extension, on December 23, 1948, and which said order is the subject of the action herein.

INTERSTATE COMMERCE COMMISSION

By: /s/ ALLEN CRENSHAW,

Attorney

/s/ DANIEL W. KNOWLTON

Chief Counsel

Of Counsel

(File Endorsement Omitted)

245

In United States District Court

No. 1525, Civil

No. 1524, Civil

(Titles Omitted)

Minute Entry Dated October 18, 1948

In the above-entitled cause it appearing that said proceeding should be heard and determined by a court of three judges.

In accordance with Section 2284 of Title 28 of the United States Code, it is hereby ordered in open court by the Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals for the Tenth Circuit that a designation of three judges be made to hear this cause and he hereby appoints and designates himself together with the Honorable Tillman D. Johnson, United States District Judge for the District of Utah and the Honorable T. Blake

Kennedy, United States District Judge for the District of Wyoming as members of the court to hear and determine the proceedings in the above entitled cause, dated October 18, 1948.

246

In United States District Court
Civil No. 1524

Minute Entry Dated October 18, 1948

On this 18th day of October, 1948, the matter came on for hearing before the Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals for the Tenth Circuit, the Honorable Tillman D. Johnson, United States District Judge for the District of Utah, and the Honorable T. Blake Kennedy, United States District Judge for the District of Wyoming.

The Denver and Rio Grande Western Railroad appearing especially by Otis T. Gibson, its attorney, the Union Pacific Railroad Company appearing by Elmer Collins, its attorney, and the United States Smelting & Refining Company appearing by Paul B. Cannon, its attorney.

On the motion of Mitchell Melich, attorney for Utah Mining Association, it was ordered that the association be authorized to intervene in this action and it would adopt the complaint filed herein as its pleadings.

On motion of Quentin L. R. Alston, attorney for the Public Service Commission of Utah, it was ordered that a petition in intervention by said commission be filed and it would adopt the pleadings of the plaintiff in this action as its pleadings.

On behalf of the defendants, United States of America appearing by Edward Dumbauld, special assistant to the Attorney General of the United States, and the Interstate Commerce Commission appearing by Allen Crenshaw, its attorney, and the matter came on for hearing on the merits. Counsel for the United States of America and the Interstate Commerce Commission waived the service of summons and the statutory time in which to plead and it was further ordered that plaintiffs would present their arguments in this case and in Civil action No. 1525, and the defendants would consolidate their arguments in the two cases.

The court heard arguments of counsel for the plaintiffs and the defendants and counsel agrees that the case is fully submitted on the merits. The court holds in favor of the plaintiffs and against the defendants and that a permanent

ment injunction should be issued. Form Findings of Fact, Conclusions of Law, and Decree to be prepared within 10 days and submitted to the court for signature.

247 In United States District Court

Civil No. 1525

Minute Entry Dated October 18, 1948

On this 18th day of October, 1948, ~~the~~ matter came on for hearing before the Honorable Orie L. Phillips, Chief Judge of the United States Court of Appeals for the Tenth Circuit, the Honorable Tillman D. Johnson, United States District Judge for the District of Utah, and the Honorable T. Blake Kennedy, United States District Judge for the District of Wyoming.

The Denver and Rio Grande Western Railroad Company appearing especially by Otis T. Gibson, its attorney, the Union Pacific Railroad Company appearing by Elmer Collins, its attorney, and the American Smelting & Refining Company appearing by John F. Finnerty, its attorney.

On motion of Mitchell Melich, attorney for Utah Mining Association, it was ordered that the association be authorized to intervene in this action and it would adopt the complaint filed herein as its pleadings.

On motion of S. D. Huffaker, Deputy Attorney General for the State of Utah, it is ordered that a petition in intervention be filed on behalf of the said State of Utah and that it would adopt the allegations of the complaint on file herein as its pleadings.

On motion of Robert S. Palmer, attorney for the Colorado Mining Association, it is ordered that said mining association may file petition in intervention and that it would adopt the allegations of the complaint on file herein as its pleadings.

On motion of Quentin L. R. Alston, attorney for the Public Service Commission of Utah, it is ordered that said commission may file a petition in intervention and it would adopt the allegations of the complaint on file as its pleadings.

On motion of J. W. Hawley, attorney for the Public Utilities Commission of Colorado, it is ordered that said commission be authorized to intervene and it would adopt the allegations of the complaint herein on file as its pleadings and the United States of America appearing by Edward Dupond, special assistant to the Attorney General.

of the United States and the Interstate Commerce Commission appearing by Allen Crenshaw, its attorney, and the matter came on for hearing on the merits. The United States of America and Interstate Commerce Commission waived the service of summons and the statutory time in which to plead herein. It was further ordered that the plaintiffs would present their arguments in this case and in case No. 1524 and that the defendants would consolidate their arguments in the two cases. The court heard arguments of counsel for the plaintiff and defendant and holds in favor of the plaintiff and that an injunction should be issued. Form of Findings of Fact, Conclusions of Law, and Decree to be prepared by counsel within 10 days and submitted to the Court at the respective addresses for signature.

249 Clerk's Note:

No. 14 of the Praecipe requests Plaintiffs' joint proposed Findings of Fact and Conclusions of Law—this document was never lodged nor filed with us, and is not included in the original file, and is therefore omitted from the Transcript.

250 In the District Court of the United States
For the District of Utah

Civil No. 1525

Civil No. 1524

(Titles Omitted)

*Findings of Fact, Conclusions of Law, and Decree
Requested by Defendants—Lodged Jan. 10, 1949*

The Court makes the following findings of fact:

1. The above-entitled causes came on to be heard on October 18, 1948, before a district court of three judges duly constituted in accordance with statute, and by agreement of all parties were submitted upon final hearing upon the pleadings and evidence, including the record of the proceedings before the Interstate Commerce Commission, and the said Commission's findings and decision thereon.

251 2. These actions were brought to set aside orders of the Interstate Commerce Commission made on May 18, 1948, in proceedings entitled *American Smelting & Refining Company, Ex Parte No. 104* (75th Supplemental Report), and *United States Smelting, Refining and Mining Company, Ex Parte No. 104* (76th Supplemental Report).

Said orders required the railroads serving certain industrial plants of said smelting companies to cease and desist from furnishing, without reasonable and compensatory charges therefor in addition to the rates for line-haul transportation, certain switching and car-spotting service within said plants in excess of the carriers' line-haul transportation obligation as determined by the said Commission.

3. The Interstate Commerce Commission had before it substantial evidence in support of its findings, and the facts found and reported by the Commission are adopted as facts found by this Court.

The Court makes the following conclusions of law:

1. This Court has jurisdiction of this cause and of the parties thereto.

2. The Interstate Commerce Commission had jurisdiction over the proceedings wherein the said orders of May 14, 1948, were made, and to make the said orders. Said orders were within the constitutional and statutory authority of the Commission, and were not arbitrary or based upon mistake of law or misapplication of the proper statutory standards. Said orders were made by the Commission upon adequate findings, supported by substantial evidence, in accordance with the applicable law, and were and are valid and lawful in all respects.

3. Line-haul rates are rates for line-haul transportation. Line-haul transportation may or may not include car-spotting and switching service within an industrial plant to the point of loading and unloading cars; it includes such service if, and only if, such service can be performed at the carrier's ordinary operating convenience in a single uninterrupted movement, in accordance with the standards and criteria set forth in the Commission's basic report in *Ex Parte No. 104* (209 I. C. C. 11, sustained 252 U. S. 402 (1937)), and subsequent cases, including *United States v. Wabash Railroad Company*, 321 U. S. 403 (1944), and *Corn Products Refining Company v. United States*, 331 U. S. 790 (1947)). Where that condition is not met, the carrier's transportation obligation under its line-haul rates ends at the point where industrial interruption or interference due to plant operations is experienced.

4. The precise determination of the point in time and space where line-haul transportation begins and ends is a function entrusted by law to the Commission.

5. Such determination is to be made by the Commission upon consideration of the specific facts found to exist at a particular industrial plant, and is to be based upon considerations relating to actual physical operating conditions at the particular plant rather than traffic considerations with regard to the level of the line-haul rates or the reasonableness or unreasonableness thereof.

6. With respect to plaintiffs' smelting plants involved in these proceedings, the Commission has made such a determination of the respective points within each plant where line-haul transportation ends and plant service begins. Such determination, being supported by substantial evidence is conclusive, and supersedes any different determination made by the carriers in their published tariffs with respect to the points where line-haul transportation ends and plant service begins.

7. The performance by carriers serving plaintiffs' smelting plants of service in excess of the line-haul transportation as so determined by the Commission, in the absence of an appropriate charge therefor in addition to the rate for line-haul transportation, is an unlawful rebate or refund in violation of Section 6(7) of the Interstate Commerce Act, as amended (49 U. S. C. 6(7)).

8. The Commission has power to order the discontinuance of such unlawful service, and its orders in the
253 case at bar are valid and should be upheld by this Court.

9. No finding with respect to the level of the line-haul rates, or with respect to the reasonableness or compensatory character thereof, is necessary or essential to the validity of the Commission's said cease and desist orders.

10. No finding under Section 6(1) of the Interstate Commerce Act, as amended (49 U. S. C. 6(1)), is necessary or essential to the validity of the Commission's said cease and desist orders.

11. The Commission made all findings necessary to sustain the validity of its orders, and such findings were supported by substantial evidence of record.

12. Plaintiffs' actions should be dismissed.

This day of November, 1948.

54 In the District Court of the United States
 For the District of Utah
 Central Division
 Civil No. 1525
 Civil No. 1524

Findings of Fact and Conclusions of Law
 Filed Jan. 10, 1949

The above-entitled causes, on stipulation of the parties, came on for final hearing on October 18, 1948, before a duly-convened statutory three-judge Court upon the application of the plaintiffs for orders to restrain and enjoin the carrying into effect of the respective orders of the Interstate Commerce Commission dated May 18, 1948, with respect to charges for terminal switching services involved in the transportation of carload freight to and from the smelters of the American Smelting & Refining Company and of the United States Smelting, Refining and Mining Company, and all of the parties being represented by counsel and evidence having been introduced, briefs received, and arguments made, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

55 FINDINGS OF FACT

(1) On November 14, 1947, a prior statutory court duly convened in this District and consisting of the same judges constituting the present statutory court, issued in certain proceedings before it, designated as Civil Actions Nos. 1324 and 1325, a single consolidated order, temporarily enjoining certain respective orders of the Interstate Commerce Commission of October 14, 1946, made in the same proceedings before the Commission, in which were entered its respective orders of May 18, 1948, here sought to be enjoined. Such proceedings before the Commission were supplemental proceedings, respectively designated as "American Smelting & Refining Company" and as "United States Smelting, Refining and Mining Company", under a general proceeding before the Commission entitled "*Ex Parte* 104, Practice of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services". In such general proceedings the Commission had previously issued a report, known herein as its basic report, 209 I. C. C. 113 (Said prior statutory court, in addition to thus temporarily enjoining the Commission's re-

spective orders of October 14, 1946, remanded to the Commission the respective supplemental proceedings in which such orders had been made, "for such action as it may find justifiable in the premises."

(2) The Commission's respective orders of October 14, 1946, thus temporarily enjoined, required the plaintiff carriers to cease and desist from certain alleged violations of Section 6 (7) of the Interstate Commerce Act in connection with the performance of terminal switching services in the transportation of earload freight to and from the smelters of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colorado, and the United States Smelting, Refining and Mining Company at Midvale, Utah.

(3) Such alleged violations of Section 6 (7), were based on findings set forth in the Commission's respective reports of the same dates as its respective orders, 266 I. C. C. 349 and 266 I. C. C. 476, and are herein incorporated by reference. Such findings were primarily confined to the terminal switching services at the respective smelters on inbound earload shipments of non-ferrous ores and concentrates handled under line-haul rates, based on the actual value of each earload and on destination weights. The Commission's respective orders extended, however, 256 to earload shipments of all commodities, whether handled inbound or outbound at such smelters.

(4) Such findings were in substance, (a) that under the carriers' duly published tariffs, it is the duty and obligation of the respective smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values; (b) that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters, of earload freight by the plaintiff carriers; (c) that the transportation services, which it is the duty of the plaintiff carriers to perform under their line-haul rates, begin and end at such designated points; (d) that the line-haul rates of the plaintiff carriers do not include compensation for any terminal switching services beyond such designated points; (e) that the performance by the plaintiff carriers of terminal switch-

ing services beyond such designated points, without charge in addition to the line-haul rates, constitute violations of Section 6 (7) of the Act.

(5) Such prior statutory court, in thus temporarily enjoining the Commission's respective orders of October 14, 1946, made the following findings of fact with respect to each such order:

"(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants.

(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary.

(4) That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

57 In addition, such court made the following conclusions of law:

"(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, and that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent powers to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in *Securities & Exchange Commission v. Chenery Cor-*

poration, U. S. , June 23, 1947, and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this court."

Judge Phillips, in concurring in the findings and conclusions, stated:

"I join in the foregoing findings and in the disposition to be made of the cases, and desire to further indicate my views.

"The Commission found and determined that the 'plant yard' at Garfield, the 'hold tracks' at Murray, the 'assembly yard' at Midvale, and the 'flat yard' at Leadville constituted reasonable points for the delivery of cars of ore and receipt of empty cars at the smelters; and that line-haul outbound transportation begins and line-haul inbound transportation terminates at those points.

"I would find:

"(1) That such 'plant yard,' 'hold tracks,' 'assembly yard' and 'flat yard' have the physical characteristics of terminal facilities and are actually used by the railroad as terminal facilities.

"(2) That the line-haul transportation properly includes one uninterrupted switch placement, or customary and reasonable terminal services not 'in excess of that performed in simple switching or team-track delivery.'

"The challenged order is predicated on the finding that railroad companies 'line-haul rates do not include compensation' for switching services beyond the points where the Commission found line-haul transportation begins and terminates, and that such switching services were performed without compensation in addition to the line-haul rates, and were therefore unlawful.

"The order requires the railroads to establish reasonable and compensatory charges for all switching services rendered beyond the points where it held the line-haul transportation begins and terminates.

"I would further find:

"(1) That the only evidence in the record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the

points where the Commission found the line-haul transportation begins and terminates, especially uninterrupted movements beyond such points.

"(2) That there is no evidence in the record to support a contrary factual conclusion.

"(3) That there is no evidence in the record to overcome the presumption that the railroads are not performing services gratuitously and that the tariffs do include compensation for movements beyond the points where the Commission found line-haul transportation begins and terminates.

"(See Interstate Commerce Commission vs. Chicago, Burlington & Quincy Ry. Co., 186 U. S. 320.)

"The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

"The question whether the Commission might require the railroad companies to file and publish new tariffs that provide separate and distinct charges for transportation services to and from the points where it found line-haul transportation begins and terminates, and additional and separate charges for switching services beyond those points, is not presented, and it is my view that we should not express any opinion with respect thereto.

"While for the reasons indicated I would hold the order illegal and permanently enjoin its enforcement, I will join in the order of remand."

(6) Neither the Commission nor the United States took any appeal from such order of the prior statutory court temporarily enjoining the Commission's respective orders of October 14, 1946, but the Commission, by its respective orders of December 5, 1947, vacated and set aside its respective orders of October 14, 1946, and reopened the respective proceedings before it for reconsideration of its respective reports and orders therein of October 14, 1946, upon the present and existing record".

(7) Upon such reopening, the Commission held no further hearing, received no further evidence, and permitted no further briefs or argument, but on May 18, 1948 issued its respective orders, here sought to be enjoined, together with its respective reports, 270 I. C. C. 359, and 270 I. C. C. 385, containing new findings upon which such respective orders are expressly based, which findings are incorporated herein by reference. Such findings likewise relate primarily to the terminal switching services at the respective smelters on inbound carload shipments or non-ferrous ores and concentrates, handled under line-haul rates based on the actual value of each carload and on destination weights.

259 The Commission's respective orders, however, extend to the terminal switching services on carload shipments of all commodities, whether handled inbound or outbound at such smelters.

(8) Such findings are substantially similar to the findings upon which the Commission had based its respective orders of October 14, 1946, except that such findings expressly eliminate any findings as to whether the line-haul rates are reasonable and do or do not include compensation for terminal switching services beyond the designated points. In this connection the Commission's respective reports containing such findings, expressly state as to each of its said orders of May 18, 1948:

"It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in *Ex Parte* No. 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas."

In addition, the Commission's report involving the smelters of the American Smelting & Refining Company, expressly states:

"We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

(9) The Commission, in its respective reports of May 18, 1948, expressly disavowed any findings as to whether

the switching charges in addition to the line-haul rates, now published in the tariffs of the plaintiff carriers for so-called interrupted switching movements beyond the "plant-yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, are or are not reasonable and compensatory.

(10) On hearing of these proceedings the parties hereto, with the approval of this Court, stipulated that the entire records in the respective proceedings before the prior statutory Court in Civil Actions Nos. 1324 and 1325, should be considered incorporated by reference in the record of these proceedings as fully as if physically incorporated herein. The records in the prior proceedings, so incorporated herein, comprise among other things the entire evidence, including the exhibits, before the Commission in the respective proceedings before it, which is the
 260 same evidence as that upon which the Commission made its respective prior findings and orders of October 14, 1946, and which evidence was held by the prior statutory Court to be insufficient to sustain such findings and orders.

(11) This Court reaffirms and remakes the findings of fact (1) to (5), inclusive, made by the prior statutory Court in temporarily enjoining the Commission's respective orders of October 14, 1946, in so far as such findings of fact relate to the evidence before the Commission in the making of its respective orders of October 14, 1946, and in the making of its respective orders of May 18, 1948, here sought to be enjoined, and further in so far as such findings of fact of the prior statutory Court refer to the basis upon which the Commission made its respective orders of October 14, 1946.

This Court makes the following additional findings of fact with relation to the Commission's respective orders of May 18, 1948, here sought to be enjoined.

(12) There was no evidence before the Commission to support any of the findings upon which the Commission has based its respective orders of May 18, 1948, and the only evidence of record before the Commission was contrary to such findings and each of them.

(13) There was no evidence to support the Commission's findings that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitutes reasonably convenient points for delivery to and receipt from the re-

spective smelters of carload freight by the plaintiff carriers. On the contrary, the only evidence before the Commission was that such carriers, under the express provisions of their duly published tariffs, have for approximately fifty years delivered and received carload freight at actual points of unloading and loading at the respective smelters beyond such designated points, and have never delivered or received such freight at such designated points.

(14) That there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective plaintiff industries. On the contrary, the only evidence before the Commission was that the tracks at such designated points constitute the only available railroad terminal facilities of the plaintiff carriers for their ordinary
261 railroad terminal handling of carload freight to and from the respective smelters of the plaintiff industries, and, as such, are used in the same manner as any railroad terminal facilities are used by carriers generally, in bringing cars into their terminals for further disposition to consignees of inbound shipments, and for the assembling of outbound shipments into the carriers' road-haul trains.

(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. On the contrary, the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called "interrupted movements" incident to determining the value of inbound shipments of non-ferrous ores and concentrates.

(16) The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates, and that the presently effective tariffs at Leadville continue so to provide. Such evidence was further that while since July, 1938, such tariffs at Garfield, Murray and Midvale still provide that the line-haul rates include terminal switching of carload shipments to track scales and

delivery to or receipt from any designated track within the plant which can be accomplished by one uninterrupted movement, such tariffs have, since July, 1938, provided certain charges in addition to the line-haul for terminal switching involving so-called "interrupted movements" resulting from orders from or requirements of the smelter.

(17) The Commission's respective orders of May 18, 1948, herein sought to be enjoined, nevertheless require the carriers to charge for all terminal switching services beyond such designated points, including switching movements incidental to the delivery and receipt of carload shipments at actual and customary points of loading and unloading at such smelters, even though no so-called "interrupted movements" be thereby involved and although

neither under the Commission's basic report in 262 *Ex Parte* 104, Part II nor in any other supplemental proceeding thereunder have charges in addition to the line-haul rates for terminal switching services been required except where so-called "interrupted movements" were thereby involved.

(18) The Commission, in its basic report in *Ex Parte* 104, Part II, 209 I. C. C. 11, p. 29, made the following general conclusions of law as to the extent of a carrier's legal obligation under its line-haul rates in operating over private industrial tracks in the delivery and receipt of carload freight:

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, *supra*. Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the Act. *American Exp. Co. v. United States*, *supra*; *Louisville & N. R. Co. v. United States*, *supra*."

In such basic report, the Commission then stated, p. 44 as follows, with reference to the character of the line-haul rates involved in its general investigation covered by such basic report, and the measure of compensation contained in such rates:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by carriers of the spotting services in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers assumed a burden not previously borne."

The Commission then stated, pp. 44-45 of such report, the following general administrative principles for determining the extent of the obligation of a carrier, in reaching points of loading or unloading within a plant under line-haul rates, of the character involved in the general investigation upon which such report was based. The Commission there stated:

263 "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the Act.

"Generally the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the pre-

ceeding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

The Supreme Court of the United States, in *United States v. Wabash Railroad Co. (Staley Case)*, 321 U.S. 43, in upholding such general administrative principles announced by the Commission, expressly recognized that the line-haul rates involved in the Commission's general investigation did not include compensation to the carriers for the performance of "spotting services", i. e., delivery or receipt from actual points of loading or unloading within a plant. The Court there said, p. 406:

"After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charges by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs." (Italics supplied.)

(19) The Commission's respective orders of May 18, 1948, here sought to be enjoined, are not based on the Commission's powers under Section 6 (1) of the Act to require the plaintiff carriers to state separately in their published tariffs their line-haul charges and their terminal charges, and the Commission in making its respective orders has made no order or finding under Section 6 (1) of the Act, although the prior statutory court by its order of remand expressly afforded the Commission an opportunity so to do.

CONCLUSIONS OF LAW

(1) It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services here involved at the respective smelters of the plaintiff industries.

(2) Under the conclusions of law made by the Commission in its basic report in *Ex Parte* 104, Part II, set out

in Finding of Fact (18), which conclusions of law this Court adopts, it is therefore the obligation of the plaintiff carriers to perform the terminal switching services here involved without charges in addition to their line-haul rates, and in so performing such terminal switching services the plaintiff carriers do not violate Section 6 (7) of the Act.

(3) Since the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here involved, the Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect and the plaintiff industry to pay charges in addition to the line-haul rates for such terminal switching service, would require the carriers to collect and the industries to pay twice for the same services, and thereby would violate Section 1 (5) (a) of the Act, which requires that all charges for any service in the transportation of property, or in connection therewith, shall be just and reasonable, and which prohibits and declares unlawful any unjust and unreasonable charge for such service.

(4) The Commission by expressly disclaiming in its respective reports of May 18, 1948, any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating in its report in the American Smelting & Refining Company case its previous finding that the line-haul rates do not include such compensation, thereby deprived its respective findings of violations of Section 6 (7) of the Act and its respective orders to cease and desist from such alleged violations, of basic findings of fact essential to support such findings of violations of Section 6 (7) and its orders to cease and desist from such alleged violations.

(5) The Commission by thus expressly disclaiming any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating its former finding in the case of the American Smelting & Refining Company that such line-haul rates do not include such compensation, thereby rendered irrelevant under Section 6 (7) all other findings upon which the Commission based its respective orders of May 18, 1948.

(6) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to their line-haul rates for all terminal switch-

ing services beyond the points designated in the Commission's respective findings, even though such terminal switching services beyond such designated points involve no so-called "interrupted movements", violate the general administrative principles determined by the Commissioner's own basic report in *Ex Parte* 104, Part II, quoted in Finding of Fact (18) of this Court, which administrative determination by the Commission was approved by the Supreme Court of the United States as within the Commission's administrative powers under Section 6 (7) of the Act, in, among other cases, *United States v. American Sheet & Tin Plate Company*, 301 U. S. 402; and *United States v. Wabash R. Co.*, (Staley Case), *Supra*.

Moreover such orders in requiring payment of charges in addition to the line-haul rates for all terminal switching services beyond the points designated in the Commission's findings even though no so-called "interrupted movements" be thereby involved, would thereby require the plaintiff industries to pay terminal switching charges from which all other industries have been expressly exempted by the Commission's orders in all other supplemental proceedings under *Ex Parte* 104, Part II, and would deprive the plaintiff industries of the right thereby available to all other such industries to avoid such additional terminal switching charges by eliminating such interrupted movements. Such orders therefore would result in undue prejudice against the plaintiff industries in violation of Section 3 (1) of the Act.

(7) Assuming that under the tariffs of the plaintiff carriers it is the duty of the plaintiff industries to certify to such carriers the values of inbound carloads of non-ferrous ores and concentrates, and that ordinarily carriers would be under no obligation to perform the terminal switching services necessary to enable industries to determine such values, it is nevertheless the obligation of the plaintiff carrier to perform such terminal switching services without charge in addition to their line-haul rates, since, on this record, it must be conclusively presumed that compensation for such switching services included in such line-haul rates, and since under the Commission's own conclusions of law in *Ex Parte* 104, Part II, the measure of such compensation determines the extent of a carrier's lawful obligation under its line-haul rates.

(8) Since it must be conclusively presumed on this record that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here in-

volved, the performance of such carriers of such terminal switching services without charges in addition to the line-haul rates cannot, as the Commission has found, result in the plaintiff industries' receiving a "preferential service not accorded shippers generally" or in any "refunding or remitting of a portion of the rates and charges collected" merely because the rates and charges for the line-haul services and for the terminal switching services are collected under blanket rates and charges which include compensation for both services, instead of by separate rates and charges for each service which contain compensation only for that service.

(9) The Commission's respective orders of May 18, 1948, cannot be construed as requiring the plaintiff carriers merely to state separately their line-haul charges and their terminal switching charges, since such orders are expressly based solely on Section 6 (7) of the Act, which section confers no such power upon the Commission, and since the Commission has made no findings under Section 6 (1) of the Act, under which section alone the Commission has power to require such separation of line-haul and terminal switching charges.

(10) While the Commission under Section 6 (1) of the Act would have power to require the plaintiff carriers to state separately in their tariffs their line-haul charges and their terminal switching charges, the Commission could only so require upon findings made under Section 6 (1) of the Act, and on evidence to support such findings. This Court expresses no opinion as to whether the evidence of record before the Commission in these proceedings would support such findings and orders under Section 6 (1) of the Act, no such issue being presented in these proceedings.

267 (11) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to the line-haul rates for all switching movements beyond the points designated in its findings, even though no so-called "interrupted movements" be thereby involved, would require the plaintiff carriers to disregard and depart from the express provisions of their duly published and effective tariffs, and are therefore unauthorized and beyond the powers of the Commission under Section 6 (7) of the Act, at least in the absence, as here, of any findings by the Commission that such tariff provisions themselves violate any section of the Act or are otherwise unlawful.

(12) The Commission's respective orders of May 18, 1948, here sought to be enjoined, are without foundation in law, are based on errors of law, and without findings or evidence essential to support them, are arbitrary and in violation of the Interstate Commerce Act and beyond the statutory powers of the Commission, and should be permanently and forever enjoined, set aside and annulled.

/s/ ORIE L. PHILLIPS
United States Circuit Judge

/s/ TILLMAN D. JOHNSON
United States District Judge

/s/ T. BLAKE KENNEDY
United States District Judge

Dated this 7th day of January, 1949.

(File Endorsement Omitted)

68 In the District Court of the United States
For the District of Utah
Central Division
Civil No. 1525

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, and AMERICAN
SMELTING & REFINING COMPANY,

PLAINTIFFS,

VS.

THE UNITED STATES OF AMERICA and the INTERSTATE
COMMERCE COMMISSION,
DEFENDANTS.

Civil No. 1524

UNITED STATES SMELTING REFINING AND MINING COMPANY,
a corporation, THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY, a corporation, and UNION
PACIFIC RAILROAD COMPANY, a corporation,

PLAINTIFFS,

VS.

THE UNITED STATES OF AMERICA and the INTERSTATE
COMMERCE COMMISSION,
DEFENDANTS.

Final Order and Decree—Filed Jan. 10, 1949

The above-entitled causes having come on to be heard on
October 18, 1948, before a District Court of three judges

duly constituted in accordance with statute, and by agreement of all parties having been submitted for final hearing, and evidence having been taken, briefs received, and arguments heard on behalf of all parties, and the Court being fully advised in the premises, and having entered its findings of fact and conclusions of law made herein in writing.

269 IT IS HEREBY ORDERED, ADJUDGED and finally determined and decreed, that the respective orders of the the Interstate Commerce Commission dated May 18, 1948, be, and the same are hereby permanently enjoined, set aside and annulled, and that the enforcement of said orders, and the execution, enforcement and operation thereof, be permanently and forever stayed and enjoined.

Dated this 7th day of January, 1949.

/s/ ORIE L. PHILLIPS
United States Circuit Judge

/s/ TILLMAN D. JOHNSON
United States District Judge

/s/ T. BLAKE KENNEDY
United States District Judge

(File Endorsement Omitted)

Clerk's Note: Notation of entry of Judgment made on docket sheet on January 10, 1949, in accordance with Rule 79 of Rules of Civil Procedure.

270 In the District Court of the United States
For the District of Utah

Central Division

\ Civil No. 1525

Civil No. 1524

(Titles Omitted)

Petition for Appeal—Filed March 7, 1949

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled cases, feeling themselves aggrieved by the final decree of the United States District Court for the District of Utah, entered in said court on January 10, 1949, pray appeals from said decree to the Supreme Court of the United States.

The particulars wherein said defendants consider the decree erroneous are set forth in the assignments of errors

accompanying this petition, to which reference is hereby made.

271 Said defendants pray that a transcript of the record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated March 3, 1949.

/s/ HERBERT A. BERGSON
Assistant Attorney General

/s/ EDWARD DUMBAULD
Special Assistant to the
Attorney General

For the United States of America

/s/ DANIEL W. KNOWLTON
Chief Counsel

/s/ ALLEN CRENSHAW
Attorney

For the Interstate Commerce Commission

(File Endorsement Omitted)

272 In the District Court of the United States
For the District of Utah
Central Division

Civil No. 1525

Civil No. 1524

(Titles Omitted)

Order Allowing Appeal—Filed March 7, 1949

In the above-entitled causes the United States of America and the Interstate Commerce Commission, defendants, having made and filed a petition praying appeals to the Supreme Court of the United States from the final decree of this court in these causes entered on January 10, 1949, and having also made and filed assignments of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided:

273 It is ordered and decreed, that the appeals be, and the same are hereby allowed as prayed for.

Dated March 7, 1949.

/s/ TILLMAN D. JOHNSON
United States District Judge

(File Endorsement Omitted)

275 Citation in usual form filed March 7, 1949.
Omitted in printing.

279

In the United States District Court
For the District of Utah
Central Division

Civil No. 1525

Civil No. 1524

(Titles Omitted)

Assignment of Errors—Filed March 7, 1949

Now comes the United States, defendant in the above-entitled causes, and in connection with its appeal herein files the following assignment of errors upon which it will rely in its prosecution of said appeal to the
280 Supreme Court of the United States from the final decree of the district court, dated January 7, 1949, and filed January 10, 1949.

The district court erred:

1. In holding that the performance by carriers serving plaintiffs' smelting plants of service in excess of the line-haul transportation as determined by the Interstate Commerce Commission, in the absence of an appropriate charge therefor in addition to the rate for line-haul transportation, does not constitute an unlawful rebate or refund in violation of Section 6(7) of the Interstate Commerce Act (49 U. S. C. 6(7)), or a basis for an order by the Commission requiring the carriers to cease and desist from a violation of the provisions of that section.

2. In failing to hold that line-haul rates are rates for line-haul transportation; that the precise determination of the point in time and space where line-haul transportation begins and ends is a function entrusted by law to the Commission; that with respect to plaintiffs' plants involved in these proceedings the Commission duly determined, upon substantial evidence, the respective points within each plant where line-haul transportation ends and plant service begins; and that the performance by carriers of switching service in excess of the line-haul transportation as so determined by the Commission, in the absence of an appropriate charge therefor in addition to the rate for line-haul transportation, is a violation of Section 6(7) of the Act, from which the Commission may require the carriers to cease and desist.

3. In holding that the findings of the Commission in its reports and orders of May 18, 1948, are not supported by substantial evidence.

4. In failing to make the proposed findings of fact, conclusions of law, and decree, requested by defendants.

5. In making its findings of fact numbered 3, 7, 12, 13, 14, 15, 16, 17, and 19; in making its conclusions of law numbered 1 through 12, both inclusive; in making its final decree, dated January 7, 1949, and filed January 10, 1949, setting aside and enjoining the Interstate Commerce Commission's orders of May 18, 1948; and in failing to dismiss plaintiffs' complaints and to hold that the said orders of the Commission were in all respects valid and lawful.

6. In substituting its judgment for that of the Commission with respect to questions committed by law to administrative determination, to-wit, the questions with respect to where transportation begins and ends at plaintiffs' plants with respect to the terminal services which may be rendered there under line-haul rates, with respect to the carriers' use of plant tracks, and with respect to the existence of plant interruption and interference.

7. In holding that the Commission must make a finding with regard to the level of the line-haul rates, and find that they are not sufficiently high to be compensatory to the carriers for service performed in excess of line-haul transportation, before an order to cease and desist from violation of Section 6(7) can be made.

8. In holding that the Commission's orders would violate Section 1(5) (a) and Section 3(1) of the Interstate Commerce Act, and that findings under Section 6(1) of the Act are necessary in order to require carriers to state line-haul charges and terminal switching charges separately.

9. In finding that the record before the court included the entire evidence before the Commission in the proceedings before it, when in fact the record before the Commission in *Ex Parte No. 104* upon which its basic report, 209 I.C.C. 11, was based, was not put in evidence before the court, but merely the records made in supplemental proceedings relating to the operating practices at plaintiffs' respective plants.

10. In finding that the Commission permitted no further briefs or arguments when, pursuant to the district court's temporary injunction of November 14, 1947, it reopened the proceedings, when in fact and in truth plaintiffs made no request or attempt to submit further briefs or argument or evidence and indicated no desire that further hearing be accorded them.

282 WHEREFORE, defendants pray that the said decree be reversed.

Dated, March 3, 1949.

/s/ HERBERT A. BERGSON
Assistant Attorney General

/s/ EDWARD DUMBAULD
Special Assistant to the Attorney General
(File Endorsement Omitted.)

283 In the District Court of the United States
For the District of Utah
Central Division
Civil No. 1525
Civil No. 1524
(Titles Omitted)

*Assignment of Errors of the Interstate Commerce
Commission—Filed March 7, 1949.*

Now comes the Interstate Commerce Commission, defendant in the above-entitled causes, by its counsel and in connection with its appeal, and files the following
284 Assignment of Errors, upon which it will rely in the prosecution of its appeal to the Supreme Court of the United States, from the final decree of this Court, entered January 10, 1949.

The District Court erred:

1. In not dismissing plaintiffs' complaints.
2. In setting aside and enjoining the Interstate Commerce Commission orders of May 18, 1948.
3. In entering its findings of fact and conclusions of law.
4. In denying and refusing to make and enter proposed findings of fact, conclusions of law, and decree dismissing complaints herein, as submitted and requested by defendants.
5. In deciding that findings of the Interstate Commerce Commission, in its reports and orders of May 18, 1948, are not supported by substantial evidence.
6. In finding that the Commission, under its orders of December 5, 1947, vacating its prior orders of October 14, 1946, and reopening the respective proceedings for reconsideration upon the existing record, held no further hearing, received no further evidence and permitted no further briefs or arguments. (Court finding (No. 7).)
7. In finding that Commission findings, in its report of October 14, 1946 (266 I. C. C. 470), were primarily confined

to terminal switching service at the respective smelters or in-bound carload shipments of non-ferrous ores and concentrates handled, under line-haul rates based upon actual value of each carload. (Court finding (No. 3).)

235 8. In finding that the Statutory Court in deciding the prior actions, based upon the orders of October 14, 1946, held Commission findings, in its reports of the same date, unsupported by the entire evidence, including exhibits, which are incorporated by stipulation in the actions herein, whereas the prior court findings, in that respect, related only to the questions of compensation for the switching services being included in the line-haul rates. (Court finding (No. 10).)

9. In finding (No. 12) that there was no evidence before the Commission to support any of the findings upon which the Commission has based its respective orders of May 18, 1948, and that the only evidence of record before the Commission was contrary to such findings and each of them.

10. In finding (No. 13) that there was no evidence to support the Commission findings that designated tracks or yards at each of the four smelters constituted reasonably convenient points for receipt of and delivery to said smelters of carload freight by the rail carriers, and that the evidence before the Commission was that the carriers, under express provisions of their published tariffs, had for some 50 years delivered and received carload freight at actual points of loading and unloading, never at such tracks, yards or points as designated by the Commission.

11. In finding (No. 14) that there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective industries, and that the only evidence before the Commission was that such tracks constitute the only railroad terminal facility of the carriers, which are used in the same manner as any railroad terminal facility.

286 12. In finding (No. 15) that there was no evidence of record to sustain the Commission's finding that transportation services which carriers were obligated to perform, under line-haul rates, begin and end at points designated by the Commission in each of the four industrial plants, and that the only evidence before the Commission was that line-haul rates included compensation for all terminal switching service beyond such points, including "interrupted movements" incident to determining value of inbound shipments of ore and concentrates.

13. In finding (No. 17) that the Commission order requires a carrier charge in addition to the line-haul rates

where there is no "interrupted movements" involved, and in the court interpretation of the Commission's basic report in *Ex Parte* 104, Part II, and in other supplemental proceedings thereunder, with respect to what is a so-called "interrupted movement". In its interpretation and application of quoted portions of the Commission's basic report in *Ex Parte* 104, Part II, 209 I. C. C. 11, pages 29, 44, and 45, and to the court opinion in *United States v. Wabash Railroad Company* (Staley case), 321 U. S. 403, 406, which said interpretation and application is contrary to and a misapplication of principles established in such cases by the Commission with court approval.

14. In finding (No. 19) that the order of the Statutory Court in the prior actions, remanding the previous Commission orders for further consideration, expressly afforded or ordered the Commission to exercise its powers under Section 6 (1) of the Act in requiring carriers to state separately in their published tariffs their line-haul charges and their terminal charges.

15. In concluding as a matter of law (No. 1) that carriers' line-haul rates to and from the several plants involved include compensation for all terminal switching services herein involved.

16. In concluding as a matter of law (No. 2) that under the Commission's basic report in *Ex Parte* 104, Part II, as set out in finding of fact (18) that it is the obligation of carriers to perform the terminal switching services herein involved without charges in addition to their line-haul rates, and that such performance of those terminal services by the carriers will not violate Section 6 (7) of the Act.

17. In concluding as a matter of law (No. 3) that the Commission's orders of May 18, 1948, requiring carriers to collect and plaintiff industries to pay charges in addition to line-haul rates for the terminal switching services herein involved, would require the payment twice for the same services, in violation of Section 1 (5) (a) of the Act.

18. In concluding as a matter of law (No. 4), as far as is here possible to understand that conclusion, that the Commission reports of May 18, 1948, in its findings as to whether or not line-haul rates include compensation for terminal switching services involved, thereby removed basic findings of fact essential to support findings of a violation of Section 6 (7) of the Act.

19. In concluding as a matter of law (No. 5) that the Commission's decision in its reports of May 18, 1948, respecting the question as to whether or not line-haul rates

include compensation for the terminal switching services involved, rendered all other findings irrelevant under Section 6 (7) of the Act.

20. In concluding as matter of law (No. 6) that requirements of the orders of May 18, 1948, of charges for terminal switching services within the four plants herein involved, beyond the designated interchange points at each plant, in addition to line-haul rates, violates principles established in the basic report in *Ex Parte* 104, as approved by cited or other court decisions, or that plaintiffs herein are required to pay terminal switching charges expressly exempted by the Commission in all other Supplemental *Ex Parte* 104 orders, and would result in undue prejudice against plaintiffs in violation of Section 3 (1) of the Act:

289 21. In concluding as a matter of law (No. 7) that it must be conclusively presumed that compensation for the switching services herein involved is included in the line-haul rates, that it is therefore the obligation of carriers to perform terminal switching services without charge in addition to the line-haul rates in connection with determining the values of ores used in calculating the ultimate rate, even though it is assumed that under tariffs it is the duty of the industries to certify such values and ordinarily carriers would be under no obligation to perform the switching service necessary to enable the industries to determine the value and certify the results.

22. In concluding as a matter of law (No. 8) that it must be conclusively presumed on the record herein that line-haul rates of carriers include compensation for the terminal switching services here involved and therefore that the performance of such services without charges in addition to the line-haul rate cannot result in a preferential service not accorded shippers generally, or a refunding or remitting of a portion of the rates and charges collected.

23. In concluding as a matter of law (No. 9) that the Commission is limited to an order under Section 6 (1) of the Act, requiring the separation of charges made under existing tariffs, as between line-haul charges and terminal switching charges, in order to determine at what point the line-haul transportation obligation begins and ends, and what part of the services involved constitutes transportation service and what part constitutes plant service.

24. In concluding as a matter of law (No. 11) that the requirement of the Commission's orders of May 18, 1948, for the collection of charges in addition to line-haul

290 rates for all switching movements beyond the points designated by the Commission at each plant as a point where transportation begins and ends, would require said carriers to disregard and depart from the express provisions of published tariffs, and therefore unauthorized and beyond the power of the Commission under Section 6 (7) of the Act.

25. In concluding as a matter of law (No. 12) that the order of May 18, 1948, are without foundation in law, are based on error of law, are without findings or evidence essential to support them, and are arbitrary and in violation of the Interstate Commerce Act, are beyond the statutory powers of the Commission, and should be permanently and forever enjoined, set aside and annulled.

26. In entering the final order and decree dated January 7, 1949, and filed in the Clerk's office on January 10, 1949.

27. In entering its findings of fact and conclusions of law, as submitted and proposed by plaintiffs, which are dated January 7, 1949, and filed in the Clerk's office on January 10, 1949.

28. In substituting its judgment for that of the Commission in respect to the points at which line-haul transportation begins and ends; at the several industrial plants here involved, an administrative decision which the Commission made and entered designating the "Plant Yard" at Garfield, the "Hold Tracks" at Murray, the "Flat Yard" at Leadville, and the "Assembly Yard" at Midvale, as such points.

29. In substituting its judgment for that of the Commission in respect to the terminal services rendered by the rail carriers at each industrial plant here involved, as to what part of such services is transportation under the carrier's line-haul obligation, and what part is plant service of said industries.

30. In substituting its judgment for that of the Commission in respect to carrier use of the "Plant Yard" at Garfield, the "Hold Tracks" at Murray, the "Flat
291 Yard" at Leadville, and the "Assembly Yard" at

Midvale, held by the Commission to be reasonably convenient points for the delivery and receipt of carload traffic to and from said plants, and held by the court to be railroad terminal facilities used by the carriers as any railroad terminal generally.

31. In substituting its judgment for that of the Commission in respect to interruptions to movements of carload shipments in making delivery at each of the several indus-

trial plants here involved, where the Commission has made and ordered a contrary administrative decision, in regard to the same car movements and switching conditions, based upon the same facts of record.

32. In holding that the only record before the Commission was that the line-haul rates of plaintiff carriers include compensation for all terminal services herein involved, upon the basis of only a partial or portion of the Commission record, which was before the court.

33. In holding the orders of May 18, 1948, invalid on the basis of the partial record, before the Court, where the entire record before and considered by the Commission, particularly the basic record in Ex Parte No. 104, was not submitted or offered in evidence by plaintiffs in these court actions.

34. In holding that the Commission orders requiring carriers to collect and industries to pay charges for the terminal switching services herein involved, in addition to the line-haul rates, would require industries to pay twice for the same services, and would violate section 1 (5) (a) of the act.

35. In holding that failure of the Commission to make any findings, in its orders of May 18, 1948, as to whether or not the line-haul rates do or do not include compensation for terminal switching services here involved, deprives the finding of violations of section 6 (7) of the act, of basic findings essential to support such orders.

292 36. In holding that Commission findings in respect to terminal switching services beyond the points designated as the beginning and ending of line-haul transportation, violates the general administrative principles, determined in the basic report in Ex Parte No. 104, Part II, which were approved by the Supreme Court in, among other cases, *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; and *United States v. Wabash R. Co.* (*Staley case*) 321 U. S. 403.

37. In holding that the Commission's findings or orders of May 18, 1948, require the payment by plaintiff industries of terminal switching charges, from which all other industries have been expressly exempted by Commission orders in all other supplemental proceedings under Ex Parte No. 104, Part II, and would result in undue prejudice against plaintiff industries in violation of section 3 (1) of the act.

38. In holding that under carrier tariffs, making it the duty of plaintiff industries to certify to carriers the values of inbound carloads of non-ferrous and concentrated, where carriers would ordinarily have no obligation to perform

switching services necessary to industry determination of such values, that herein it is nevertheless the obligation of carriers to perform such switching services, without charge in addition to the line-haul rates, since on the basis of the record herein, which does not include any part of the basic record which supports Commission findings in its basic report in Ex Parte No. 104, Part II, it must be presumed that compensation for such switching is included in the line-haul rates.

39. In holding that the requirement of orders of May 18, 1948, of payment of charges in addition to line-haul rates for all switching movements beyond the designated interchange points, requires carriers to disregard and depart from express provisions of their effective tariffs.

293 WHEREFORE, defendant Interstate Commerce Commission prays that the said decree be reversed.

/s/ DANIEL W. KNOWLTON
Chief Counsel

/s/ ALLEN CRENSHAW
Attorney

For Interstate Commerce Commission
(File Endorsement Omitted)

304

In the United States District Court
For the District of Utah

No. 1524 Civil.

D. & R. G. W. R. R. *et al.*,

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA
and

INTERSTATE COMMERCE COMMISSION,
DEFENDANTS.

No. 1525 Civil.

BINGHAM & GARFIELD RAILWAY

PLAINTIFF,

vs.

UNITED STATES OF AMERICA
and

INTERSTATE COMMERCE COMMISSION,
DEFENDANTS.

Before JUDGES PHILLIPS, KENNEDY and JOHNSON.

At Federal Building, Salt Lake City, Utah, Monday, October 18, 1948.

Opinion of the Court, stated by JUDGE PHILLIPS:

The Court: The Court reaffirms and remakes the findings of fact numbered 1, 2, 3, 4 and 5 in its order in the other cases; that is, its order in 1324 and 1325, civil.

The Court further finds that upon this record it must find and presume that the charges in the tariffs cover the services rendered beyond the points designated by the Commission as the end of the line haul in the three yards. Those points are designated in the order of the Commission as the "plant yard" at Garfield, the "hold tracks" at Murray, and the "flat yard" at Leadville.

The Court further finds, that there is no basis in the record for a finding by the Commission that the furnishing of the services referred to beyond the points above designated constitute either free services or constitute a rebate or violation of Section 6, Paragraph 7.

305 **The Court** further finds, that the plant yard at Garfield, the hold tracks at Murray, and the flat yards at Leadville are used by the railroads as terminal facilities; that is to say, are used as any terminal is used by a railroad where it brings the cars into the terminal for the purpose of further disposition to the consignee and that the evidence does not support the finding of the Commission that the line haul terminates at the plant yards, the hold tracks and the flat yards, for the reason that the shipper is entitled to an uninterrupted service beyond that point to a convenient point of delivery.

The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul and a separate specific charge for switching services beyond the end of the line haul, and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.

We conclude, as a matter of law, that the evidence in this case does not support a finding of a violation of Sec. 6, Paragraph 7, of the Act, or a basis for an order to cease and desist from a violation of the provisions of that section.

I don't know whether the case is ripe for a permanent injunction, Gentlemen.

Mr. FINERTY: May I say a word on that?

The Court: I will hear from both of you.

Mr. FINERTY: I filed a motion when the court entered a temporary injunction in the old case, pointing out that un-

der Section 47, Title 28, the court could only enter a temporary injunction pending determination of the issues before the court, and that after those issues had been
306 determined a final injunction might be issued; though there might be a remand under the former injunction.

The COURT: I assume there is no objection to a permanent injunction, because the whole case is before the court, isn't it?

Mr. CRENSHAW: I couldn't bind the Commission without reporting and a recommend to the Commission with reference to an appeal, and have the Commission decide what it wants to do.

The COURT: It occurs to me, Gentlemen, that the case is fully submitted. All of the facts are clear.

Mr. FINERTY: That is my opinion.

The COURT: All of the legal arguments have been made that could be made on a final hearing, and I see no reason why we shouldn't grant a permanent injunction against the enforcement of the order. Perhaps my associates will want to suggest some additional findings.

Judge JOHNSON: Couldn't the gentlemen here stipulate that it is on the merits?

The COURT: Will you stipulate that this hearing is on the merits?

Mr. FINERTY: I think actually, Judge Johnson, that was the intention at the start.

The COURT: The record may show that both sides agree that the case may be disposed of as upon final hearing.

Mr. CRENSHAW: May I suggest that a permanent injunction would leave it open to the Commission to reopen in any case if they wanted to reconsider, if they thought they could conform to the court's requirements.

The COURT: You mean a temporary injunction?

Mr. CRENSHAW: No; this one.

The COURT: All right,—the court will grant a permanent injunction.

Mr. CRENSHAW: We tried to do what we understood the court wanted us to do as a commission.
307

The COURT: We are not criticising you.

Mr. CRENSHAW: Mr. Finerty is correct, I suppose in saying we are just stupid.

The COURT: You had your own good reason for taking this course, and we have no criticism.

Mr. DUMBAULD: It occurs to me that the Commission might wish to make findings under 6-1, if that would be of benefit, and I wondered whether your injunction would permit that?

The COURT: They can still do that.

Mr. CANNON: In referring to the various yards I believe you omitted the "assembly yard."

The COURT: What we have said in this case applies equally to your case, except that the yard in question, designated by the Commission as the end of the line haul is called the "assembly yard," and the same findings will be made in both cases, with that differentiation.

Now you gentlemen can prepare a permanent injunctive order.

Mr. DUMRAULD: Will that include findings, conclusions and decree and everything, in a formal way?

The COURT: I think we have indicated what they ought to be, and you can prepare them in both cases.

Mr. CRENSHAW: I suggest that they be submitted in chambers.

Judge KENNEDY: You gentlemen will stipulate that we may sign these findings, conclusions and order at our respective places?

Mr. CRENSHAW: Yes.

Mr. FINERTY: If we could get about ten days—

Mr. CANNON: The order will be a consolidated order, as it was last time?

The COURT: Yes. You will have to differentiate between those assembly yards and those places.

308 Mr. CANNON: Yes.

The COURT: Court is in recess.

313 In the District Court of the United States

For the District of Utah

Central Division

Civil No. 1525

Civil No. 1524

(Titles Omitted)

Petition to Have Original Records in the District Court Transmitted to the Clerk of the Supreme Court of the United States, as a Part of the Record Upon Appeal—Filed March 7, 1949

Defendants-appellants petition the Court, pursuant to Rule 10, paragraph (4) of the Rules of the Supreme Court of the United States, to authorize and instruct the Clerk of the District Court to transmit as a part of the record upon appeal to be filed in the Supreme Court of the United States, original of all documents, transcripts, exhibits, or other

parts of the District Court records, of which there are no copies on file, upon the following grounds:

314 Order allowing appeal to defendants-appellants from the decree of the District Court to the Supreme Court of the United States and citation to plaintiffs-appellees, were signed by the Honorable Tillman D. Johnson, District Judge, on March 7, 1949; appeal papers, including "Defendants' (Appellants') Praecept for Transcript of Record", were filed in the office of the Clerk of the District Court on March 7, 1949, wherein request was made to include, as a part of the transcript of record upon appeal, all documents, exhibits, transcripts, and other parts of the District Court records; and it appears that there are only originals of same such exhibits, documents, transcripts, or other parts of the District Court records on file, thereby involving much expense and work to prepare copies thereof for the transcript of record on appeal; and it appears that such parts of the District Court records will be necessary or desirable for the inspection of the Supreme Court.

Dated March 3, 1949.

/s/ HERBERT A. BERGSON
Assistant Attorney General.

/s/ EDWARD DUMBAULD
*Special Assistant to the
Attorney General.*

For the United States of America.

/s/ DANIEL W. KNOWLTON
Chief Counsel.

/s/ ALLEN CRENSHAW
Attorney.

For Interstate Commerce Commission.

315 In the District Court of the United States
For the District of Utah
Central Division
Civil No. 1525
Civil No. 1524
(Titles Omitted)

*Order to Transmit Original Court Records to the Supreme
Court Upon Appeal—Filed March 7, 1949*

Upon application of defendants-appellants duly made, for good cause shown, and it appearing that there are no copies

of many documents in the records of the District Court, which, as part of the transcript of record upon appeal to the Supreme Court of the United States, should be inspected by said Supreme Court,

It is ordered, That the Clerk of this Court transmit to the Supreme Court of the United States, as a part of the transcript of record upon appeal, to be filed, and in the same manner as other parts of the record, all original documents and exhibits in the District Court records, of which there are no copies, and that such original papers be returned to the Clerk of this Court after final decision of the Supreme Court of the United States upon appeal, unless the said Supreme Court shall desire to retain such exhibits for its files.

Dated this 7 day of March, 1949.

/s/ TILLMAN D. JOHNSON
United States District Judge

(File Endorsement Omitted)

In the District Court of the United States
For the District of Utah
Central Division
Civil No. 1525
Civil No. 1524
(Titles Omitted)

Certificate of Service—Filed March 7, 1949

I hereby certify that on the 7 day of March, 1949, I mailed copies of: (1) Petition for Appeal, (2) Order Allowing Appeal, (3) Citation on Appeal, (4) Notice of Appeal to Appellees, (5) Assignment of Errors, (6) Statement as to Jurisdiction, (7) Statement by Appellants Directing Attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States; (8) Praecipe for Record, (9) Petition to Direct Clerk to Transmit Original Records, (10) Order to Clerk to Transmit Original Records, originals of which were filed with the Clerk of the District Court, and (11) Certificate of Service, to counsel for the following named plaintiffs-appellees and intervenors, at the address of each as indicated:

John F. Finerty, Esq., 120 Broadway, New York 5, N. Y.,
Attorney for American Smelting & Refining Company;

- Paul B. Cannon, Esq., Cheney, Jensen, Marr & Wilkins,
120 Continental National Bank Bldg., Salt Lake
City, Utah,
Attorney for United States Smelting Refining and
Mining Company;
- Otis J. Gibson, Esq., Denver & Rio Grande R. R. Bldg.,
Denver, Colorado,
Attorney for Denver & Rio Grande Western Rail-
road Company;
- W. Q. Van Cott, Esq., Walker Bank Building, Salt
Lake City, Utah,
Attorney for Denver & Rio Grande Western Rail-
road Company;
- H. B. Thompson, Esq., Union Pacific Building, Salt
Lake City, Utah,
Attorney for Union Pacific Railroad Company;
- Elmer B. Collins, Esq., Union Pacific Building, Omaha,
Nebraska,
Attorney for Union Pacific Railroad Company;
- Grover A. Giles, Esq., Attorney General of the State
of Utah, State Capitol, Salt Lake City, Utah,
Attorney for the State of Utah;
- H. Lawrence Hinkly, Esq., Attorney General of the
State of Colorado, State Capitol, Denver, Colorado,
Attorney for the State of Colorado;
- Quinton L. R. Alstron, Esq., Salt Lake City, Utah,
Attorney for the Public Service Commission of the
State of Utah;
- Joseph W. Hawley, Esq., 318 State Office Bldg., Den-
ver 2, Colorado,
Attorney for the Public Utilities Commission of the
State of Colorado;
- Mitchell Melich, Esq., Kearns Bldg., Salt Lake City,
Utah,
Attorney for the Utah Mining Association;
- Henry S. Sherman, Esq., 514 Equitable Building, Den-
ver, Colorado,
Attorney for the Colorado Mining Association.

Dated March 7, 1949.

/s/ ALLEN CRENSHAW

Allen Crenshaw,

Attorney for

Interstate Commerce Commission

Filed: U. S. District Court
March 7, 1949

In United States District Court

(Civil 1324)

Docket Entries

- 6-13-47 Complaint filed together with Appendix A.
(Three Judge Court)
- 6-18-47 By leave of Court the State of Utah, the State of Colorado, the Public Utilities Commission of Colorado, the Colorado Mining Association, the Utah Mining Association and the Public Service Commission of Utah were allowed to intervene and petitions in intervention filed. Answer of The United States filed. Answer of The Interstate Commerce Commission filed.
Certain exhibits introduced and admitted in evidence. The Court heard arguments of plaintiffs' counsel and case continued until June 19, 1947 at 10 o'clock A. M.
- 6-19-47 Three Judge Court resumed. Same Judges and same counsel. The court heard arguments of plaintiffs' counsel and defendants' counsel. Rebuttal arguments given by John F. Finerty and Paul B. Gannon. Cases taken under advisement. Plaintiffs given 30 days to file briefs and defendants given 20 days thereafter to file their briefs.
- 7-14-47 Reporter's transcript of proceedings filed.
- 8-19-47 Brief of Interstate Commerce Commission received.
- 11-14-17 This case heretofore under advisement and Findings of Fact, Conclusions of Law and Order remanding cases back to Interstate Commerce Commission for further action and enjoining said Commission until further order of the Court was signed by Orie L. Phillips, U. S. Circuit Judge, Tillman D. Johnson, U. S. District Judge of Utah and T. Blake Kennedy, U. S. District Judge of Wyoming, and filed. Notice of entry of order mailed to all counsel.
- 11-19-47 In accordance with letter from Judge Orie L. Phillips, it is ordered that concerning memorandum be corrected to show certain additions and same made on original Findings of Fact, Conclusions of Law and Order. Notice mailed to all counsel of such corrections.

- 12- 6-47 Motion by plaintiffs filed.
- 12-23-47 Opposition to motions by plaintiffs to modify decision of the Court filed.
- 12-31-47 Order signed by Honorable Orie L. Phillips, Hon. Tillman D. Johnson and Honorable T. Blake Kennedy and filed denying motion of plaintiffs without prejudice for a rehearing and to modify the Findings and Conclusions. Copy of order and notice of entry mailed to counsel of record.
- 6- 2-48 Copy of Decision of I. C. C. filed.
- 10- 6-48 Brief of plaintiffs filed.
- 1-10-49 It appearing that companion cases No. 1524 and No. 1525 have now been closed by signed Findings of Fact, Conclusions of Law and Decree and this case is no longer active and therefore closed accordingly.

320 In United States District Court
(Civil 1325)

Docket Entries.

- 6-13-47 Petition filed. (Three Judge Court).
Service of Summons waived.
- 6-18-47 Answer of The United States filed.
Answer of the Interstate Commerce Commission filed.
By leave of Court the Public Service Commission of Utah and the Utah Mining Association were allowed to intervene and petitions in intervention filed. Court heard arguments of plaintiffs' counsel and Court adjourned until June 19, 1947 at 10 o'clock A. M.
- 6-19-47 Three Judge Court resumed. Same Judges and same counsel. The court heard arguments of plaintiffs' counsel and defendants' counsel. Rebuttal arguments given by John F. Finerty and Paul B. Cannon. Cases taken under advisement. Plaintiffs given 30 days to file their briefs and defendants given 20 days thereafter to file their briefs.
- 7-14-47 Reporter's transcript of proceedings filed.
- 7-31-47 Brief of petitioners filed.
- 8-19-47 Brief of Interstate Commerce Commission received.

- 1-14-47 This case heretofore under advisement and Findings of Fact, Conclusions of Law and Order remanding cases back to Interstate Commerce Commission for further action and enjoining said Commission until further order of the Court was signed by Orie L. Phillips, U. S. Circuit Judge, Tillman D. Johnson, U. S. District Judge of Utah and T. Blake Kennedy, U. S. District Judge of Wyoming, and filed. Notice of entry of order mailed to all counsel.
- 1-19-47 In accordance with letter from Judge Orie L. Phillips, it is ordered that concurring memorandum be corrected to show certain additions and same made on original Findings of Fact, Conclusions of Law and Order. Notice mailed to all counsel of such corrections.
- 2-13-47 Motions by plaintiffs filed to permanently enjoin order of Commission and to modify Findings of Fact and Conclusions of Law.
- 2-31-47 Order signed by Hon. Orie L. Phillips, Hon. Tillman D. Johnson and Hon. T. Blake Kennedy and filed denying motion of plaintiffs without prejudice for a rehearing and to modify the Findings and Conclusions. Copy of order and notice of entry mailed to counsel of record.
- 6- 2-48 Copy of Decision of I. C. C. filed.
- 1-10-49 It appearing that companion cases No. 1524 and No. 1525 have now been closed by signed Findings of Fact, Conclusions of Law and Decree and this case is no longer active and therefore closed accordingly.

21 In United States District Court
(Civil 1524)

Docket Entries.

- 0- 6-48 Complaint filed.
- 0-12-48 Petition in intervention on behalf of the Utah Mining Association filed.
- 0-15-48 Reply brief of Interstate Commerce Commission filed.
- 0-16-48 Brief of United States filed.
- 0-18-48 Answer of Interstate Commerce Commission filed.
- Answer of United States filed

- 10-18-48 Petition in intervention filed by Public Service Commission of Utah and so ordered. Pursuant to Sec. 2284 of Title 28, it is ordered by the Honorable Orie L. Phillips, Chief Judge of the Court of Appeals for the 10th Circuit, that Honorable T. Blake Kennedy of Wyoming and Honorable Tillman D. Johnson of Utah shall be designated as the 3 Judges to determine the issues of these proceedings.
Case called for trial.
Court heard arguments of counsel and both sides agree case is submitted.
Court holds in favor of plaintiffs. Injunction to be issued. Findings of Fact, Conclusions of Law and Decree to be prepared and presented for signature.
- 10-20-48 Reporter's transcript of decision of the Court filed.
- 11-29-48 Defendants' objections to plaintiffs' proposed Findings of Fact and Conclusions of Law received. Findings of Fact, Conclusions of Law and Decree requested by defendants received.
- 12-7-48 Report of proceedings by reporter filed.
- 12-15-48 Letter from Allen Crenshaw filed.
- 1-10-49 Findings of Fact and Conclusions of Law signed by Orie L. Phillips, Circuit Court Judge, Tillman D. Johnson and T. Blake Kennedy, District Court Judges, holding that I. C. C. should be enjoined filed.
Final Order and Decree enjoining I. C. C. from enforcing Orders signed by said three Judges filed.
Order denying proposed Findings of Fact and Conclusions of Law of defendants signed by same three Judges and filed.
Defendants' proposed Findings, etc. lodged.
Notice of entry of orders mailed to all counsel of record.
- 1-29-49 Order correcting Findings of Fact and Conclusions of Law signed by Judge Johnson and filed.
- 3-7-49 Petition for appeal filed.
Order allowing appeal filed.
Assignment of errors filed by United States and Interstate Commerce Commission. Citation on appeal signed by Judge Johnson and filed.

3-7-49 Statement as to jurisdiction filed and copy of opinion and final order and decree and findings and conclusions attached.

3-7-49 Statement of defendants directing attention to Rule 12 of Supreme Court filed.
Notice of appeal filed.

Praecipe for record on appeal filed.

Petition to have original records on appeal filed.

Order signed by Judge Johnson filed to transmit original records to Supreme Court, if no copies are available.

Certificate of service filed.

4-21-49 Petition to enlarge time filed.

Order enlarging time until June 5, 1949 to docket cause and file record in Supreme Court of the United States signed by Judge Johnson and filed.

5-27-49 Letters from John F. Finerty, Attorney General of the United States, I. C. C. and Otis Gibson counsel for D. & R. G. W. RR. Co. filed *re* changes in transcript. Order signed by Judge Johnson and filed that Court reporter make necessary changes in transcript and agreed by counsel.

6-1-49 Upon motion of Mr. Crenshaw and Mr. Finerty, it is ordered by Orie L. Phillips, Chief Judge of the 10th Circuit Court of Appeals, that time to docket cases with the Supreme Court of United States be enlarged to July 6, 1949. Certified copy of minute entry mailed to Supreme Court of United States.

In United States District Court
(Civil 1525)

Docket Entries.

0-11-48 Complaint filed.

0-12-48 Petition in intervention on behalf of the Utah Mining Association filed.

0-15-48 Reply brief of Interstate Commerce Commission filed.

0-16-48 Brief of United States filed.

0-18-48 Petition in intervention filed by Public Service Commission of Utah and so ordered.

Motion of Colorado Mining Association for leave to intervene and motion granted and Petition in Intervention filed and adopts complaint and answer of railroad companies.

Answer of Interstate Commerce Commission filed.

Answer of United States filed.

Petition in Intervention filed by State of Utah and adopts complaint and answer of railroad companies and so ordered.

Pursuant to Sec. 2284 of Title 28, it is ordered by the Honorable Orie L. Phillips, Chief Judge of the Court of Appeals for the 10th Circuit, that Honorable T. Blake Kennedy of Wyoming and Honorable Tillman D. Johnson of Utah shall be designated as the 3 Judges to determine the issues of these proceedings.

Case called for trial.

Court heard arguments of counsel and both sides agree case is submitted.

Court holds in favor of plaintiffs. Injunction to be issued.

Findings of Fact and Conclusions of Law and Decree to be prepared and presented for signature.

10-20-48 Reporter's transcript of decision of the Court filed.

11-29-48 Defendants' objections to plaintiffs' proposed Findings of Fact and Conclusions of Law received.

Findings of Fact, Conclusions of Law and Decree requested by defendants received.

12-7-48 Report of proceedings by Reporter filed.

12-15-48 Letter from Allen Crenshaw filed.

1-10-49 Findings of Fact and Conclusions of Law signed by Orie L. Phillips, Circuit Court Judge, Tillman D. Johnson and T. Blake Kennedy, District Court Judges, holding that I. C. C. should be enjoined filed.

Final Order and Decree enjoining I. C. C. from enforcing orders signed by said three Judges filed. Order denying proposed Findings of Fact and Conclusions of Law of defendants signed by same three Judges and filed.

Defendants' proposed Findings, etc. lodged.

Notice of entry of orders mailed to all counsel of record.

- 29-49 Order correcting Findings of Fact and Conclusions of Law signed by Judge Johnson and filed.
- 7-49 Petition for appeal filed.
Order allowing appeal filed.
Assignment of errors filed by United States and Interstate Commerce Commission. Citation on appeal signed by Judge Johnson.
Statement as to jurisdiction filed and copy of opinion and final Order and Decree and Findings and Conclusions attached.
Statement of defendants directing attention to Rule 12 of Supreme Court filed.
Notice of appeal filed.
Praecipe for record on appeal filed.
Petition to have original records on appeal filed.
Order signed by Judge Johnson and filed to transmit original records to Supreme Court, if no copies are available.
Certificate of service filed.
- 21-49 Petition to enlarge time filed.
Order enlarging time until June 5, 1949 to docket cause and file record in Supreme Court of the United States signed by Judge Johnson and filed.
- 27-49 Letters from John F. Finerty, Attorney General of United States, L. C. C. and Otis Gibson counsel for D. & R. G. W. RR. Co. filed *re* changes in transcript. Order signed by Judge Johnson and filed that Court reporter make necessary changes in transcript and agreed to by counsel.
- 1-49 Upon motion of Mr. Crenshaw and Mr. Finerty, it is ordered by Orie L. Phillips, Chief Judge of the 10th Circuit Court of Appeals, that time to docket cases with the Supreme Court of United States be enlarged to July 6, 1949. Certified copy of minute entry mailed to Supreme Court of United States.

325 In the District Court of the United States
 For the District of Utah

Central Division

Civil No. 1525

Civil No. 1524

(Titles Omitted)

Præcipe for transcript of record—Filed March 7, 1949

To the Clerk of the above-named Court:

You will please prepare a transcript of the record in the above-entitled consolidated causes to be transmitted to the Clerk of the Supreme Court of the United State and include in said transcript the following:

1. Complaints with Appendices and Exhibits to each, filed in Civil Actions Nos. 1324 and 1325.
2. Answers of the United States to complaints in Civil Actions Nos. 1324 and 1325.
- 326 3. Answers of the Interstate Commerce Commission to complaints in Civil Actions Nos. 1324 and 1325.
4. All court orders convening and naming members of the three-judge statutory court in Civil Actions Nos. 1324 and 1325.
5. Records of the Interstate Commerce Commission in American Smelting & Refining Company, Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, Seventy-fifth Supplemental proceedings, as offered in evidence herein, including transcript of Commission hearings in said supplemental proceeding, with all exhibits thereto, and including all papers, documents and records, certified and uncertified, under all court exhibit numbers, as received in evidence herein.
6. Records of the Interstate Commerce Commission in United States Smelting Refining and Mining Company, Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, Seventy-sixth Supplemental proceedings, as offered in evidence herein, including transcript of Commission hearings in said supplemental proceeding, with all exhibits thereto, and including all papers, documents and records, certified and uncertified, under all court exhibit numbers, as received in evidence herein.

7. Findings of Fact, Conclusions of Law, including opinion of Circuit Judge Phillips, and Decree of Court, entered November 14, 1947, in Civil Actions Nos. 1324 and 1325, as consolidated, heard and decided together.
8. Complaints with Appendices and Exhibits to each, filed in Civil Actions Nos. 1524 and 1525.
9. Petitions to intervene, orders allowing interventions, and complaints filed by all interveners to Civil Actions Nos. 1324 and 1325, and Civil Actions Nos. 1324 and 1325, particularly by the State of Utah, the State of Colorado, the Public Service Commission of the State of Utah, the Public Utilities Commission of the State of Colorado, the Utah Mining Association, and the Colorado Mining Association.
10. Answers of the United States to complaints in Civil Actions Nos. 1524 and 1525.
11. Answers of the Interstate Commerce Commission to complaints in Civil Actions Nos. 1524 and 1525.
12. All court orders convening and naming members of the three-judge statutory court in Civil Actions Nos. 1524 and 1525.
- 327 13. Reporter's transcript of the court hearing at Salt Lake City, Utah, in the consolidated causes, Civil Actions Nos. 1524 and 1525, including statement of the court opinion as made for the said record.
14. Plaintiffs' joint proposed findings of fact and conclusions of law.
15. Joint proposed findings of fact and conclusions of law, submitted by defendants United States and Interstate Commerce Commission.
16. Findings of Fact, Conclusions of Law, and final Decree as entered by the court in Civil Actions Nos. 1524 and 1525.
17. Petition for Appeal.
18. Order Allowing Appeal.
19. Citation on Appeal.
20. Notice of Appeal.
21. Assignment of errors.
22. Statement of Jurisdiction of the Supreme Court of the United States.
23. Statement of defendants-appellants directing attention to paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.
24. Petition to order original records in the office of the District Clerk transmitted to the Clerk of the Su-

preme Court of the United States, as a part of the record upon appeal.

25. Order to transmit original records of the Clerk of the District Court, as a part of the record upon appeal to the Supreme Court of the United States.
26. Certificate of Service of Notice of Appeal.
27. This Praeipe for transcript of record.
28. All docket entries in Civil Actions Nos. 1324 and 1325 and in Civil Actions Nos. 1524 and 1525 in appropriate order.

Dated: March 3, 1949.

HERBERT A. BERGSON

Herbert A. Bergson
Assistant Attorney General.

EDWARD DUMBAULD

Edward Dumbauld
*Special Assistant to the
Attorney General.
For the United States of America.*

DANIEL W. KNOWLTON

Daniel W. Knowlton
Chief Counsel.

ALLEN CRENSHAW

Allen Crenshaw
*Attorney.
For Interstate Commerce Commission.
(File Endorsement Omitted)*

- 329 Clerk's Certificate to foregoing transcript omitted in printing.

- 330 In the District Court of the United States
(Titles Omitted)

Stipulation Amending Praeipe—Filed Sept. 9, 1949

To the Clerk of the above-named Court:

Counsel for parties to the above-entitled consolidated causes, now pending appeal in the Supreme Court of the United States, hereby stipulate that the Praeipe filed in the appeal should include the reporter's transcript of the consolidated Court hearing, at Salt Lake City, on June 18, 1947, in Civil Actions Nos. 1324 and 1325, that omission of such transcript in the Praeipe was an oversight, and

331 that the said Praecipe be now amended to include the same, and that the Clerk of the above-named Court be, and is hereby requested to forward said transcript of Court hearing, together with this stipulation, to the Clerk of the Supreme Court of the United States.

Dated: August 9, 1949.

HERBERT A. BERGSON,
Herbert A. Bergson,
Assistant Attorney General,

W. D. McFARLANE,
W. D. McFarlane,
*Special Assistant to the Attorney General,
For the United States of America,*

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel.

ALLEN CRENSHAW,
Allen Crenshaw,
*Assistant Chief Counsel,
For the Interstate Commerce Commission,
Appellants.*

JOHN F. FINERTY,
John F. Finerty,
For American Smelting & Refining Co.,

PAUL B. CANNON,
Paul B. Cannon,
*For United States Smelting,
Refining and Mining Co.,*

OTIS J. GIBSON,
Otis J. Gibson,
*For Denver and Rio Grande
Western Railroad Co.,*

ELMER B. COLLINS,
*For Union Pacific Railroad Company,
Appellees.*

(File endorsement omitted)

336

In the District Court of the United States
For the District of Utah.

Civil No. 1324

BINGHAM & GARFIELD RAILWAY COMPANY; THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY (WILSON MC-
CARTHY AND HENRY SWAN, TRUSTEES); UNION PACIFIC
RAILROAD COMPANY; and AMERICAN SMELTING & REFINING
COMPANY, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, DEFENDANTS.

Civil No. 1325

UNITED STATES SMELTING, REFINING AND MINING COMPANY;
THE DENVER & RIO GRANDE WESTERN RAILROAD COM-
PANY; UNION PACIFIC RAILROAD COMPANY, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, DEFENDANTS.

BEFORE:

HONORABLE ORIE L. PHILLIPS, United States Circuit
Judge.

HONORABLE T. BLAKE KENNEDY, United States District
Judge.

HONORABLE TILEMAN D. JOHNSON, United States District
Judge.

337 Salt Lake City, Utah

June 18, 1947

COUNSEL PRESENT:

For Plaintiffs:

Mr. John F. Finerty, American Smelting & Refining Co.

Mr. Otis J. Gibson, D. & R. G. W. R. R.

Mr. Elmer D. Collins, U. P. R. R.

Mr. Paul B. Cannon, U. S. Smelting, Ref. & Min. Co.

For Defendants:

Mr. Allen Crenshaw, Interstate Commerce Commission.

Mr. Edward Dumbauld, Department of Justice.

For Intervenor:

Mr. E. B. Evans, State of Colorado.

Mr. Joseph B. Hawley, Public Utilities Com. of Colorado.

Mr. Chas. A. Root, Public Service Com. of Utah.

Mr. Grover Giles, State of Utah.

Mr. Henry S. Sherman, Colorado Mines Association.

Mr. Mitchell Melich, Utah Mining Association.

Reporters' Transcript of Evidence and Proceedings
—Filed July 14, 1947—

340

COLLOQUY BETWEEN COURT AND COUNSEL.

Judge PHILLIPS: We have been furnished with copies of the complaint and with the appendices to the complaint. Have answers been filed?

Mr. CRENSHAW: Your Honor, I find in the mad rush I have been engaged in trying to get this case ready I have overlooked my brief case and left it in the hotel room but I do not think it will mean anything if you will proceed without it. I have given Mr. Finerty a copy of it. There are some minor changes maybe. I wish the Court to understand from the beginning it has been done in a completely mad rush. May be some minor errors we will have to correct.

Judge PHILLIPS: We will treat it as filed with the understanding that minor amendments may be made.

Mr. CRENSHAW: Thank you, sir. I will file them at noon and give all the parties copies.

Mr. DUMBAULD: I have here for filing answers on behalf of the United States, three copies and one for the Clerk. With regard to the second case, No. 1325, we just received the complaint last evening at the hotel, but the answers will be similar and are now being typed and we ask leave to file them when they are prepared.

341 Judge PHILLIPS: What is the nature of the second case?

Mr. DUMBAULD: It is the same situation except it is a different plant and belongs to a different company, the United States Smelting Company.

Judge PHILLIPS: I suppose the issues are—

Mr. DUMBAULD: Practically identical.

Judge PHILLIPS: The two cases may be consolidated for hearing I assume?

Mr. DUMBAULD: I should think so.

Mr. CRENSHAW: That is agreeable to the Commission.

Mr. FINERTY: May I suggest if they are consolidated for hearing that the hearings proceed in sequence and that in 1324 we be allowed to present our case and then 1325 proceed, in order to avoid confusion, because there are some distinctions between the cases.

Judge PHILLIPS: In other words, hear both sides in 1324, then hear both sides in 1325.

Mr. FINERTY: That is correct, your Honor.

Mr. DUMBAULD: If the Court please, I would prefer that both plaintiffs present their cases first because our defense will be practically the same in principle on both cases and it would involve duplication to have to argue twice on the same—

Judge PHILLIPS: I did not think we would argue it 342 twice but if you will make up your record—

Mr. DUMBAULD: That will be perfectly satisfactory.

Judge PHILLIPS: —in both cases, when it comes to the argument I assume we would argue the cases together.

Mr. FINERTY: Personally, if I have a preference and if it would suit the convenience of the Court, I would rather complete the argument in 1324 both for the plaintiffs and for the Government, and particularly because there are a number of intervenors in both cases and I think it would be rather confusing to try to argue the cases—particularly as far as rebuttal is concerned which I hope to be allowed—to argue the cases jointly. I think it will be conducive to saving of time and orderly procedure if the arguments as well as the records are made separately, although I have no objection, of course, to the court considering the two cases together because they are related cases.

Judge PHILLIPS: Suppose we make up the record in the two cases and the Court will then have a better picture of the situation and perhaps we can then determine which would be the most convenient and expeditious. I do not think there is any need to be too particular about which way we proceed,—whatever way will be most convenient and most expeditious and at the same time get the cases clearly presented. That is what everybody wants.

Mr. CRENSHAW: In the Commission's view of the 343 case the issues involved in the two cases are identical. I will say, especially with respect to the two American Smelting plants and the one with the United States Smelter, where we are required to make separate argument, or answer to them—our argument of course is

in answer to their argument—we would have to duplicate the same argument.

Judge PHILLIPS: If the record is in in both cases we could hear the argument in one, then you could supplement whatever additional argument you want to make in the second case. I would take it it wouldn't take long to argue the second case after we hear the first. I don't see why it should make a great deal of difference. We will determine that when we get the picture presented.

Now are there interventions?

Mr. EVANS: If your Honor please, on behalf of the State of Colorado and at the order and request of the Governor, I am filing a petition to intervene as a party plaintiff in No. 1324 and ask that we be permitted to adopt the allegations of the complaint as the allegations of the intervenor.

Judge PHILLIPS: Any objection to the intervention?

Mr. CRENSHAW: I haven't received a copy. I assume we will receive it now. We have no objection to this intervention or any others who feel they have an intervention in the case.

344 Judge PHILLIPS: The intervention will be allowed.

Mr. HAWLEY: If the Court please, on behalf of the Public Utilities Commission of the State of Colorado we ask leave to intervene and file a motion for intervention.

Judge PHILLIPS: What position do you take in the case?

Mr. HAWLEY: The position of the Commission is that it has jurisdiction over practically 93 per cent of the intrastate traffic, inbound traffic to the smelter at Leadville and naturally is interested in the outcome of this case which involves simply the interstate traffic of 7 per cent of the inbound traffic into Leadville.

Judge PHILLIPS: You, I assume, align yourself with the plaintiff railroad companies and smelter companies.

Mr. HAWLEY: Yes, your Honor, and in the motion for intervention we ask leave to incorporate the complaint in this case as part of our intervention.

Judge PHILLIPS: Very well.

Mr. ROOT: May it please your Honor, the Public Service Commission of the State of Utah would like to intervene in this case on substantially the same grounds as the Public Service Commission of Colorado.

Judge PHILLIPS: You may file your petition.

Mr. GILES: May it please your Honor, as Attorney General for the State of Utah and under the direction

345 of the Governor of the State I desire to be permitted to intervene and file petition in this matter and be permitted to adopt the complaint of the plaintiffs and join with their view in this matter.

Judge PHILLIPS: Very well.

Mr. SHERMAN: If it please your Honors, on behalf of Colorado Mines Association which is a non-profit Colorado corporation composed of about three thousand miners, mine owners and lessees, I desire to file and tender at this time a motion to intervene by way of complaint and a petition in intervention accompanies the motion. In the interest of more orderly procedure and with the approval of the court I would like to defer any argument in support of the motion and any testimony to be adduced in behalf thereof until later. Copies of the intervention have been furnished Mr. Crenshaw and the attorney for the Government. I have three copies for the Court.

Mr. CRENSHAW: He mentions the question of testimony. I don't know where it would come from except in the record of the Commission. I have no idea what he has in mind in the way of testimony.

Mr. SHERMAN: Simply by way of supporting our right to intervene.

Mr. CRENSHAW: We won't object to that intervention.

Judge PHILLIPS: You have that right. You may
346 intervene with permission of the Court under the statute I would say.

Mr. DUMBAULD: As I understand the situation any party which had participated in the proceeding before the Commission may intervene as of right. Now some of these people—I think the Utilities Commission represented by Mr. Root has already participated in the proceeding, and the other ones I don't believe did, and probably technically they would not have a right to intervene, but it would probably simplify the proceeding to just let them intervene *ex gratia* rather than treat them as friends of the court.

Judge PHILLIPS: I have read that long section on whom may intervene. I don't know what it means. It looks to me like they opened the door pretty wide if the Court says you may come in here.

Mr. SHERMAN: I was simply willing to furnish testimony in case there was any question.

Mr. DUMBAULD: I think we should let everybody in that wants in without testimony. Testimony would just delay the proceedings.

Judge PHILLIPS: Very well.

Mr. CRENSHAW: Perhaps I should explain the attitude of the Commission with reference to these interventions and simply say the Commission does not intend to engage in any delaying tactics technically or otherwise or to
347 prevent appearances of any of these gentlemen who think they have an interest in the case. The Commission does not believe some of them have an interest in it, only through their own misconception of an interest in the case.

Judge PHILLIPS: I do not see how that can affect the results.

Mr. MELICH: I want to intervene on behalf of Utah Mining Association in both of these cases.

Judge PHILLIPS: Very well.

Mr. FINERTY: Mr. Dumbauld unintentionally stated that the Utah Commission only was a party to the proceeding before the Commission. That was also true of the Colorado Commission represented by Mr. Hawley.

Judge PHILLIPS: That clears it up any way. Is it understood we are to go to trial for final disposition, final hearing?

Mr. DUMBAULD: That is our understanding.

Mr. FINERTY: In that connection, if it please the court, I would like the record to show, just as a matter of record, that the Government of the United States and the Interstate Commerce Commission waive service of the complaint as provided in the statute; that they waive issuance of summons, and that they waive statutory time to answer.

That is merely for the purpose of the record. There is no question of that understanding.

348 Mr. DUMBAULD: That would be waived by the fact of our filing answers I should think. With regard to service of summons, probably to make sure that the statute giving the Court jurisdiction in a suit against the United States is complied with, I would suppose that at their convenience the plaintiffs should have summons served, but we waive all questions as to timeliness or anything necessary in order that the matter may be heard and disposed of on the merits at this time.

Judge PHILLIPS: I would think if you came in and entered a general appearance and agreed to go to final hearing, there would be no necessity for summons.

Mr. CRENSHAW: That is exactly what the Commission says.

Judge PHILLIPS: Unless some distinction in this case from other cases. Any way, why not let the record show what Mr. Finerty has suggested?

Mr. CRENSHAW: That is agreeable.

Judge PHILLIPS: The record may so show, that those waivers are made by the Department of Justice and by the Interstate Commerce Commission through their respective counsel?

Mr. CRENSHAW: That is correct your Honor.

Mr. CANNON: May it be understood that applies also to the second case, 1325, involving the United States Smelting Company?

349 **Judge PHILLIPS:** I assume that may be true, that these waivers go to both cases?

Mr. DUMBAULD: Yes.

Mr. CRENSHAW: That is agreeable with the Commission.

Mr. FINERTY: May it please the Court, there are a couple of preliminary matters I would like to dispose of; one is to correct page 9 of the complaint in the foot-note where in the middle of the footnote it states "these same tariff provisions apply to Garfield and Murray"—

Judge PHILLIPS: Just a minute, Mr. Finerty; Judge Johnson doesn't seem to have a copy of the complaint.

On page 9 in the footnote?

Mr. FINERTY: Yes.

Judge PHILLIPS: What paragraph?

Mr. FINERTY: In the middle of the footnote; the paragraph starts: "These same tariff provisions apply to Garfield and Murray until July 5, 1938 on interstate traffic"—

Judge PHILLIPS: Wait a minute; I haven't got it yet—page 9?

Mr. FINERTY: Page 9, yes, in the footnote.

Mr. COLLINS: Just above the letter "a" in parenthesis in the middle of the page.

Judge PHILLIPS: I have it now. Thank you.

Mr. FINERTY: "to June 25, 1930, on intrastate traffic." "1930" should be changed to "1938", and the
350 correction in Exhibit B-5 to appendix B.

Judge PHILLIPS: B?

Mr. FINERTY: Yes, B-5 to appendix B, page 29 heading No. 3, strike out the word "upon" next to the last line of that heading before the words "such holding": "Upon" is in error and makes the heading unintelligible.

Judge PHILLIPS: Strike out "upon"?

Mr. FINERTY: Strike out "upon", yes.

Judge PHILLIPS: Are they all the corrections?

Mr. FINERTY: Those are all the corrections, yes.

Judge PHILLIPS: The complaint and exhibits will be amended in the manner suggested by counsel.

Mr. FINERTY: In support of the complaint, may it please the Court, I wish to offer certain exhibits, including complete record before the Commission and the exhibits attached to the complaint and to the appendices. Because the exhibits before the Commission—certain exhibits certified there—bear Numbers 1, 2 and so forth, I am going to suggest to the Court that we be permitted to designate exhibits introduced in this hearing and not attached to the complaint or appendices, by the prefix H. I have designated all exhibits attached to the complaint by the prefix C, and all exhibits attached to Appendix A by the prefix A, and to Appendix B by the prefix B. It is going to be necessary to keep for the record the exhibits separately.

351 Judge PHILLIPS: I assume that we will have to examine the entire record before the Commission in view of the fact that you challenge their findings.

Mr. FINERTY: That is true, your Honor, so far as the record is concerned regarding the supplemental proceeding concerning the services at the American Smelting & Refining Company—I think Colonel Crenshaw and Mr. Dumbauld will agree that on my statement that I do not challenge the conclusions in the general report as shown in that report, it will not be necessary, as now appears, to introduce that complete record before this court.

Mr. CRENSHAW: We have had rather a complete understanding with Mr. Finerty about this, in order to avoid confusing the Court with the technical question about the record, and of course if the question of custom which came up in a recent case I tried were to be injected here, it would require the entire record to decide it. That was the question in the Corn Products case; I have explained that to Mr. Finerty and he says he is eliminating those features. I made the mistake in the other case of telling the Court we had sufficient record there, when as a matter of fact later issues injected in it required the entire record. I have an understanding with Mr. Finerty—I have not been able in the short time to even check the entire record to know

352 it is a full record of the supplemental proceeding—I assume it is—but if perchance any part is omitted,

I have agreed that may be later certified and filed with the Court to complete it, because he understands as

I do, and as the Court has suggested, that the entire record must be before the Court.

Mr. DUMBAULD: I wish to state for the record, as I have already told Mr. Finerty privately, that the Government does not waive the benefit of the rule in the Mississippi Valley case that it is necessary to put in the entire record whenever a plaintiff seeks to challenge the findings made by the Commission; and the Court will understand that in this case—in the original *Ex Parte* 104 proceeding—the Commission did make a basic report so-called in which they laid down certain principles, and that report was based upon the record of the hearing held at that time; then subsequently the Commission held numerous hearings at different specific, particular plants with a view of applying those general principles to the facts as developed of record at the particular plant; and now if as Mr. Finerty states in open court, he does accept the principles as made in the basic report, I agree that it is hardly necessary to have the record in the hearing that supported that, but just as a measure of precaution I do want to say, as in the Corn Products case, if in the excitement of argument he should

353 happen to venture into challenging the principles of the original report, that in that event we would not be waiving whatever rights we had under the general rule, but I am sure that no such situation or contingency will arise.

Mr. FINERTY: I want to state, to make my position entirely clear, that I concede the conclusions in the general report—what we call the basic report—209 ICC 11, as to the customary and reasonable terminal switching services included in the line-haul rates, are not challenged here so far as they apply to the facts stated in the basic report, and I will, of course, attempt to distinguish those facts from the facts here. I do want to call the court's attention to something that the Court may have to consider, because from Mr. Dumbauld's statement I am not quite clear as to the position of the Department of Justice. I have personally examined the record behind the report in 209 ICC. That record is on file in the Supreme Court of the United States, and I would like to state for the benefit of the Court that it consists of 12,504 printed pages of testimony which represents 18,027 pages of transcript; in addition to which it represents 2323 pages of exhibits, many of those exhibits the paging not showing, being applied to the exhibits separately, exceeding—I suppose they come up to around four or five thousand pages of exhibits.

Now I submit to the Court that under those circumstances for the Government under any conditions to
 354 take the position that before we can challenge an order in a supplemental proceeding confined to the terminal services at the smelters of the American Smelting & Refining Company we must place before this Court a record of 12,000 approximately—all together something over 15,000 printed pages which costs \$35,000 to print,—I say that any such requirement would be a denial of the opportunity of any individual industry or any individual carrier to challenge any order the Commission might see fit to make. I am certain that very few industries could afford to spend \$35,000 to print this record, and I assure you it is tied up in the Supreme Court, and so far as I know was never opened by the Supreme Court from the time it arrived in the Court, because I had to dig it out of the catacombs of the Court.

I do not think the question is going to arise, but if it does arise I want to make my position clear.

Mr. CRENSHAW: I hope the implication is not that the Supreme Court refuses to consider evidence that is before them because he says he doesn't know that they read it. Neither does he know they did not.

Judge PHILLIPS: I do not think that has anything to do with it.

Mr. FINERTY: I am sure I do not intend to burden this Court with fifteen or twenty thousand pages of record.

Judge PHILLIPS: I think it is perfectly clear that
 355 Mr. Finerty accepts the report and starts his case with the supplemental hearings, and so long as that position obtains there is no reason why we should have this other. If there develops in the case any reason why we must have it or should consider it here, we can have it. That question can be raised on the face of what is now presented. I see no reason for it.

Mr. DUMBAULD: I may say in the Hanna Furnace Company case I think they did present the entire original record, as well as the supplemental record. It has been done, but I agree if counsel takes the position that he is not challenging the basic record, it is entirely unnecessary to burden the Court with it at this time.

Mr. CRENSHAW: I am quite sure from my experience in the Corn Products case that it is not necessary to have that record here. We are not insisting upon it. I have tried the Wabash case, 321 U. S., and the Corn Products

case; I tried them both. We didn't have that general record in either one. The effect of the ruling in the Corn Products case was to say that is no more needed in that case because the law and the facts have already been decided by the Supreme Court. So this Court in this case doesn't need to be concerned with it.

Judge PHILLIPS: I think that is right.

Mr. FINERTY: In that connection, may it please the Court, I would ask Mr. Crenshaw, while his answer has not
356 been filed, to state—

Mr. DUMBAULD: I have here an extra copy of Mr. Crenshaw's answer.

Mr. CRENSHAW: I have signed copies, sealed and sworn to in my room.

Mr. FINERTY: There is an unintentional misstatement of fact on page 2 of the answer where it states that "in the course of the general proceedings 209 ICC 11"—

Mr. CRENSHAW: I understand that and we will correct it.

Mr. FINERTY: I want it in the record, if your please, right now. "General information was developed as to the general situation with reference to terminal services of rail carriers as it existed at many plants all over the nation, including plaintiff's plants at Garfield and Murray, Utah, and Leadville, Colorado."

I think Mr. Henshaw will concede that the only hearing was as to the plant at Garfield, and no hearing as to the plants at Leadville and Murray preceded the basic report of 1935.

Mr. CRENSHAW: That is conceded and will not appear in the answers I will file with this Court.

Judge PHILLIPS: It may be understood that correction is made in the answers. You will make it before you file the
answers?

357 Mr. CRENSHAW: Oh yes, your Honor.

Mr. CANNON: If the Court please, I presume what has been said with regard to the record in the basic report may apply also to the other case.

Mr. CRENSHAW: Yours is probably the same way; I imagine it is, I haven't checked it.

Mr. CANNON: That is, that in case 1325 there is no need introducing the basic report.

Mr. CRENSHAW: No.

Mr. CANNON: What has been said with regard to that in 1324 will apply to the U S case 1325.

Mr. CRENSHAW: That is agreeable to us.

Mr. DUMBAULD: That is agreeable.

Mr. CANNON: I might say we have copied the basic report as part of our petition in the United States Smelting case and it is there for reference in the event any of the Court wish to read it. We don't think it applied but it is there to show what it holds and what it doesn't hold.

Judge PHILLIPS: Very well.

Mr. CRENSHAW: There wouldn't be any question at all that the Court could take judicial notice of the Commission order and report in 209 ICC.

Judge PHILLIPS: Just for convenience I assume.

Mr. CANNON: That is all.

Offers in evidence

Mr. FINERTY: I desire to offer in evidence in support of the complaint the following exhibits:

358 Exhibit H-1 which is a certified copy of all testimony and all exhibits introduced at the hearing—supplemental hearing of May 19, 1932 at Salt Lake City, Utah, particularly concerning the Garfield smelter of the American Smelting & Refining Company.

Judge PHILLIPS: Very well.

Mr. FINERTY: I desire to introduce as Exhibit H-2 certified copies of all the transcript of testimony and all exhibits introduced at the hearings of May 26th and May 27th, 1944, in the supplemental proceeding concerning the terminal services at the smelters of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colorado.

In the same exhibit is a certified transcript of the oral argument of June 27, 1946 before the entire Commission in those proceedings.

There is one exception to my statement that all exhibits are included here. Exhibit 33, bearing that number before the Commission, apparently doesn't appear in the Commission records, nor have I a copy of it, but it is stated in the record that it is a reproduction of pages 13 to 19 of Exhibit 4 which is certified, so of course if Mr. Crenshaw can locate Exhibit 33 I would be glad to have it certified.

Mr. CRENSHAW: I tried to check that back; I couldn't find it. I think we have sufficient record before the
359 Court to try the case. As far as I am concerned I am not going to raise the question, even if I know some little portions—minor portions of the record are not here.

Judge PHILLIPS: Very well.

Mr. FINERTY: I desire to offer in evidence as Exhibit H-3 a transcript of the oral argument before Division No. 3 of the Commission of June 27, 1946.

Mr. DUMBAULD: Just for the record, I object to the reception of exhibits containing nothing but argumentative material or briefs and argument of that sort.

Mr. FINERTY: May I state, so the record will leave no doubt about the proposition, that these exhibits and the exhibits attached to appendix B are introduced particularly to show, first, that we have exhausted our administrative remedies, and, second, to show the pattern of arbitrary action of the Interstate Commerce Commission in these proceedings.

Mr. CRENSHAW: I will have to answer that. If the Court please, we make no point as to the fact we are in court and all those questions we have tried to waive out of it. I am not making any objection to his filing here a transcript of oral arguments made before the Commission which will probably be repeated before this Court in this hearing, that is if the Court wants to read those arguments over again it is all right with me.

360 Mr. FINERTY: I am not asking the Court particularly to read our argument; I am asking them to read the remarks made by the Commission members on argument.

Judge PHILLIPS: They may go in.

Mr. CRENSHAW: It is not objected to.

Mr. FINERTY: I offer as Exhibit H-4 transcript of oral argument of Mr. Elmer Collins of May 3, 1945, in *ex parte* 104, terminal services, United States Smelting, Refining & Mining Company, that argument being referred to in the oral argument of Mr. Collins of May 4th in the instant case, certified copy of which has been offered.

Mr. DUMBAULD: Same objection.

Mr. COLLINS: What year?

Mr. FINERTY: 1944.

Judge PHILLIPS: Same ruling.

Mr. FINERTY: In the Commission's report and in the correspondence filed with the Commission appears a reference to the contracts between the Denver & Rio Grande and the Oregon Short Line Railroad Company, now the Union Pacific Railroad Company, for joint switching at the Garfield and Murray smelters. Unfortunately I didn't have this certified; I overlooked it. I have a carbon copy of

Mr. Collins's letter transmitting the contracts to the Commission and with the attached contracts and subject to checking by Mr. Crenshaw, I would appreciate being
361 allowed to offer that in evidence as Exhibit H-5.

Mr. CRENSHAW: It has not been certified?

Mr. FINERTY: No.

Mr. CRENSHAW: As far as the Commission is concerned we waive that, with the suggestion that he be permitted to have that certified and later filed with the Court.

Judge PHILLIPS: Very well.

Mr. CRENSHAW: I don't know how important it is. I am trying my best to get this case tried on the basic position of worthwhile trees rather than brambles, bushes and underbrush.

Mr. FINERTY: I am sorry to burden the court with so many preliminaries but one of them is to show the right of the Denver & Rio Grande Western to participate in this proceeding. That arises by the fact that at the time the order here sought to be enjoined was made the properties of that company were in the hands of trustees appointed under Section 77 of the Bankruptcy Act. I have here and desire to file as Exhibit H-6 an order approving the appointment of those trustees, made by the District Court of the United States for the District of Colorado, on November 18, 1935. This is certified by the Clerk of the Court.

Mr. DUMBAULD: No objection.

Mr. CRENSHAW: I am happy to admit this, if the Court please.

362 Mr. FINERTY: I also desire to introduce as Exhibit H-7 a certified copy of the order of the same court of December 18, 1935, appointing as trustees of the properties of the Denver & Rio Grande Wilson McCarthy and Henry Swan, who are the parties named in the Commission's order in this case.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I desire to offer as Exhibit H-8 certified copy of the order of the same Court of April 10, 1947, entitled "Consummation Order and Final Decree" returning the properties of the reorganized Denver & Rio Grande Western Railroad Company to the company and giving that company the option to be substituted as party to any and all litigation for or against the debtor corporation or trustees.

Mr. DUMBAULD: No objection.

Judge PHILLIPS: I would have thought you would have just stipulated the ultimate facts without burdening the record with all these exhibits.

Mr. FINERTY: You mean in connection with the Denver and Rio Grande?

Judge PHILLIPS: Yes.

Mr. FINERTY: That would be satisfactory.

Mr. DUMBAULD: I think it is admitted in the pleadings, if the Court please, but we have no objection to
363 receiving this evidence.

Mr. FINERTY: If it is understood as admitted at the time the complaint was filed—of course I didn't know what would be admitted—I desire then on that understanding to withdraw Exhibits H-6, H-7 and H-8.

Judge PHILLIPS: It is stipulated that—you better read your stipulation into the record.

Mr. CRENSHAW: I think they are all in; I don't know whether they will take up more room—

Judge PHILLIPS: I was trying to keep out of the record a formal bunch of exhibits that I think you could agree as to the facts.

Mr. FINERTY: May I state my understanding of the stipulation. That while the order of the Commission sought to be enjoined in terms runs against Wilson McCarthy and Henry Swan, Trustees of the property of the Denver and Rio Grande Western Railroad Company, the reorganized Denver and Rio Grande Western Railroad Company has the right, under the order of the District Court of the United States, to appear in the proceeding before the Commission in substitution for the Trustees, and to appear in these cases as party plaintiff.

Mr. DUMBAULD: That is satisfactory.

Judge PHILLIPS: Very well.

Mr. FINERTY: I desire now to offer in evidence
364 those exhibits attached to the complaint; Exhibit C-1 being a copy of the order of the Interstate Commerce Commission here sought to be enjoined, the order of October 14, 1946.

Mr. CRENSHAW: We have no objection to that.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I desire to offer Exhibit C-2 being a copy of the supplemental report of the Interstate Commerce Commission of October 14, 1946, 266 ICC 349, in which are the findings made part of the order referred to.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I desire to offer as Exhibit C-2-A the dis-secting report of Commissioner Alldredge in the Anaconda Copper Mining Company Terminal Service case, 266 ICC

387, pages 394 to 396, referred to by Commissioner Allredge in his dissenting report in the instant case.

Mr. DUMBAULD: For the record I object as being irrelevant whether there were dissenting Commissioners or not, and as being part of the proceedings in another case, but for that matter the Court will take judicial notice of it. It is part of the Commission's published report.

Judge PHILLIPS: All right. It cannot do any harm. It is a matter that we could all examine anyway. It may come in.

Mr. FINERTY: I desire to offer in evidence Exhibit C-3, the report of Division 3 of the Interstate Commerce Commission in these proceedings of October 1, 1945.

Mr. DUMBAULD: That is objected to as being the proposed report of a subordinate branch of the Commission and not constituting the action of the Commission here involved, except as evidence of the fact which is admitted that the said report was duly filed as a step in the procedure.

Mr. FINERTY: Mr. Dumbauld is a step ahead of me. The report I am referring to is not the proposed report to which he refers. The report I refer to is the final report of Division 3 which became the final report of the Commission until set aside.

Mr. CRENSHAW: I have no objection to either one. They are parts of the records of the Commission.

Incidentally at this point, I have some extra copies of all the decisions and reports in both of these cases. There are two reports in each case, one of the Division and one of the Commission, and for the convenience of the Court I think you can see them in a better form than the exhibits.

Judge PHILLIPS: You may pass them up.

Mr. FINERTY: I offer in evidence as Exhibit C-4 order of Division 3 of October 1, 1945, in the instant proceedings.

Mr. DUMBAULD: No objection.

366 Mr. CRENSHAW: No objection.

Mr. FINERTY: I offer as Exhibit C-5 proposed report of Examiners Way and Diamondson of the Commission in these proceedings which was served January 6, 1945.

Mr. DUMBAULD: This is the exhibit to which my objection applied.

Mr. CRENSHAW: The Commission has no objection. It is part of the record.

Judge PHILLIPS: Objection overruled.

Mr. FINERTY: I desire to offer in evidence Exhibit 1-A to Appendix A which is the original order of the Interstate

Commerce Commission instituting the general investigation known as *Ex Parte* 104, part 2, in which the supplemental proceeding here in question were subsequently held.

Mr. DUMBAULD: No objection.

Mr. CRENSHAW: The original order instituting the investigation?

Mr. FINERTY: Yes.

Mr. CRENSHAW: For whatever it is worth we admit it.

Mr. FINERTY: I may say one purpose of that order is to show that the investigation is not confined to Section 6(7) as stated in the report of the majority.

Mr. CRENSHAW: We will clear that up later.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I wish to offer in evidence as Exhibit B-1 a notice of order of the Interstate Commerce Commission of April 15, 1932, setting the hearing at Salt Lake City held May 19, 1932, under which the original supplemental hearing was held by the Commission concerning the terminal services of the Garfield smelter of the American Smelting and Refining Company.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I offer as Exhibit B-2 order of the Interstate Commerce Commission of March 16, 1944, setting a supplemental hearing as to the American Smelting and Refining Company smelters at Garfield and Murray, Utah, and Leadville, Colorado, under which order the hearing in these proceedings of May 26 and May 27, 1944, was held.

Mr. DUMBAULD: No objection.

Mr. CRENSHAW: No objection.

Mr. FINERTY: Incidentally, that order set the hearing for May 8th but was afterwards postponed, and that order included reference to the Midvale smelter of the American Smelting & Refining Company which was in error and eliminated from the postponing order.

I desire to offer in evidence the exhibits attached to Appendix B as B-3, B-4, B-5, B-6 and B-8, being respectively the industry's brief of November 1, 1944, the Industry's exceptions of March 27, 1945, the Industry's supplemental Memorandum of May 31, 1945, the Industry's first petition for reconsideration and re-argument after the report of Division 3, the petition being dated December 11, 1945, and B-8 being the Industry's second petition for reconsideration and re-argument.

Mr. DUMBAULD: These are objected to as being briefs and arguments; and self-serving statements, except to the

extent that they show the fact, which is admitted, that the Commission duly held a hearing at which all the procedural formalities necessary were taken.

Mr. FINERTY: They are offered for the purpose, as I have before stated, of showing an exhaustion of administrative remedies, and incidentally also a denial of administrative remedies, and show the arbitrary pattern of the action of the Commission in this entire proceeding.

Mr. HENSHAW: We have no objection to them. Of course the petitions and exceptions set forth are a material part of the record itself. I agree with Mr. Dumbauld the briefs are unnecessary. I have no objection to them going in.

Judge PHILLIPS: I cannot really see why a brief is evidence.

Mr. DUMBAULD: They are very good briefs I might say. In fact they constitute, as I suggested, a fine brief for the plaintiff in this case.

Mr. FINERTY: May I state why and for what they are evidence? I want to show that in this brief the Industry
369 raised issues, to which I will later refer, as to uncontradicted evidence, as to uncontradicted law, neither denied by the ICC but wholly ignored and never decided.

Judge PHILLIPS: They may go in. They cannot do any harm. Parts of them appear to be material. They will be in the record.

Mr. FINERTY: Parts of them will be helpful to the Court if it desires to go into the intricacies of the operation of these plants; they are described in detail in the brief.

Judge PHILLIPS: Of course we could not accept statements in a brief as to the facts.

Mr. FINERTY: Those statements, of course, are supported by references to the certified transcript.

Mr. CRENSHAW: It is obvious the Commission didn't agree to those contentions of the plaintiff.

Judge PHILLIPS: We wouldn't accept any statement of the facts.

Mr. CRENSHAW: I think those are questions that must be decided by the Court here.

Mr. FINERTY: I offer as Exhibit B-7 the order of the Interstate Commerce Commission of March 22, 1946, denying the first petition of the Industry and those of the Union Pacific, Denver and Rio Grande and Public Utilities Commission of Colorado, for reconsideration and re-argument of report and order of Division 7.

370 Mr. CRENSHAW: No objection.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I offer, as Exhibit B19, the order of the Interstate Commerce Commission of June 3, 1946, granting the second petition of the Industry for reconsideration and re-argument before the full Commission of the order of January 3, and postponing the order of Division 3 of October 1, 1945 until the further order of the Commission.

Mr. CRENSHAW: We have no objection.

Mr. DUMBAULD: No objection.

Mr. FINERTY: I have had prepared for the convenience of the Court, if the Court ever desires to examine it, photostat copies of the Basic Report of the Commission in these proceedings, 209 ICC, at page 11. They are not introduced in evidence; merely offered for the convenience of the Court.

Mr. DUMBAULD: No objection.

Mr. HENSHAW: I have received a copy and I appreciate it and I think the Court will appreciate that form of it.

Mr. FINERTY: I know it is difficult to carry ICC Reports around.

I shall in my argument refer to Section 1 of the Elkins Act. I therefore have had an excerpt made of the pertinent provisions of Section 1 which I would like to
371 hand the Court for its reference.

I also have had prepared for the information of the Court replicas of Exhibit 3 which is a map of the smelter yard at Garfield; of Exhibit 17 which is a map of the smelter yard at Murray, and I had hoped to have replicas of Exhibit 32 which is a map of the smelter yard at Leadville, for each member of the Court. However, in some mysterious way they didn't come on the Denver & Rio Grande this morning and I have only one copy of that.

Judge PHILLIPS: They may get here by tomorrow morning.

Mr. FINERTY: I think they will be here. In any event I have a copy I can refer to in argument.

Mr. CRENSHAW: I appreciate the fact that he has offered those to the Court.

Mr. FINERTY: If the Court please, that is the evidence in support of the petition by the complaining carriers and the complaining Industries.

Mr. DUMBAULD: We have no evidence, your Honor.

Mr. CRENSHAW: We have none.

Judge PHILLIPS: Have the intervenors anything to offer?

Mr. EVANS: Nothing, if your Honor's please.

Mr. CANNON: If the Court please, we have some evidence in the other case, 1325. I was wondering if you
372 care to have it introduced now.

Judge PHILLIPS: Mr. Finerty, do you represent the Industries in both cases?

Mr. FINERTY: No. Mr. Cannon represents the United States smelter and I represent the American smelter, your Honor.

Mr. DUMBAULD: Before Mr. Cannon offers his evidence, I am now prepared to file an answer on behalf of the United States in No. 1325, with three copies.

Mr. SHERMAN: May it please the court—

Judge PHILLIPS: May I digress for a moment. All of you know there is legislation pending in Congress to change the mode of procedure in these cases recommended by the Conference of Senior Circuit Judges. There is a recommendation of an amendment of the venue section, Mr. Dumbauld, by the Attorney General's office.

Mr. DUMBAULD: That is right.

Judge PHILLIPS: The effect of which is to say that the venue shall be in the Circuit of the residence of the applicant before the Commission. I wish you would ask whoever was the inventor of that idea when you get back home, what he would do in this case.

I have written some members of the Committees in Congress about it, being Chairman of the Committee of the Judicial Conference sponsoring that legislation, and
373 called their attention to—frequently orders made by the Commission—proceedings initiated by the Commission—in which there was no applicant. Any way when the case got into Court the applicant disappeared and the ICC and the Department of Justice tried the case. I couldn't see any sense in it.

Mr. DUMBAULD: I think there is a residual provision in the proposed amendment that in that event it should be in the district—

Judge PHILLIPS: It looks to me like they are putting the cart before the horse, getting the emphasis in the wrong place. I hope you will think about it. I didn't want to overlook sending that word back to whoever interfered with the simple provision, with that phraseology which the Commission has agreed to, which everybody can read and understand. Nobody can read the venue provision in the Act and have any idea what it means—just a jumble of words. Seems to me if we are going to have any legislation we

ought to try to get matters of that kind cleaned up. I am afraid we are moving back in the opposite direction if we take the Attorney General's suggestion.

I beg your pardon, gentlemen, for trespassing in this case.

Mr. SHERMAN: As far as the intervention of the Colorado Mining Association is concerned, I stated awhile
374 ago I would defer any testimony until later. I do think testimony is important. I told the witness who is present, and who will be a very short witness however, that I wouldn't use him until this afternoon. However it may be testimony may be avoided if counsel for the Commission and the Justice Department would be willing to stipulate as to what he would testify to if he was testifying.

Mr. CRENSHAW: Just advise the Court what the nature of that testimony is.

Mr. SHERMAN: I will be glad to. He will testify that the Colorado Mining Association is a non-profit Colorado corporation composed of about three thousand members, miners, producers, shippers and those interested in the mining industry in Colorado; that they have a real and vital interest in this case because if the order of the Interstate Commerce Commission should be upheld which imposes additional switching charges and line-haul charges for line haul movement, and particularly to the Leadville smelter, that these additional charges will be borne definitely and ultimately by the shippers and producers of ore in Colorado and will not be absorbed by the smelting company. In other words, they are the ones who will bear the burden of additional charges.

The purpose of the intervention is to sustain the complaint, to show that the order of the Interstate Commerce Commission is invalid and should be held to be
375 null and void.

This witness will also testify that there are approximately 300 so-called marginal mines in Colorado who are operating now chiefly by benefit of subsidy which is of a rather temporary nature, as probably the Court may take judicial notice of; that if that Federal subsidy is withdrawn and additional switching charges are imposed as the order of the Commission contemplates, it will simply result in closing a great number of the marginal mines of Colorado, over half of them I believe the witness will testify. In any event a substantial number of marginal mines, thus affecting the mining industry of Colorado as a whole; and he will also

testify that the greater number of mines now operating in Colorado are marginal mines.

If we can stipulate as to that—

Mr. DUMBAULD: As I understand, if the Court please—

Mr. SHERMAN: There are two more items. That the order of the Commission was made without notice having been given. I do not believe, however, that this witness will be able to testify to that effect. The contention of the intervenor Colorado Mining Association will be that no shipper or producer was called to testify in that investigation which was upon the motion of the Commission itself, 376 and hence had no opportunity to be heard in the matter. I do not believe he can testify to that. However, I do want to say that 93 per cent is interstate—I think I will leave that out; that is in the record; so I think that is all.

Mr. DUMBAULD: I understand, if the Court please, that the petition for intervention of this intervenor has already been granted and I, therefore, do not see the necessity of this line of testimony. In other words, it attempts to add to the record on the merits. I would object to it on the ground it is testimony that was not before the Interstate Commerce Commission and hence not properly admissible here in this review proceeding.

As to the matter which he would not be able to testify to as to notice, there is no legal requirement of such notice, and certainly this intervenor has access to the Traffic World and other trade publications and would have participated in the proceeding before the Commission if it had been thought that it had any interest in the matter why it should do so.

Mr. CRENSHAW: The only purpose in the world, as I see it, would be to show the interest of the Association in this court hearing in opposition to the Commission's order. When we admit the intervention I think we admit that how-
ever far fetched I might think it is. The rest of 377 that testimony if it were ever material which I doubt certainly, about the cease and desist order by the Commission is not part of the record before the Commission and could not be considered hereby the Court as a reason for setting that order aside. On both grounds we object to that testimony.

Mr. SHERMAN: The petition is based upon the testimony which I stated and it is recited those are facts in the petition. I had assumed when there was no objection to our in-

tervening in the case that there would be no objection to our producing testimony to substantiate the intervention.

I might say in reply to Mr. Dumbauld's remark there, as erstwhile Chairman of the Public Utilities Commission, in the matter of rates and matters of that kind I do not think there was ever an occasion when a shipper was involved that we didn't on our own motion endeavor to get those shippers in to see that their rights were protected.

Mr. CRENSHAW: May be you have a more efficient Commission in Colorado than we have in the Government.

Mr. FINERTY: May I suggest I think Colonel Crenshaw is correct that the relevance of this testimony has to do with the interest of this intervenor under section 45-A of the Rules of Civil Procedure, and as such is pertinent. I happen to have read the petition in intervention. Every statement in it is founded on evidence before the Commission.

378 Mr. SHERMAN: Is it your idea then that we—I don't care if it is not stipulated—but if those facts are necessary I would like to introduce it by way of testimony—is it your idea they are sufficient as it stands?

Mr. DUMBAULD: The Court has already granted the intervention, so no purpose of evidence—

Judge PHILLIPS: May the record show this: that counsel for the Colorado Mining Association has made a statement to the court of testimony that he is prepared to produce for the purpose of showing his interest and his right to intervene, and it is stipulated that the evidence would support his right to intervene and no question is made of his right to intervene, therefore it would not be necessary to offer this evidence into the record?

Mr. MELICH: Your Honor, since Mr. Sherman made that statement, our position with reference to the Utah Mining Association is similar to theirs; we could show the same things.

Judge PHILLIPS: The record may show the same with respect to the Utah Mining Association, the interest of both being shown sufficiently to support the right to intervene.

You may introduce your testimony.

Mr. CANNON: I would like to offer in evidence as Plaintiff's Exhibit H-1 in case 1325 a certified copy of the proceedings before the Interstate Commerce Commission commencing with the notice of hearing dated March 24, 1944 down to the last order of the Commission which I believe is an order extending the date of the effec-

tiveness of their order. This is bound in one document under one certificate, so we will offer it as one exhibit. It does contain many of the things that were offered in the other case, such as arguments, briefs and so on, and I presume they will wish to make objection to certain portions of it, but we offer it as one exhibit because it is certified under one certificate.

Mr. DUMBAULD: Let the record show we make the same objections where applicable, and do not object to the record the Court has made.

Mr. CANNON: Mr. Crenshaw asked me if it has the map. It is the entire exhibit that we introduce which includes map of the smelter.

Mr. CRENSHAW: I have had no chance to check this one at all. As I understood the agreement or understanding we had with Mr. Finerty about completion of the record, if we should find it necessary, if that is agreeable to you we may make the same one here.

Mr. CANNON: That is agreeable, yes. I might state for the convenience of counsel and the Court, a map is also attached to each of our petitions in the back, so the Court has maps as part of our petition.

I was just served with copy of the answer in our case by the Government. I haven't had a chance to check it, so consequently I am not positive that this is all the evidence that we will want to introduce. I believe it is but I would like to reserve the right after checking the answer at noon to offer any additional evidence if it is necessary.

Mr. CRENSHAW: You mean parts of the Commission record?

Mr. CANNON: Yes, this is all of the Commission record. That is why I say I presume no more evidence will be necessary, but I haven't even had a chance to study the answer and compare it with the complaint. I don't want to waive the right to introduce additional evidence if there is any more to be introduced. I presume there will not be, that we couldn't probably introduce anything outside the record anyway.

Judge PHILLIPS: We will open it up if you find it necessary to make a showing of anything that is material.

Mr. CANNON: I will offer some later if we consider it necessary when I have studied the answer.

May I ask the reporter, was it shown in the record that our exhibit was received?

Judge PHILLIPS: The record may show the exhibit offered by the petitioner in 1935 has been received in evidence with the reservation that if it should develop additional evidence is material, the matter will be opened up for additional evidence.

. . .

645 Clerk's Certificate to foregoing transcript omitted in printing.

648 In the United States District Court
District of Utah, Central Division
Civil No. 1524.

THE DENVER AND RIO GRANDE WESTERN RAILROAD; UNION
PACIFIC RAIROAD COMPANY; and AMERICAN SMELTING &
REFINING COMPANY,

PLAINTIFFS,
VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION,
DEFENDANTS.

Civil No. 1525.

BINGHAM & GARFIELD RAILWAY,
PLAINTIFF,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION,
DEFENDANTS.

Salt Lake City, Utah,
October 18, 1948.

Before:

HONORABLE ORIE L. PHILLIPS,
HONORABLE T. BLAKE KENNEDY,
HONORABLE TILLMAN D. JOHNSON.
Reporter's Transcript of Proceedings

Reported by: Simon Barlow.

649 APPEARANCES:

MR. EDWARD DUMBAULD,
Attorney for the United States.

MR. ALLEN CRENSHAW,
Attorney for the Interstate Commerce Commis-
SION.

MR. JOHN F. FINERTY,
Attorney for American Smelting & Refining Com-
pany.

MR. PAUL B. CANNON,
MR. C. W. WILKINS,
Attorneys for United States Smelting & Refining
Company.

MR. OTIS J. GIBSON,
Attorney for The Denver & Rio Grande Western
Railroad Company.

MR. ELMER B. COLLINS,
Attorney for the Union Pacific Railroad Company.

Colloquy between Court and counsel

Judge PHILLIPS: I assume there ought to be an order entered constituting the court. Will you gentlemen prepare an order, or has the clerk prepared one?

The **CLERK:** I haven't, sir.

Judge PHILLIPS: Well, you may enter an order that the court is constituted of Judge Johnson, Judge Kennedy and myself, to hear these two cases.

Mr. FINERTY: May I please the Court, I would like to present Mr. Edward Dumbauld, Special Assistant to the Attorney General of the United States, and Mr. Allen Crenshaw representing the Interstate Commerce Commission.

Judge PHILLIPS: Very well; they may appear.

650 **Judge PHILLIPS:** Will you gentlemen prefer to make necessary stipulations with respect to the other case, or do you desire to do that orally?

Mr. FINERTY: To do it orally will be satisfactory.

Judge PHILLIPS: Proceed.

(With corrections made by Mr. Finerty with the written filed consent of counsel for plaintiffs and defendants.)

Mr. FINERTY: This is the complaint of the Denver and Rio Grande Western Railroad Company, the Union Pacific Railroad Company, and American Smelting & Refining Company, asking that this court enjoin the Commission's order in the proceedings entitled "American Smelting & Refining Company, Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services," the order being entered May 18, 1948.

In connection with that complaint I suggest that we enter into oral stipulations of record already agreed on.

First, I ask that the Interstate Commerce Commission and the United States stipulate to waive formal service of

the complaint and notice of this hearing and agree to proceed to final hearing upon the complaint.

Mr. DUMBAULD: I will agree with that, if they will admit the filing of answers for the Commission and for the United States as well.

Mr. FINERTY: I shall agree to that.

Judge PHILLIPS: Very well.

Mr. FINERTY: I also ask to incorporate in the record here the entire record in Civil Action 1324, particularly incorporating the items in the Second Footnote on Page 5 of the Complaint.

Mr. DUMBAULD: That is the entire record?

Mr. FINERTY: That is the entire record. To be sure to put before the Court these actual items I particularly specified them as included.

Mr. DUMBAULD: It seems to me if we incorporate everything in the clerk's office as a part of the record on this proceeding we have covered the whole business.

Mr. FINERTY: That is all I want to have done.

Judge PHILLIPS: Were you through, Mr. Finerty?

Mr. FINERTY: I wasn't quite through; but in accordance with Mr. Crenshaw's suggestion I was going to suggest the same stipulation as to the hearing of the case of the United States Smelting & Refining Company and the carriers, both as to waiver of service of the complaint and notice of hearing, and the incorporation of the record in Civil Action 1325.

Mr. CANNON: We would like the same stipulation, of course.

Judge PHILLIPS: It is understood that it includes the pleadings and evidence, documentary and oral, in the other case.

Mr. FINERTY: And the transcript of the court there. The complete record of what transpired in the other case. Our case 1524 will include what occurred in the other hearing, of 1325.

Judge PHILLIPS: Yes.

Mr. FINERTY: I understand that this court has been convened by Judge Johnson in accordance with the stipulation of the parties before you, Judge Phillips, in July of this year.

Judge PHILLIPS: Well, I am not sure. Hasn't the Judicial Code changed that? Aren't all the three judge courts now constituted by the senior judge of the Court?

Mr. FINERTY: I think that is correct, your Honor.

Judge PHILLIPS: That is the reason I suggested the order I announced from the Bench.

Mr. FINERTY: I must confess I don't know.

Judge PHILLIPS: That is correct, isn't it, Mr. Dumbauld?

Mr. DUMBAULD: I think your Honor is correct; but we are making no point of irregularity, if any.

Judge PHILLIPS: Will somebody bring in that amendment to the Judicial Code?

Mr. DUMBAULD: I think any order your Honor would make would comply both with the former practice and the present practice.

653 Judge PHILLIPS: Well, the difficulty has been that we have had a different number for this.

Judge KENNEDY: I think the code was amended by the original deficiency act.

Mr. DUMBAULD: That is right; and formerly in this court the District Judge called to his assistance the other two judges.

Judge PHILLIPS: That is right, and now under the other types of court the designation is made by the senior judge. I think that is correct. If it is not, we will correct it. Now, is there anything else preliminary?

Mr. FINERTY: I think an arrangement has been reached regarding our stipulation, that in this Complaint No. 1325 the Bingham & Garfield Railroad is not a party to the complaint, but it is still a party to the Commission's order.

I am prepared, if it is necessary to burden the record to do so, to file copies of the order of the Commission permitting the abandonment of the Bingham & Garfield on condition that they will revoke their outstanding tariffs and concurrences filed with the Interstate Commerce Commission. I have copies of that order and copies of the revocation. They are extremely voluminous, and if it is satisfactory to Mr. Crenshaw and Mr. Dumbauld I

654 will simply refer to the case in which the order of the Commission permitting the abandonment of the common carrier operations of the Bingham & Garfield was made.

It is an order of the Commission of June 24, 1948, entered in Finance Docket No. 16093, Bingham & Garfield Company abandonment, and the supplementary order entered in Finance Docket 16094, Denver & Rio Grande Western Railway Company, Acquisition and Operation. Under that Consent and Order the Denver & Rio Grande Western Railroad Company obtained, or purchased from the Bingham & Garfield, certain trackage of the Bingham & Gar-

field and now directly handle the traffic into the American Smelting & Refining Company as formerly handled by the Bingham & Garfield.

Mr. DUMBAULD: I suggest those documents be put into the record and have no objection to their admission.

Mr. FINERTY: I think it has already filed revocations of its tariffs and concurrences. I would have to burden the record with something like twenty-five separate concurrences and tariffs that are revoked. Now those are all matters of record before the Commission. The tracks of the Bingham & Garfield have actually been taken out, and there is no operation.

Mr. GIBSON: They have been taken out, and there is no connection.

Judge PHILLIPS: I don't see any connection of
655 that company with this case being heard. Hasn't asked any relief.

Mr. FINERTY: The Bingham & Garfield didn't ask any order.

Judge PHILLIPS: I was assuming that the Commission would take no action compelling them to obey the order. Do you think it ought to be in, Mr. Dumbauld?

Mr. DUMBAULD: My only thought was that the facts in the case might be pertinent, as showing the physical operations that took place at the plant, as described in the hearing. I judge wanted to be sure that counsel didn't wish to withdraw all the references to the physical operations at the plant that were at that time performed by the Bingham & Garfield.

Mr. FINERTY: I haven't thought it proper to change the record.

Judge PHILLIPS: I think it is only about right to leave it out.

Mr. DUMBAULD: I think it is not within the purview of the order.

Mr. FINERTY: Having already burdened the court with two corrections, I wish to burden them with two
656 more immaterial corrections that I think should be made.

Mr. DUMBAULD: Did your Honor receive copies of the brief of the United States?

Judge PHILLIPS: I think we got the brief of the Commission.

Mr. CRENSHAW: While he is getting that, I have my brief of October 4th.

Judge PHILLIPS: You say there was a change in yours somewhere?

Mr. CRENSHAW: It appears there in the third line from the bottom. I think it is "November 4th." It should be "October 4th," the date upon which I received the brief.

Mr. FINERTY: On the 24th line in page 26, I have attributed to Judge Kennedy something that Judge Phillips did, and the name of "Judge Kennedy" should read "Judge Phillips".

The second correction is in the appendix of the brief, Roman numeral VII, where in that connection the last word in the sixth line from the top, reading "ten carriers"; it should read "the carriers".

Judge PHILLIPS: Roman VII, did you say?

Mr. FINERTY: Yes, Roman seven.

Judge PHILLIPS: What is the correction?

Mr. FINERTY: The word "ten" as stated, should be "the" in place of "ten".

657 Mr. FINERTY: Now I had, only fifteen minutes before the convening of this court, received the brief of the United States. I understand a copy was mailed to my office. I make no point of it. I haven't had time to read the brief of the United States.

If, after my argument, there is any occasion for further reply to it, I would ask leave to file a brief memorandum. I don't think there will be any occasion for further reply.

I understand, Judge Phillips, there are certain interventions here, and before asking your Honor to hear my argument I think it would be appropriate to hear them.

Mr. ROBERT S. PALMER: May it please the Court:

I ask permission to intervene on behalf of the Colorado Mining Association, filing the proper motion and also a petition of intervention in behalf of the same Association.

Judge PHILLIPS: Do you adopt the complaint of the Railroads?

Mr. PALMER: We adopt the complaint of the Railroads.

Judge PHILLIPS: And the answers already filed may be regarded as answers to your pleadings?

Mr. PALMER: Yes.

Judge PHILLIPS: So no new answer need be filed?

658 Mr. PALMER: Yes.

Mr. S. D. HUFFAKER: At this time the State of Utah, through its Attorney General, asks leave to file a petition in intervention in this matter in support of the plaintiffs, and we wish also to adopt the brief filed herein by the plaintiffs.

RECORD

P. 522 - 597

Judge PHILLIPS: You adopt the complaint of the Railroads?

Mr. HUFFAKER: Yes, your Honor. . .

Mr. MITCHELL MELICH: I ask leave to file a petition in intervention on behalf of the Utah Mining Association. We filed one heretofore in the other two cases, and seek the same permission now.

Judge PHILLIPS: You adopt the complaint of the railroads?

Mr. MELICH: Yes, your Honor.

Judge PHILLIPS: Well, the interventions may be recorded and filed.

Mr. J. W. HAWLEY: I ask leave to intervene on behalf of the Public Utilities Commission of Colorado—H. Sorens Hineckley,—and adopt the complaint and the briefs of the railroads.

Mr. PALMER: May it please the Court:

In view of the real and vital interest which the producers of the nonferrous ores in the states of Utah and Colorado have in the outcome of this case, may

I ask leave to read a certain portion of the petition at this time, orally?

Judge PHILLIPS: Yes.

Mr. PALMER: This is on page 6 of the petition, if your Honor please:

“The effect of the order upon the Mining Industry of Colorado.”

“Most of the mines of Colorado producing non-ferrous ores are small mines and marginal in character and will in many instances be forced to close with the imposition of additional costs. In 1935 there were 1315 producing mines in Colorado. There are now less than 300 such operating mines. These mines have incurred heavy losses recently by reason of the discontinuation of Government subsidies, which forced many to close and others to continue operations on very slim margins. The increase of charges at this time will further hamper those remaining in operation to continue in operation. The mining industry is paying higher rates to carriers by reason of increased tariffs due to graduated scales provided in published tariffs based on metal values. The mining industry is suffering under heavy operating costs, and any additional burden will force decreased production and numerous close-down.

"There were formerly more than 25 smelters on the line of the Denver and Rio Grande Western Railroad Company in Colorado, but because of economic difficulties there is remaining only one, namely, the smelter at Leadville, which is involved in this proceeding. These marginal mines of Colorado cannot survive any appreciable increases in freight rates, and the order of the Commission does impose an appreciable increase in rates, which is a duplication and is arbitrary and unreasonable.

"The mining industry of Colorado as a whole is seriously and vitally interested in the outcome of this proceeding, and, moreover, the outcome of the proceedings involves the economy of the State of Colorado as a whole, as affected by the economy of the mining industry."

May I just add this one statement? That in the event the order of the Commission should be sustained by this court, in view of the vital and real interest which the mining industry of Colorado has in this case and the irreparable damage which we feel might result from such a ruling, I would like at this time to advise that it is the sentiment of this party that an appeal must be taken to the Supreme Court.

Thank you very much.

661 Mr. QUENTIN R. L. ALSTON: If the Court please, I don't see anybody here representing the Public Service Commission of Utah, who intended to intervene in the case. Mr. Root telephoned me he was remaining this morning at his home, ill, but one of his assistants would be here to present the matter. But apparently he has not been able to get here yet, and I thought maybe we might reserve the matter of his intervention until he comes.

Judge PHILLIPS: He can intervene when he gets here.

I assume there is nothing left in the case but the presentation of the arguments?

Mr. DUMBAULD: I might say at this time I have handed to the clerk a copy, and copies have been served by mail to counsel, of the new answer in both of the new cases, and I would ask leave that they be filed and that we adopt the answers in the previous cases insofar as any matters involved in the previous litigation are involved here.

Judge PHILLIPS: Very well. They may be filed, and so treated.

Mr. FINERTY: There is only one other matter:

We offer in evidence in this record Exhibits 1 to 8, inclusive, attached to the complaint, which I will not undertake to specify, but they are the orders of this Commission and the orders of this Court, and possibly they are not necessary, but it would be more orderly to offer them here in evidence.

Mr. DUMBAULD: No objection.

Judge PHILLIPS: Very well; they may be received.

Now, how much time do you want to orally argue the case? I may say that Judge Kennedy is very anxious to leave at 5:20 this afternoon, and I hope that you may present the arguments so that the court will have some time for consultation after the case is closed, with the hope that we may be able to reach a decision.

Mr. FINERTY: I should think my argument will take between an hour, and an hour and a half.

Judge PHILLIPS: That is all right.

There seem to be two areas where there is considerable dispute. Your brief, Mr. Finerty, predicates part of your claim for relief upon the proposition, as I understand it, that we must assume from the present state of the record that the line-haul tariff charges cover the line-haul and that movement beyond the line-haul which doesn't result in an uninterrupted movement, and that the previous decisions growing out of the parent order, and the parent order itself, of the Commission, are predicated upon a finding that the switching services rendered were not covered by any tariff and were in effect over-services and would constitute a rebate.

The second, as I understand it, is that the evidence doesn't support the findings of the Commission that the haul terminates in the several places designated in the order, but that those are in substance merely terminal facilities of the railroad, and that the line-haul should include a further movement, at least a movement to a convenient delivery point or a convenient resetting point.

Now, as I understand the briefs on the other side, they take the position that it is quite immaterial whether the line-haul charge covers these services or not; that the Commission has a right to invoke a further segregation between the tariff covering line-haul service and the tariff covering switching services that are not part of the line-haul, as a matter of fact, as separate and distinct tariffs, and that it is quite immaterial what the present tariff does cover, because the Commission has the right to require separation

and require a reasonable charge for the switching service which the railroads perform.

Now, you said in your brief that every one of these cases heretofore decided, including the Anaconda Mining case in Montana, was predicated upon a finding supported by evidence that the line-haul tariff charge didn't cover switching service.

Mr. FINERTY: Yes.

664 Judge PHILLIPS: Somewhere in your argument I think it ought to be possible to settle that proposition without question.

Mr. FINERTY: I intend to settle it without question.

Judge PHILLIPS: We will give you until twelve o'clock, Mr. Finerty.

Mr. FINERTY: I wish to state our position goes farther than the court stated.

Judge PHILLIPS: I understand your subsidiary—

Mr. FINERTY: Our position is that it is *res judicata* in this court that the line-haul rates include terminal switching services, whether or not there is interruption of movement, under the finding of your gentlemen in—

Judge PHILLIPS: Some of your operations provide for an additional charge beyond an interrupted movement.

Mr. FINERTY: That is true. And our brief will show that our point is that those tariffs themselves are unreasonable in providing that charge.

Judge PHILLIPS: I see.

Argument on Behalf of American Smelting & Refining Co.

Mr. FINERTY: I am going to warn the Court in advance that I may have occasion to use rather strong language, and if I don't support the strength of my assertions it will count against me. I expect to support them.

685 Now, let me first refer you,—because, after all,

I think you will take the authority of the Supreme Court in that respect, rather than my word,—let me refer you to my brief, pages 8 and 9, and the foot-notes, in which I take every case in which the Supreme Court has affirmed an order of the Interstate Commerce Commission, and except in those cases where such orders were affirmed in memoranda opinions, on the authority of the cases I adhere to, in every case the decision of the Supreme Court itself recites that the line-haul rates did not include compensation for the terminal switching services.

In *United States vs. American Sheet & Tin Plate Company*—that is the major and first case involved—the Supreme Court said this:

“If the findings were limited to the practices specified in the sections mentioned (Sections 2 and 3) the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for
686 which the carrier is compensated under its interstate line-haul rates.”

Now, there is your Basic Report, that first case going to the Supreme Court, and that, as you will recall, is an aggregation of cases. The Tin Plate case was only one of something like fourteen appealed cases and the Supreme Court says,—in every one of those cases the Supreme Court held that the line-haul rates did not include compensation for the terminal switching services.

In *United States vs. Pan American Petroleum Corporation*, 304 U. S. 106, Foot-note, page 9, the Supreme Court says:

“The Commission held that, in the circumstances disclosed at each of the plants under consideration, the carriers’ obligation of delivery was fulfilled by placing or receiving cars on interchange tracks and that the moving and spotting of cars in the industries’ plants formed no part of the services covered by the line-haul rates.”

But let me read from the decision of the Supreme Court in the Staley case. You can omit the first quotation from the Staley case, which is *United States vs. Wabash Railroad Company*, 321 U. S. 403.

The court said, page 406, referring to the basic report and study that the Commission had made and to all the supplemental orders of the Commission made since that report up to the time of the Staley case—and I want
687 to say that I have read every supplemental order that the Commission has made,—but don’t take my word for it, take the Supreme Court’s. The Supreme Court says, page 406:

“After the study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the in-

dustries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service; and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs."

Now, how has Mr. Crenshaw, in his brief, in the face of that statement by the Supreme Court of the United States, had the face to say that the Supreme Court of the United States has knowingly ever affirmed an order of the Interstate Commerce Commission in which a finding that the line-haul rates did not include compensation of the terminal services was not included? I will go further. What if both the Supreme Court and I are mistaken? The point is that the Supreme Court never knowingly affirmed such an order. I want now to challenge Mr. Crenshaw to
688 point out any case.

Mr. CRENSHAW: Bring the reports in here.

Judge Phillips: Make your argument to the court.

Mr. FINERTY: I beg your pardon.

I challenge Mr. Crenshaw to show any case in which the Commission previous to this case has attempted to make such an order, with an express repudiation of a former finding, that the line-haul rates did not include compensation for the terminal services, where the Commission has not appealed from a finding of a court that the line-haul rates to include compensation for the terminal services, and where the Supreme Court has ever affirmed or would affirm such an order. And that is this case.

I don't want to interrupt my argument now, but, entirely aside from this question, I would like to refer the court to pages 17 and 31 of my brief, in which I analyze the assininity of any belief that there can be a violation of section 6 (7) without a finding that the line-haul rate did not include compensation for the terminal service.

I may be getting to it and I may not, but it is perfectly apparent, and it must be perfectly apparent, that if the line-haul rates do include compensation for the terminal services, as this court has found they do, that if charges
689 in addition to the line-haul rates were imposed for those terminal services that order of the Commission compels carriers to collect and the industry to pay twice for the same services.

Judge PHILLIPS: I will ask this question, in order to get your point of view of something that was discussed when the case was here before:

Let us assume that the line-haul rates cover all the services being rendered. Let us assume, further however, that part of those services are beyond the line-haul, beyond the convenient delivery point, and that there are additional services. Would the Commission have power to require a segregation, in separate tariffs, of the line-haul service and the switching service, unless it could find that there had been a violation of the statute in the form of a rebate or free service?

Mr. FINERTY: I will answer that frankly, that I think the Commission would have that power, if they found grounds and evidence that was necessary for that purpose of the Act, as provided by Section 6 (1) of the Act, to segregate those charges.

But what I call your attention to here is that the only authority of the Commission in that respect, as to segregation of charges, is under Section 6(1) of the Act. That under Section 6 (1) is the only authority that the Commission has. And there is no finding in this case, and
690 you can't sustain the Commission's order in the Florida case without such a finding that Section 6 (1) has been violated. And certainly if the Commission was ever told how it could accomplish that much it was told by this court; that if it didn't mean to increase the charges but merely to segregate them, they could say so and say "Segregate the line-haul and terminal switching charge."

As you pointed out yourself, Judge Phillips, in your former opinion, far from doing that, the Commission merely says that under the tariffs as now published, to get the compensation for the line-haul rates you have to publish new tariffs again compensating the carriers for the switching services already included in the line-haul rates. And there is no authority under 6 (1) or 6 (7) either for such an order.

Judge PHILLIPS: 15 U. S. C. A. 61?

Mr. FINERTY: No.—28 U. S. C. A. 6 (1)—Beg your pardon, it is 49 U. S. C. A., Section 6 (1).

I have attempted to show you, out of the mouth of the Supreme Court and out of the mouth of the Commission, itself, that what I say is correct: that the Commission has never made an order under Section 6 (7) where it didn't make a finding that the line-haul rates include compensation for the terminal switching services.

703 Mr. CANNON: I was just going to suggest that the Public Service Commission of Utah have their attorney here and we might handle that before adjournment.

Judge PHILLIPS: Very well.

Mr. CRENSHAW: I don't know what is the trouble, but I can hardly talk.

Mr. CLINTON A. L. ALSTON: Our previous procedure in this case was to have the case presented by Mr. Finerty and then to be followed by the railroad attorneys. We are ready to proceed.

Judge PHILLIPS: You go ahead and make your intervention.

Mr. ALSTON: I am representing at this time the Public Service Commission of Utah. Mr. Root represented the Public Service Commission previously, at the hearing of the Commission and at this court, and he had prepared a petition for intervention and he called me at the last minute and asked me if I would appear before the court and ask the court's leave to file the petition in intervention of the Public Service Commission of the State of Utah.

Judge PHILLIPS: It adopts the complaint of the railroads?

Mr. ALSTON: Yes, in substance it adopts the complaint of the railroads, your Honor.

704 Judge PHILLIPS: You may file it.

Mr. ALSTON: Not familiar with the case, I will just file the petition and ask the court to consider the petition of the Public Service Commission of Utah in making its findings and determination.

Judge PHILLIPS: Very well.

I think if we adjourned now it would enable Mr. Crenshaw to get to the doctor's office.

Mr. CANNON: I couldn't very well get through by twelve o'clock.

Judge PHILLIPS: We will recess until one o'clock, then.

(Thereupon, at 11:50 o'clock a. m., a recess was taken until 1:00 p. m. of the same day.)

737 *Argument on behalf of the United States*

738 Well now, the fact is that the very principle of *Ex Parte* 104 is that the transportation ends where the interruption is experienced, and if it were true that the fact that this plant has been so changed since the Commission's hearing that this service can now be per-

formed without interruption, nothing is more certain than that if a bona fide showing were made on that the Commission would give them a rehearing and make new findings as to where transportation begins and ends.

In the Staley case there were repeated changes in the industrial unit, and the maximum amount of switching permissible under *Ex Parte* 104 principles, and in the case which I have cited in my brief, with regard to Elevator "C" at the Staley plant, when a rearrangement of tracks had been made so that Elevator "C" could be served without inconvenience, the Commission so found, notwithstanding the fact that within the order found in the Wabash case they had made different findings with reference to a different track layout than they had in the Staley plant.

So I do want to emphasize that in our judgment *Ex Parte* 104 principles were based on physical operating facts. As the Commission has said, they can be determined by experienced operating railroad officials if they give their consideration to the question as an operating physical matter, apart from all traffic considerations.

739 I think that is very indispensable, and of course the Commission makes the same application. In other words, what we are dealing with here is a rate practice, a mode of determining rates, and not with the level of the rates or the reasonableness of the rates, and I think that the attempt of the plaintiffs to avoid that is simply to cause confusion, so that in every case that comes up, to determine where transportation begins and ends they want to convert it into a rate case, to get in all the delays and litigation that the reasonableness of rates involves and what is a fair rate of return on the capital of the company, what is the valuation of the capital of the company on which they are entitled to a return. All those things they want to get in. They want to involve the level of the rates, to see whether they are getting compensation or not for this service that is beyond transportation.

And we say that in *Ex Parte* 104 cases the thing that the Commission has to determine is where this line-haul transportation should end and plant service begin. And we say that the line-haul rate is nothing but a rate for line-haul transportation, and therefore if you know where the transportation ends, you know where the rate ends, and any service in addition to that, without a reasonably compensatory tariff, amounts to a rebate, because it is free
740 service.

If they think the line-haul rate is too high, the Commission is open to them and there is adequate procedure there to have the Commission prescribe for the railroads what the reasonable rate level would be.

All that on the merits of the case was fully gone into on our previous argument in this case, and our briefs also deal with it in detail; so I won't say anything more about that.

Now I want to mention the Montana case. At the previous argument our learned friends said this case is exactly like the Montana case. Since then the Montana case has been decided by the court there and the Commission's opinion has been sustained. Eminent counsel in that case saw fit not to take an appeal, and now eminent counsel in this case say the Montana case is entirely different.

It seems to me if there is any difference at all, the Montana case would apply *a fortiori* to this case. I have here with me copies of my brief in that case which has a map of the plant and a discussion of the matters of interruption, and for the convenience of the court I will leave those with the court, and it is my opinion that in a comparison of the facts insofar as you go into the question of actual interruption in the two plants, you will find that the case 741 is *a fortiori* for the case here.

The evidence clearly shows that the carriers simply could not possibly make delivery at their own uninterrupted operating convenience, because the industry itself doesn't know where it wants the cars to be spotted until after this extra service for weighing and for assaying the content of the ore has been gone through with. So that it seems to me it is very clear, insofar as the merits of the case and the evidence to support the Commission's findings are concerned, that there is evidence to support it and they are correct.

Now, the point has been made that they say that they are "railroad yards"—I think a careful examination of the record will disclose—I can't give you the page numbers now because I didn't think that point would arise again, but my recollection from the previous hearing is that you will find from the evidence, talking about a railroad terminal yard is purely the testimony of our good friend Mr. Finerty as constructed by leading questions to his own witnesses, and he would get to talking with them about railroad yards as if they were really railroad yards; but I think that Mr. Collins and the witnesses from his road were too alert to answer yes or no to the leading questions of

Mr. Finerty, and I think their evidence doesn't use the expressions "railroad yards" and "terminal yards" for those. The fact is that that simply exists in the imagination of counsel.

774 (At 3:06 o'clock a short recess was taken.)

Judge PHILLIPS: The court will be in session.

Judge PHILLIPS: Mr. Clerk, have you the order we entered before?

The CLERK: I have a copy of the order.

Judge PHILLIPS: Copy of the old order?

Mr. CANNON: Copy of it right here.

The CLERK: It is in the complaint, your Honor.

Mr. FINERTY: Exhibit N-7 in the complaint.

Opinion

The COURT: (At 3:30 P. M., same day)

The court reaffirms and remakes the findings of fact numbers 1, 2, 3, 4 and 5 in its order in the other cases, that is in its order in 1324 and 1325, Civil.

The court further finds that upon this record it must find and presume that the charges in the tariffs cover the services rendered beyond the points designated by the Commission as the end of the line-haul in the three yards. Those points are designated in the order of the Commission as the "plant yard" at Garfield, the "hold tracks" at Murray, and the "flat yard" at Leadville.

The court further finds that there is no basis in the record for a finding by the Commission that the furnishing of the services referred to beyond the points above designated constitute either free services or constitute a
775 rebate or violation of Section 6, paragraph 7.

The court further finds that the plant yard at Garfield, the hold tracks at Murray, and the flat yards at Leadville are used by the railroads as terminal facilities; that is to say, are used as any terminal is used by a railroad where it brings the cars into the terminal for the purpose of further disposition to the consignees, and that the evidence does not support the finding of the Commission that the line haul terminates at the plant yards, the hold tracks and the flat yards, for the reason that the shipper is entitled to an uninterrupted service beyond that point to a convenient point of delivery.

The court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges

and make a specific tariff charge for the haul to the end of the line haul and a separate specific charge for switching services beyond the end of the line haul, and that the court by remanding the case gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.

We conclude as a matter of law that the evidence in this case does not support a finding of a violation of Section 6, paragraph 7, of the Act, or a basis for an order 776 to cease and desist from a violation of the provisions of that section.

I don't know whether the case is ripe for a permanent injunction, gentlemen.

Mr. FINERTY: May I say a word on that?

The COURT: I will hear from both of you.

Mr. FINERTY: I filed a motion when the court entered a temporary injunction in the old case, pointing out that under Section 47, Title 28, the court could only enter a temporary injunction pending determination of the issues before the court, and that after those issues had been determined, a final injunction might be issued, though there might be a remand under the former injunction.

The COURT: I assume there is no objection to a permanent injunction because the whole case is before the court, isn't it?

Mr. CRENSHAW: I couldn't bind the Commission without reporting and a recommend to the Commission with reference to an appeal and have the Commission decide what it wants to do.

The COURT: It occurs to me, gentlemen, that the case is fully submitted; all of the facts are clear.

Mr. FINERTY: That is my opinion.

The COURT: All of the legal arguments have been made that could be made on a final hearing, and I see no reason why we shouldn't grant a permanent injunction 777 against the enforcement of the order. Perhaps my associates will want to suggest some additional findings.

Judge JOHNSON: Couldn't the gentlemen here stipulate that it is on the merits?

The COURT: Will you stipulate that this hearing is on the merits?

Mr. FINERTY: I think actually, Judge Johnson, that was the intention at the start.

The COURT: The record may show that both sides agree that the case may be disposed of as upon final hearing.

Mr. CRENSHAW: May I suggest that a permanent injunction would leave it open to the Commission to reopen in any case if they wanted to reconsider, if they thought they could conform to the court's requirements.

The COURT: You mean a temporary injunction?

Mr. CRENSHAW: No; this one.

The COURT: All right—the court will grant a permanent injunction.

Mr. CRENSHAW: We tried to do what we understood the court wanted us to do as a commission.

The COURT: We are not criticising you.

Mr. CRENSHAW: Mr. Finerty is correct I suppose in saying we are just stupid.

The COURT: You had your own good reason for
778 taking this course, and we have no criticism.

Mr. DUMBAULD: It occurs to me that the Commission might wish to make findings under 6-1, and that would be of benefit, and I wondered whether your injunction would permit that?

The COURT: They can still do that.

Mr. CANNON: In referring to the various yards I believe you omitted the "Assembly yard".

The COURT: What we have said in this case applies equally to your case, except that the yard in question designated by the Commission as the end of the line haul, is called the "assembly yard", and the same findings will be made in both cases, with that differentiation.

Now you gentlemen can prepare a permanent injunctive order.

Mr. DUMBAULD: Will that include findings, conclusions and degree and everything, in a formal way?

The COURT: I think we have indicated what they ought to be, and you can prepare them in both cases.

Mr. CRENSHAW: I suggest that they be submitted in chambers.

Judge KENNEDY: You gentlemen will stipulate that we may sign these findings, conclusions and order at our respective places?

Mr. CRENSHAW: Yes.

779 Mr. FINERTY: If we could get about ten days—

Mr. CANNON: The order will be a consolidated order as it was last time?

The COURT: Yes. You will have to differentiate between those assembly yards and those places.

Mr. CANNON: Yes.

The COURT: Court is in recess.

780

Certificate

I, Simon Barlow, hereby certify that on October 18, 1948, at Salt Lake City, Utah, I reported the proceedings had in the United States District Court in the within entitled causes of action, and that the within pages numbered from 1 to 132 inclusive, contain a full, true and correct report and transcript of said proceedings as reported by me and transcribed under my direction.

E. M. GARNETT
Official Reporter

By
(sgd) SIMON BARLOW
Assistant Reporter

Dated this 4th day
of December, 1948.

781

Certificate

I, E. M. Garnett, certify that this corrected transcript, pages 1 to 133 inclusive, has been copied by me or under my direction from the original transcript prepared by the assistant reporter, with the corrections requested and agreed to in writing by counsel for the respective parties, pursuant to the order of United States District Judge Tillman D. Johnson, which order is on file herein.

E. M. GARNETT
Official Reporter

Dated at Salt Lake City, Utah
this 11th day of July, 1949

785

Exhibit II-1 (No. 1324, Civil)

Before the
Interstate Commerce Commission
Ex Parte 104, Part 2

TERMINAL SERVICES OF CLASS I CARRIERS

Reporter's Transcript of Hearing

Salt Lake City, Utah, May 19, 1932
10 a. m.

BEFORE: C. M. BARDWELL, Attorney-Examiner.
Met pursuant to notice.

APPEARANCES

Riley A. Gwynn, Washington, D. C., appearing for the Interstate Commerce Commission.

George Williams, L. F. Wilson and J. A. Gallaher, Equitable Building, Denver, Colorado, appearing for The Denver & Rio Grande Western Railroad Company.

A. C. Ellis, Jr., 1003-7 Kearns Building, Salt Lake City, Utah, appearing for The Columbia Steel Company.

J. M. Souby and Dana T. Smith, 1416 Dodge St., Omaha, Nebraska, and W. Hal Farr, 10 So. Main St., Salt Lake City, Utah, appearing for Los Angeles and Salt Lake Railroad Company.

787

PROCEEDINGS

EXAM. BARTWELL: The Interstate Commerce Commission has set down for hearing this morning *Ex Parte* 104, Part II, Terminal Service of Class 1 Carriers.

Will you please state your appearances orally to the reporter?

MR. GWYNN: Riley A. Gwynn, Washington, D. C., for the Interstate Commerce Commission.

MR. GALLAHER: George Williams, L. F. Wilson, and J. A. Gallaher, all Equitable Building, Denver, Colorado, on behalf of The Denver & Rio Grande Western Railroad Company.

MR. ELLIS: A. C. Ellis, Jr., attorney for the Columbia Steel Company.

MR. COEY: A. L. Coey, Superintendent L. A. & S. L. Railroad, Union Pacific System, Room 220, Union Depot, Salt Lake City.

EXAM. BARTWELL: Are there any other appearances?

I don't know that it is necessary to state the purpose of these hearings further than has been expressed in the notices that have been sent out to the respondent railroads and also to individual industries. That purpose was stated as being to determine the following questions concerning the terminal switching service performed on industrial tracks which connect industrial plants with the rails of the respondent carriers.

788 (1) Whether such terminal switching services, as a whole or in part—performed in placing cars at designated locations of the industrial tracks in positions accessible for loading and unloading, are services which the connecting common carriers by operation of law are in duty bound to perform.

(2) Whether, in circumstances where such services are performed by the industry, any allowance made to the industry by connecting common carriers as compensation for that work, is lawful?

I believe the Denver & Rio Grande is ready to proceed.

Mr. GALLAHER: We are ready to proceed. I will call Mr. Wilson.

L. F. WILSON was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. GALLAHER) Please state your name, your residence and your occupation.

A. L. F. Wilson, assistant general manager of The Denver & Rio Grande Western, headquarters, Denver.

Q. How long have you been engaged in the railroad business, with what companies, and in what capacities?

A. I have been with the Denver & Rio Grande Western since May of 1907, capacities of secretary to the assistant general manager, assistant car distributor, assistant car accountant chief clerk to the general manager, 789 superintendent of transportation, general superintendent of transportation, and assistant general manager.

Q. Have you prepared a statement, Mr. Wilson, which explains your testimony in response to the inquiries made by the Interstate Commerce Commission in this case?

A. Yes, sir, I have.

Q. Will you please proceed to read that statement into the record.

A. The statement I have prepared containing my evidence, is in response to letter of Mr. George B. McGinty, Secretary of the Interstate Commerce Commission, dated April 18, 1932, addressed to Mr. J. A. Gallaher, Commerce & Valuation Counsel, Denver and Rio Grande Western Railroad Company, Denver, Colo., with respect to two specific questions concerning the terminal services performed by our company on the industrial tracks of the American Smelting & Refining Company at Garfield, Utah:

For convenience, I quote these questions:

"1. Whether such terminal switching services, as a whole or in part—performed in placing cars at designated locations of the industrial tracks in positions accessible for loading and unloading, are services which your company, as a common carrier, is duty bound by operation of law to perform as an accident of transportation; and

790

"2. Whether, in circumstances where such services are performed by an industry named, any allowance is made by your company to the industry as compensation for that work, is lawful?"

Mr. George Williams, Freight Traffic Manager of the Denver and Rio Grande Western Railroad, is to follow me and will testify as to charges assessed, tariff references, etc.

While my testimony will be devoted principally to the handling of cars into, out of, and within the Garfield plant of the American Smelting & Refining Company, from my personal knowledge of those facts, it is my belief that such terminal switching services as a whole, or in part, performed in placing cars at designated locations of the industrial tracks accessible for loading and unloading—are services which our company, as a common carrier, is duty bound to perform as an incident of transportation; and so far as my knowledge goes from recent investigations made by me, the Denver and Rio Grande Western does not make, nor has it made, any allowance of any kind for services performed by the Garfield Smelter, on behalf of the Rio Grande.

The Garfield Smelter of the American Smelting & Refining Company is located at the extreme end of the Garfield Branch of the Denver & Rio Grande Western Railroad, and is twenty-two miles from Welby, where the Garfield Branch connects with the Bingham Branch, Welby being a distance of five miles from Midvale where the Bingham Branch connects with the main line between Denver and Salt Lake. Garfield Smelter is 27 miles from Midvale and 32½ miles from Salt Lake.

791 In addition to the Denver & Rio Grande Western, the Los Angeles & Salt Lake and Bingham & Garfield reach this smelter, which owns and maintains at its own expense 15.5 miles of standard gauge track. All of these lines operate their trains into and out of the train yard within the plant, but the Denver & Rio Grande Western performs all switching that is performed by a railroad. The switching we perform in connection with the business of the Bingham & Garfield is handled on switching charge basis shown in items 1680, 1690 and 1700 of Freight Tariff Denver & Rio Grande Western G. F. D. No. 6600. Switching we perform for the Los Angeles & Salt Lake is handled in accordance with contract between this company and the Los Angeles and Salt Lake entered into February 1st, 1927, and which, briefly, provides that the entire cost to the Denver & Rio Grande

Western in connection with the joint switching service shall be charged to the joint account and apportioned between each line on the basis that the total number of loads of revenue freight handled for each line bears to the total number of carloads of revenue freight handled. Revenue derived from intraplant switching is credited to the joint account. Therefore, each line derives benefits from such revenue in the same proportion as it participates in the expense. Item 1670 of Tariff No. 6600 provides for the assessment of switching charge on cars handled in intraplant service.

The principal commodities going into the smelter yard consist of ore, concentrates, coal, sand, etc., of which there was a total of 613 cars in April, 1932. The principal commodities moved out of the plant consist of bullion, acid and flue dust, of which, in April, 1932, there was a total of 80 cars. The regular or usual handling of the inbound business consists of movement of the loads over track scale located in the train yard, thence to the various unloading spots, except that during the severe weather months frozen ore and concentrates, after moving over track scales, are spotted in thaw house which is owned and operated by the smelter, thence to unloading spots.

Empties for outbound loading are track scaled and placed at loading points, thence moved over track scales and lined up in train yard for one of the three railroads to move out in their regular trains. Empties not required for outbound loading are track scaled and lined up for movement in the train yard for each railroad in the same manner as are the outbound loads.

In addition to these ordinary switching movements the smelter orders certain cars moved in intraplant service, these cars being loaded principally with yard cleanings, convertible high line dust, rejected ore, R. B. dust, trench slag, acid, ore, etc. This intraplant switching does not amount to a great deal for the reason the Smelting Company owns, maintains and operates at its own expense a small steam locomotive and an electric motor which they employ for the purpose of handling cars in intraplant service for their own convenience and economical reasons, also for the purpose of hauling slag out to the dump. In addition to those two ways of transporting various intraplant commodities, the Smelting Company further minimizes intraplant switching by the railroad by means of cable devices to pull cars, and by belt conveyors.

All of the switching done by the railroad is handled by one engine assigned six days per week, eight hours daily, and an extra engine working three days weekly, Mondays, Wednesdays and Fridays. At the present time each of the three railroads entering Garfield operates a train into and out of the smelter tri-weekly.

Q. Mr. Wilson, you mentioned the fact that the smelter owns 15.5 miles of standard gauge track. That trackage is for the purpose of intraplant switching, is it not?

A. Intraplant switching and serving the various parts of the plant.

Mr. GALLAHER: You may cross examine.

Cross-Examination.

794 Q. (By Mr. GWYNN) Do the other two railroads that you mentioned reach Garfield on their own rails?

A. Yes, sir.

Q. And you state that they place cars in the yard in this plant; do you mean by that statement that the yard is inside of the plant gates or on the property of the industry?

A. In referring to the train yard I mean that is located within the Garfield Smelter property.

Q. And the cars are not taken into any other yard prior to their delivery on the tracks—on the industry tracks?

A. Well, now, as to the other two lines I don't know; but as for our line, our road haul movement is directly into the plant,—into the train yard of the plant.

Q. When the cars arrive in a train at Garfield they go directly to the plant, and not into another train yard?

A. No, sir.

Q. And the industry is not notified prior to the delivery of the cars in this yard?

A. I think they do get a consist from Midvale.

Q. From Midvale?

A. Yes, sir.

Q. You don't know whether they do or not?

A. They must get a consist, because they are prepared with switching orders when the train arrives.

795 Q. Is the respondent carrier permitted to deliver those cars in this yard at any and all times? In other words, it doesn't have to wait for instructions from the plant after they get the consist to deliver the cars in this yard?

A. No restriction whatever; whenever our train moves to Garfield it moves right into the plant yard.

Q. The locomotives which take the cars into this yard drop them and do none of the plant switching, is that correct?

A. That is correct; the road haul engine cuts off in the terminus.

Q. What kind of locomotives do you assign the plant, ordinary six-wheel switchers?

A. What is known as our C 40 or 41 class, which means 40 or 41 thousand tractor.

Q. That would be the O 6 type?

A. Consolidated engine.

Q. I didn't get that.

A. Consolidated.

Q. That would be the O 6 type, according to the White symbol?

A. Four drivers—480.

Q. That would be the eight-driver, wouldn't it?

A. Yes, sir.

Q. Has no tender. Can you tell me approximately the extent of the tracks within the plant that is beyond these yards where your locomotives are required to spot the cars, approximately the length of them?

796 A. I don't know exactly, but after walking over the yard several times I should say the industry tracks are confined to an area of probably three-quarters of a mile long, and approximately one-third or one-half mile wide.

Q. You don't know the aggregate length of the tracks within the plant?

A. Yes, sir; fifteen and one-half miles.

Q. You covered that in your testimony?

A. Yes, sir.

Q. Do you know the approximate number of different tracks on which your locomotives are required to spot these cars?

A. I can not say the exact number, no, sir.

Q. And you don't know the approximate number of spotting points within the plant?

A. Yes, sir, approximately about seven or eight different spots.

Q. You indicated in your testimony that the industry maintained a certain steam locomotive and certain other means of performing its own intraplant services. I think you also indicated some service was performed by your locomotives?

A. Yes, sir.

Q. Can you tell me—give me an idea of the extent of the service you performed that is intraplant service by your own locomotives?

A. Do you refer strictly to intraplant moves?

Q. Intraplant moves strictly. Does ten per cent
797 of your service in the plant consist of intraplant moves?

A. I don't think it is that much, no, sir.

Exam. BARDWELL: I think you stated in your direct, didn't you, Mr. Wilson, that it was very small?

A. Yes, it is small.

Mr. GWYNN: I will pass that question.

Q. The record shows it was a small amount; I want to ask you whether or not the intraplant switching which is performed by the industry's own locomotives is upon the same tracks or upon the same leads which are used by the respondent's locomotives in performing the spotting service?

A. On the same tracks that we performed service on, and in addition they serve some tracks we do not serve by reason of the condition of the track or the short curvature.

Q. In other words, they perform some of the spotting service in certain parts of the plant where your locomotives can not operate?

A. Yes, sir, and in addition they serve those tracks on which our locomotives can not move.

Q. Does this intraplant service by the industry's own locomotives, which as I understand from your testimony is upon the same leads and upon the same tracks as used by your locomotives, take place at any and all times during the eight-hour shift? In other words, are the industry's
798 locomotives busy at practically all times while your locomotives are working in the plant?

A. I can not say all the time, no; I don't know just how many hours of the day they are busy.

Q. Who gives your engine foreman instructions as to when and where to spot the cars beyond this yard or within the plant where the cars are placed by the lime haul locomotive?

A. The weigh-master is usually the man, weigh-master of the A. S. & R.

Q. The weigh-master of the A. S. & R.?

A. Yes, sir.

Q. He gives his instructions direct to whom?

A. To the engine foreman or sometimes to the car clerk. We have a station right there near the weigh-master's.

Q. Are these cars weighed prior to their delivery in the yard? You said something about that in your testimony; I don't recall what it was.

A. The movement—ordinary movement of a load after it comes to rest in the train yard and is set out by the road locomotive, is over the track scale and then to the unloading point.

Q. So the switch engines in the plant have nothing to do with the weighing of the cars?

A. That is the plant switch engine?

Q. The plant switch engine.

A. The A. S. & R. engines, no, sir.

Q. Your own plant switch engine?

799 A. Our plant engine does.

Q. I understood it was the engine that brings the cars in.

A. The road engine cuts off as soon as it brings the cars in, and returns out of the yard.

Exam. BARDWELL: To be sure I get it correct, the road engine brings it to a certain track and just cuts off and goes, —then your engine operating in the plant takes it and takes it to the scale?

A. Yes, sir.

Exam. BARDWELL: Then spots it after weighing?

A. That is correct, yes, sir.

Q. (By Mr. GWYNN) Then I understand from your testimony that the engine foreman in charge of these switch engines which are assigned to the plant gets his instructions from one of the officers of the plant or one of the employees of the industry?

A. Yes, sir.

Q. The weigh-master?

A. Yes, sir.

Q. As to when and where to spot the cars?

A. Yes, sir.

Q. Will you state in your own words the reason why respondent company finds it necessary to assign one locomotive for an entire eight-hour shift within this industry upon six days a week and an additional locomotive 800 for an eight-hour shift upon three days?

A. In order to perform the services which I understand we are obligated to perform.

Q. You gave us a statement as to the number of cars in a month, I believe, inbound something over six hundred, outbound about eighty. Wouldn't it be possible for the

locomotives which bring these cuts of car to the yard within the industry's property or upon the industry's property to spot those cars if they were permitted to do so in a much shorter time, rather than to require the services of one or two locomotives for an eight-hour shift?

A. No, I don't think so. I believe it is more economical and practicable to handle it with the assigned switch engine to relieve the road line cost—reduce the road line cost, also get better service with the assigned switch engine.

Q. With the approximate number of seven hundred cars in a month, which was the number of both the inbound and outbound, there would be something in the neighborhood of twenty-five cars a day—carload traffic. You wouldn't say it would require an eight-hour shift or two eight-hour shifts to spot those cars, would you?

A. That is hardly correct; that only covers the loads, the seven hundred cars. You see, the great majority of loads go in; the cars come out empty; a lot of the cars
801 that are loaded in the plant are moved into the plant empty.

Q. Taking into consideration the empties, would you say that would require an eight-hour shift six days a week and two eight-hour shifts on three of the days in order to perform the service?

A. Yes, sir, in my opinion one and one-half switch engines are necessary at the plant now to handle the business, based on the number of cars we handle with those engines.

Q. And is it not a fact that at times there is interference of delay occasioned by reason of the fact that the industry's own locomotives are using the same leads and the same tracks in performing the intraplant services as the respondent's locomotives must use in performing the spotting service?

A. I don't think there can be interference by the electric motor. It is possible there is an occasional delay by reason of the dinky steam locomotive.

Q. Why could there be no interference by reason of the electric motor?

A. I have not observed any, and I have been out there several times. I do not believe the electric motor goes in the same part of the yard; I am not sure about that.

Q. If they do go upon the same tracks in the same part of the yard, there would be interference?

A. There would be a possibility for interference, yes.

Q. And the steam locomotive operates upon the same tracks, doesn't it?

A. Some of the same tracks.

Q. Why is there no interference? Do they have a schedule for the performance of intraplant service at certain times and your locomotives perform the spotting service at other times?

A. The principal reason is, most of our switching is on the upper level, what is known as the upper level, on which the train yard is located, and the dinky locomotive doesn't come up there. There might be some interference on the lower level.

Q. Do you mean from that testimony that the major part of the service by this dinky steam locomotive is upon their tracks in a different part of the plant?

A. Down on the lower level, yes, sir; most of our switching is on the upper level.

Q. Your principal carload traffic that you handle inbound to the plant is coal, isn't it?

A. The coal—I can give you the number of cars in this particular month; last month we handled sixty-six cars of coal; one hundred and eighty-five cars of ore.

Q. On what tracks are the carload shipments of ore spotted?

A. The ore is usually spotted on the unloading docks; concentrates just below the scales—track scales.

Q. Where is the coal spotted?

A. It is spotted in two different places, to the trestle or in the storage yard.

Q. Well, now, can you say whether or not there is intraplant switching performed by this steam locomotive owned by the industry upon the same track where you spot the ore, that is, the unloading docks?

A. No, I cannot testify accurately with respect to the movement.

Q. Where is the major part of intraplant service performed?

A. It is performed on the lower level.

Q. Can you indicate more definitely what operations of the plant require the intraplant switching?

A. It consists of cars loaded with cleanings taken over to one of the unloading bins—a car of coal, for instance, set to the trestle and they later order it set to the storage pile; that is an intraplant movement.

Q. That would not constitute the major part of the intraplant service, would it?

A. As I said, the intraplant service we perform is slight.

Exam. BARDWELL: I understand you are talking now about the intraplant service you perform?

A. Yes, sir; consisted of only thirty-two cars—

Q. (By Mr. GWYNN) Probably there is a misunderstanding. At this time I am attempting to develop as to whether or not the services of these plant engines are required upon the same tracks as the respondent locomotives at the same time, and I intended to ask you what constituted the major part of the intraplant service performed by his dinky steam locomotive which is owned by the industry, and upon what tracks it is performed?

A. Most of it is performed on the lower level. As to those various moves, I can not describe them.

Q. What part of the manufacturing process—of the smelter process requires this intraplant service by this dinky steam locomotive owned by the industry, if you know?

A. I can not answer that correctly, I do not believe.

Exam. BARDWELL: You say that is performed on the lower level. Is any intraplant service performed or is there much of the ordinary spotting service performed by your company on the lower levels?

A. Some, yes, sir.

Exam. BARDWELL: Most of the spotting is done on the upper level?

A. Most of the spotting is done on the upper level. And the train yard is switched on the upper level, because the train yard is located on the upper level.

Q. (By Mr. GWYNN) Is it not a fact that the intraplant service as performed by the industry with its dinky steam locomotive is more or less a continual service, which must be performed at the particular times the industry requires it to be performed?—Otherwise there would be a delay in the manufacturing process?

A. I assume that is correct.

Q. Is it not a fact that the cars from the yard must be spotted by your locomotives at the particular times called for, else there would be a delay to the industry in its manufacturing and shipping?

A. I will say generally they are set at the time called for, yes, sir.

Q. Well, now, you have indicated by your testimony that these two locomotives, one working six days a week, the other working three days, each working an eight-hour shift, spots seven hundred loads, approximately, at the present

time, or did spot approximately that number in April. Can you give me an idea as to the volume of business in normal times?—I am assuming, of course, business is not normal for this industry.

A. No, except with respect to a general decrease in business, I should say the volume out there right now is about one-third of what it was two or three years ago.

Q. Can you say how many switch engines would be required in normal times?

A. I believe the maximum number we have had is four, that is, since the B. & G. has been operating, since 1911.

Q. Would you say in your opinion it is necessary to the economic and efficient management of this industry 806 to have the spotting service performed by the respondent carrier under the direction of the industry and at the times called for and at the convenience of the industry rather than at the convenience of the carrier?

A. I think so, yes. I want to amplify that, though, that the industry doesn't disregard entirely the performance of switch engines, that is, they work with us; whenever we can we reduce the switch engine hours with their cooperation.

Q. You would say in the manufacturing and shipping of the out-bound commodities it is necessary for the proper and timely operation of this industry to have, you might say, the continuous service of these switch engines owned by the respondent carrier?

A. Daily service, yes, except Sundays; it is not continuous, however.

Q. Do you consider the service performed here is similar to the service performed at most private tracks where the carrier spots the cars at such times as it may find it convenient to do so, having in mind in the present case that you take the cars into the plant and place them in the yard and the engine that brings them in lets go of the cars at that point, and then you furnish to this industry the continuous service of a switch engine and crew six days a week and two switch engines and crews three days a week and perform the service at a particular time—at the 807 beck and call of the industry and at the convenience of the industry rather than at the convenience of the carrier? Do you think that service is similar to the ordinary terminal service that you perform upon private tracks—switch tracks?

A. It is not exactly similar, no, for the reason that the volume is dissimilar. The volume there seems to justify it.

Q. The service is greater, isn't it,—I am not referring to the cost per car, which, of course, would be maybe greater or less according to the volume,—but the service, I am asking you whether or not the service is similar or whether the service is dissimilar?

A. The service is similar in that we try to give any consignee service when they want it.

Q. You try to work out some kind of convenient schedule?

A. Yes. If the volume of business is small we might have a road engine do the work. If the volume is large it is economical and more practical to assign a switch engine.

Q. It is a fact you assign a switch engine at no other industry except the A. S. & R. plant, isn't it?

A. Exclusively, that is true.

Q. And it is a fact it is not your general practice to stop cars upon private tracks and there drop them and then furnish another engine to pick them up when requested by the plant to perform the service?

A. It is not a general practice on our railroad for 808 the reason that is the only plant of that kind that we have on the railroad where the volume of business is sufficient to justify the assigning of an exclusive engine.

Q. I believe I have only one additional question at this time; I believe probably I have asked it of you before, and if so, it will be repetition. I am going to ask you whether or not as a railroad man of considerable experience you would say that those two switch engines which are assigned to this industry are not doing a great deal more spotting than what would be done was it not for the fact they must perform the service at the convenience of the industry, that is, they could probably perform this service in half the time and get through with it if permitted to do so?

A. I hardly think that is correct. If I did, we would take one of them off.

Q. I don't know whether it is a fact. I am trying to develop the facts. I haven't any preconceived ideas, what is the fact in this regard. I want you to state frankly.

A. I do not think that is true; otherwise we would take one engine off as a matter of fact.

Q. If you took one engine off, say you furnished an engine for four hours instead of eight, would that satisfy the industry, provided that engine could spot that number of cars?

A. If it furnished satisfactory service I don't see any reason why the smelter would object. That is what 809 they want, service.

Q. Isn't it a fact the service would not be satisfactory to the smelter unless the engine was there for an eight-hour shift in order to furnish the service at any time during that eight hours?

A. I don't know. I don't believe I could answer that.

Mr. GWYNN: I think I have no further questions at this time.

Re-direct Examination.

Q. (By Mr. GALLAHER) If any other industry where the business would justify the assignment of a switch engine you would be glad to do that, wouldn't you, under similar circumstances?

A. Yes, sir.

Q. And the switching service that is performed at the present time at the Garfield plant we believe is down to the very lowest possible minimum of service under the traffic which we are now handling?

A. Yes, sir.

Q. And is done upon as economical a basis as we know how to do it?

A. Yes sir, that is true.

Mr. GALLAHER: That is all I have.

Exam. BARDWELL: I just want to ask you one question about this weighing. I don't recall just what your 810 testimony was. But are all inbound loads weighed?

A. Yes, sir.

Exam. BARDWELL: What is the purpose of that weighing?

Mr. GALLAHER: I was going to develop that by my traffic witness. I am going into that rather thoroughly. He could answer it, though.

Exam. BARDWELL: If you are going to develop that,—

Mr. GALLAHER: Mr. Williams is to follow.

Exam. BARDWELL: I just want to ask this about it. I just want to be sure the record shows the exact operation. When it comes in, all the cars are weighed, all the inbound loads are weighed?

A. Yes, sir.

Exam. BARDWELL: How about the inbound empties?

A. All empties are weighed before loading.

Exam. BARDWELL: What about the outbound loads?

A. They are all weighed.

Exam. BARDWELL: That is for billing purposes?

A. That is for billing purposes.

Mr. GWYNN: Mr. Gallaher, this witness testified that the switching was performed by this steam locomotive owned

by the industry in some instances upon the same tracks and leads as used by the respondent's locomotives?

Mr. GALLAHER: Yes.

811 Mr. GWYNN: If there is any witness here who could tell me something about the intraplant switching performed by the plant locomotive, where it takes place, the major part of it, I would like to know. I would like to know whether or not that switching is being performed by the plant locomotive at the same time in many cases as the respondent's locomotives are performing the service, that frequently they both—or one or the other have to be delayed by reason of the other one using the switch or the lead, and whether or not the respondent's locomotives are frequently delayed by reason of the intraplant service. Apparently this witness has stated all that he knows in that regard.

Mr. GALLAHER: I would be very glad for Mr. Wilson to develop that fact. It is my understanding, however, that up on the upper level is where most of the Rio Grande switching engine's work is done. The lower level is where most of the intraplant switching is done by the dinky engine of the smelter. For that reason the amount of intraplant switching done by the D. & R. G. engine is a very small part of the intraplant switching. If Mr. Wilson can develop and give you the information which you now seek for—

The WITNESS: I will try to get it.

Mr. GALLAHER: We will be glad to give it to you.

812 Mr. GWYNN: I might point out, in my opinion I consider that fact material, inasmuch as the Commission, in determining whether or not the service performed by the respondent carrier in this industry is a common carrier service may take into consideration—at least, in my opinion should take into consideration the fact as to whether or not these locomotives which you assign to the plant frequently, when they take up a car and go to a certain track to spot it, they find the industry's locomotive already upon that lead or upon that track, and your locomotive has to wait until the industry's locomotive has finished this switching and gets out of the way,—whether or not there are such delays, and if there are such delays whether that is merely an infrequent occurrence or whether that is a daily occurrence.

Mr. GALLAHER: I think Mr. Wilson can clear that point, and will be very glad to have him do so.

Will you proceed, Mr. Wilson?

Mr. GWYNN: You mean he will get that information?

Mr. GALLAHER: I think he will give it to you now as best he can, and I think he will cover it pretty thoroughly.

The WITNESS: I can not answer that any more fully than I have. I will have to develop it from the engine foreman at Garfield. I will get him on the phone in a short time.

Mr. GWYNN: Mr. Gallaher, as far as I am concerned I would be willing for you to determine the fact—for your company to determine the fact and advise the Commission, if arrangements can be made with the Examiner for the reception of that in evidence.

813 Mr. GALLAHER: I have no objection to that. We want to give the Commission whatever information we can.

The WITNESS: If I might suggest, our assistant superintendent is here. He possibly knows more about it than I do. Maybe he can answer that question right here. He is sitting right here.

E. W. DEUEL was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. GALLAHER) Will you please state your name, your occupation and your residence?

A. E. W. Deuel, assistant superintendent, Denver & Rio Grande.

Q. Salt Lake City?

A. Salt Lake City.

Q. Mr. Deuel, will you please give such information as you can in response to the information which Mr. Gwynn desires to obtain, and I will ask Mr. Gwynn if he will interrogate you upon that point.

Q. (By Mr. GWYNN) Mr. Deuel, do you have personal knowledge of the operations in the plant of the American Smelting & Refining Company at Garfield?

A. Yes, sir.

Q. And do you have personal knowledge of the intra-plant switching operations performed by the locomotives owned by the industry?

814 A. Yes, from observation.

Q. From your own observation?

A. Yes, sir.

Q. And do you have personal knowledge of service performed by the two locomotives of the respondent company which are assigned to the industry?

A. Yes, sir.

Q. Will you state whether or not from your observation the two locomotives owned by the respondent company are frequently required to perform service upon the same tracks or leads which are used by the plant's own steam locomotive?

A. Yes, sir, at times it is performed on all the leads.

Q. From your observation can you say whether or not the industry's locomotive and the respondent's locomotive are frequently attempting to perform service upon the same track and one or the other must wait or be delayed in the performance of the service?

A. Very little of that; we have very little delay, and very little interference. Might be a case where one would have to wait for the other to move, but the delay would be very, very little.

Q. And the instances where respondent's locomotives are required to wait are rather infrequent?

A. Yes, sir.

Q. From your observation can you say whether or
815 not those locomotives assigned by respondent company are kept busy performing the spotting service, that is, they have enough business to keep them occupied at practically all times during the eight hour shifts?

A. Yes, sir, they do.

Q. What is your position with the respondent company?

A. Assistant superintendent.

Q. Assistant superintendent?

A. Yes, sir.

Q. Is it your opinion that these locomotives could perform much greater service, that is, they could spot a great many more than seven hundred cars plus the empties in a month if they were permitted to perform the service without waiting for instructions from the plant as to when and where to spot the cars?

A. No, sir; very little delay; generally kept busy.

Q. In spotting a carload shipment of ore does your locomotive take several cars at a time, or one car, or will you describe the service as it ordinarily and usually takes place?

A. After a train arrives, the train engine is cut off; the empties for the engine are built up on some other track and leave the yard. The smelter takes a few samples, grab samples, of the trains that come in; the cars are inspected; a switch engine takes hold of them and goes to the scale and weighs them all and then spots them where they are

816 told to spot them.

Q. In performing that spotting does the respondent engine take one carload of ore or two carloads and spot them and then take another one or two cars as the plant shall request?

A. Take several carloads and spot them.

Q. Four or five carloads?

A. Or ten or twelve in a cut.

Q. In the spotting of the coal how many cars are spotted at a time?

A. The coal is not going in there in very great quantities now. It would be handled in the same way. Could handle several cars of coal the same.

Q. In your opinion would it be practical or economical for this industry to receive its terminal service in one or two or three hours rather than to have continual service by locomotives assigned to the plant?

A. Could not get along without the locomotives assigned to the plant.

Q. That is, if your train locomotives which bring the cars in would proceed to perform the spotting and pushing of the cars in upon the tracks desired, the industry could not operate efficiently or economically with that kind of service?

A. It could not.

Q. Can you explain why?

Q 817 A. Yes. Because the arrival of your trains is irregular; they are not there at the time the spotting would take place; different levels, different movements around there required; movements at a certain time. For instance, you unload some cars and want some moves made; a switch engine has to be available to do that; or you want some more cars placed on a certain track.

Q. The service would be unsatisfactory if respondent should put two locomotives in there to perform the service in four hours, or whatever it would take?

A. Yes, sir.

Mr. GWYN: I think that is all the questions I have.

Q. I understand from your testimony—and if this is not correct I want you to correct me—I understand these two switch engines which are assigned to the plant are actually busy substantially during the entire eight-hour shift, and that they are busy spotting cars between these yards and the points of loading or unloading, and that they are not delayed except occasionally by the plant operations—or the operations of the plant locomotives?

A. That is correct.

Mr. GWYNS: Any delay by performing intraplant service by those locomotives would not count, because you get paid for it?

Mr. GALLAHER: Yes.

818 Q. (By Mr. GALLAHER) It is your contention that these two engines are absolutely necessary and essential for the handling of the company's business in which such service is performed?

A. They are.

Mr. GALLAHER: That is all.

GEORGE WILLIAMS was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. GALLAHER) Will you please state your name, your occupation and your residence?

A. George Williams; freight traffic manager of the Denver & Rio Grande Western Railroad; residence, Denver, Colorado.

Q. Mr. Williams, before you proceed with giving the testimony which you have prepared I would like you to explain for the benefit of the record just why it is necessary to weigh all shipments that go into the plant and out of the plant.

A. The reason for getting the weights at the plant, so far as the railroad is concerned, is to have a basis on which to assess our freight charges. Have to get the smelter weights—or the weights at the smelter—in order to make the proper assessment of our freight charges.

Q. And the freight charges upon ore are determined upon the value of the ore itself; is that correct?

819 A. Yes, all of our rates—all of our freight rates on ore are published on the basis of varying valuation. The ordinary custom is to begin with a value of ten dollars per ton, and in Utah we increase the rate twenty-five cents per ton for each increase of ten dollars in valuation. In other words, if we had a rate from a certain point to Garfield of one dollar per ton or an ore value of over ten dollars per ton, we would have a rate of one dollar and twenty-five cents per ton; on ore valued at thirty dollars, a rate of one dollar and fifty cents; on ore valued at forty dollars, and so forth, up to a one hundred dollar valuation: we do not publish any specific rates for values over one hundred dollars. But we publish a rule that applies a percentage scale to the valuations exceeding one hundred dollars per ton.

Q. So that it becomes necessary that all of these ores be assayed before you can determine definitely what the rate is; is that correct?

A. Yes; there are two operations necessary in order for us to determine our freight charges; one is the weight, and the scaling is done on arrival of the commodity at the smelter, particularly ore or concentrates. Now, with ore and concentrates we then have to obtain an assay certificate showing the valuation of the ore or concentrates before we can apply the proper freight rate.

820 Mr. GALLAHER: Mr. Examiner, is that sufficient? That is what I proposed to develop as to the necessity for the weighing of cars. If it is not sufficiently developed, however, if you care to interrogate Mr. Williams at this time it will be all right.

Q. (By Exam. BARDWELL) As I understand it, this weighing, you obtain your weight for billing purposes?

A. For the purpose of assessing our freight charges on the inbound shipments. On the outbound shipments we take the weights for billing purposes.

Q. The inbound ore, is this the first place it is weighed? It is not weighed at the point of origin?

A. No, we had no facilities for weighing—we had no scales at most of the shipping points. They always obtain weights on ore and concentrates at the smelter and use those weights for the purpose of assessing our freight charges.

Q. Are those scales inside the plant? Are they railroad scales or plant scales?

A. I am not sure; I believe at Garfield they are owned by the industry; I think they are not the railroad scales.

Exam. BARDWELL: That is not properly a question for this witness, possibly.

The WITNESS: I could not answer it definitely. I can only give you my impression as to the ownership of the scale.

Exam. BARDWELL: I think that is all.

821 Q. (By Mr. GALLAHER) Will you proceed, Mr. Williams, and give such other testimony as you have in response to the Commission's inquiry as to the terminal service at the Garfield plant.

The WITNESS: May I have the exhibit?

Exam. BARDWELL: This will be W-1.

(The list of charges was thereupon marked "Exhibit B-W-1, Witness Williams", for identification.)

A. Our Exhibit W-1 shows the various charges which are published and collected for the switching service specified at the Garfield smelter, Garfield, Utah, and to which reference was made in Mr. Wilson's testimony.

The exhibit gives the tariff reference items, description of the service, and the switching charge therefor.

Item 1670, which is the first item shown on the exhibit, describes the delivery at spotting points and the service which will be accorded without a switching charge within the Garfield smelter terminal on carload traffic on which the Rio Grande receives a road haul, and the switching charge of two dollars and seventy cents per car provided in this item is for any additional spotting or switching not specifically covered by the free delivery service enumerated in the first section of the item.

In actual practice this item would apply principally on carload shipments of crude ore, for the reason that most of the concentrate shipments reaching the Garfield 822 smelter come from the Arthur and Magna plants of the Utah Copper Company and are handled at a rate of ten cents per ton by the Bingham & Garfield Railway, in addition to which the Rio Grande switching charge of two dollars and twenty-five cents per car shown in item 1680 is assessed.

During the period from July 1, 1929, to June 30, 1930, the Garfield smelter received 4771 cars containing 378,910 tons of concentrates from Arthur and Magna, on which traffic the switching charge of two dollars and twenty-five cents per car provided in item 1680 was charged, amounting to a total of \$10,734.75 switching charges.

Item 1690, providing a switching charge of two dollars and twenty-five cents per car on sand received from the B. & G. Railway needs no comment, and my information is that during the one-year period from July 1, 1929, to June 30, 1930, there were one hundred and ninety-four cars of sand received from the B. & G. Railway on which the Rio Grande collected total switching charges amounting to \$436.50.

Item 1700 covers all carload freight received from the B. & G. Railway other than concentrates and sand, which traffic is specifically covered by item 1680 and 1690.

During the one-year period mentioned, the B. & G. Railway delivered to the Rio Grande at Garfield 1273 cars containing 69,470 tons of Utah intrastate ore, and 444 cars containing 19,294 tons of interstate ore traffic, a total

823 of 1717 cars on which the Rio Grande collected three dollars and sixty cents per car for its switching service or a total amount of \$6,181.20.

During the same one-year period mentioned the Rio Grande collected a switching charge of two dollars and seventy cents per car on 1088 cars handled in intraplant service under the second paragraph of item 1670 amounting to a total of \$2,937.60. Therefore, during the one-year period named the Rio Grande collected switching charges at Garfield smelter amounting to approximately \$30,930, made up as follows:

Concentrates from Arthur and Magna, \$10,734.75;

Sand from the B. & G. Railway, \$436.50;

Carload traffic from the B. & G. Railway other than concentrates and sand, \$6,181.20;

Intraplant switching, \$2,937.60;

Outbound bullion, approximately \$10,440;

Or a total of approximately \$30,730.05 for that year.

That is all I have on that.

Mr. GALLAHER: You may cross-examine.

Cross Examination.

Q. (By Mr. GWYNN) Were these amounts all collected from The American Smelting & Refining Company?

A. No.

824 Q. Take the \$2,937.60 collected under item 1670, will you state whether or not that was collected from shippers other than the American Smelting & Refining Company?

A. The Rio Grande would collect that from the B. & G. Railway.

Q. The B. & G. Railway would absorb it?

A. I am not sure; I am not sure about their tariff provision as to the absorption.

Q. Did the Rio Grande collect two dollars and twenty-five cents under item 1680 from the B. & G.?

A. Not under item 1680; that would be collected from the American Smelting & Refining Company.

Q. Referring to that particular item providing the charge of two dollars and twenty-five cents for switching to unloading bins, I presume those bins are within the plant of the American Smelting & Refining Company?

A. Yes, sir.

Q. And I presume the service in switching those cars is performed by the two locomotives which are assigned to the plant belonging to the respondent company, is that correct?

A. It would be performed by the Rio Grande.

Q. I also presume that the service performed for a charge of two dollars and seventy cents under item 1670 would be also performed within the plant of the American Smelting & Refining Company by the switch engines of the Rio Grande?

A. Yes, sir.

Q. Going to item 1690, the sand, carloads, received 825 from B. & G. and switched to Garfield Smelting Company's plant yards, does that mean the service is completed for this two dollar and twenty-five cent charge by merely placing the cars in the yards inside of the plant, or does that include the service of spotting these cars?

A. I am not sure; my understanding is that if we were requested to have a carload of sand spotted at a certain point we would take this sand brought in by the B. & G. and in one switching service spot it.

Q. You mean by one switching service, you would not stop out at these yards?

A. No; we would give it the switching service in one operation; we would pick up the car from the interchange track and spot it or deliver it where the smelter wanted it.

Q. Why would you perform that in one operation? Would that be less expensive?

A. If they had to have more than one, we would have to make another charge.

Q. In other words, the two dollars and twenty-five cents is charged for one service, the service into these yards?

A. Yes, sir.

Q. Or one service rather than two?

A. Yes, sir.

Q. With reference to item 1700, you collected \$6,181.20 826 for performing switching service within the plant of the American Smelting & Refining Company; is that correct?

A. That is on traffic which the B. & G. Railway deliver to us and which we switch.

Q. Did the B. & G. pay you the three dollars and sixty cents, or did the American Smelting & Refining Company?

A. My understanding is we collected this switching charge from the B. & G. Railway.

Q. You are not certain as to that?

A. I am not real certain about that, but that is my understanding of it.

Q. Going back to item 1670, also 1680, the respondent company has collected certain charges for performing

switching services upon certain shipments within the plant of the American Smelting & Refining Company. Now, can you distinguish between those shipments and the shipments which the respondent considers its duty to spot free of charge as part of the transportation service under the line haul rates?

A. Yes.

Q. What is your distinction?

A. Take a carload of ore originating at, say, Eureka, Utah, going to the Garfield smelter; if we handle that carload of ore in the winter time it may be frozen; we would take the car to the scales first, then take it to the thaw house and thaw it, on the theory we had not completed our transportation until we had delivered the shipment
827 in shape for unloading. Now, having completed that, we are through with that performance. If the industry wants something else done, then the two dollar and seventy cent per car charge as published would be assessed.

Q. That is, after you have taken the car to the thaw house and the ore is thawed out ready to unload—

A. Yes, sir.

Q. —you consider you should collect two dollars and seventy cents for spotting the car in the plant where the plant wishes to unload it?

A. When we specifically provide in this item what we determine is a part of our road haul common carrier service for delivery, if there is additional service then we would make the charge as published. Now, my explanation goes to this, the answer as to why we consider our common carrier duty is not fully met with when we make delivery in the yard or up to the plant of the smelter of a carload of frozen ore.

Q. In other words, if the ore was not frozen you could take it to the smelter without first taking it to the thaw house, and that service would be included in the line haul rate, and you would not collect the two dollars and seventy cents?

A. Correct.

Q. But if you are required to take it to the thaw house first, you would assess the additional charge of two dollars and seventy cents for completing the spotting service?

828 A. Let me put it this way—I don't think we are thinking along the same line, exactly—When we bring a carload of ore or concentrates into the smelter yards

we have to get the weight first, we have to get an assay certificate; we will perform switching service for the purpose of scaling the car; we will take it to the sampling plant for the purpose of the assay; if it is in the winter time we will take it to the thaw house to have the ore thawed out.

Q. You will do both services?

A. All those are included in our line haul rate.

Does that make a clear answer to your question?

Q. To complete the service you take it to the sampler and the thaw house as part of the line haul service—or part of the service under the line haul rate. Now, what else will you do with it?

A. We take it to the plant they want it unloaded. Perhaps I haven't made it clear, Mr. Gwynn, but we regard the service for weight and the service for sampling in order that we may know the value of the ore—

Q. Pardon me, this two dollars and seventy cents is an intraplant charge purely, isn't it?

A. That is purely an intraplant charge.

Exam. BARDWELL: I would like the witness to finish what he was going to say. I think he was going to say he considered that part of the common carrier service.

829 A. We consider the scaling of the car for the weight and the getting of the assay as part of our common carrier duty.

Exam. BARDWELL: And the thawing?

A. Yes sir, and the thawing also, in the winter time.

Q. (By Mr. GWYNN) Pardon me for the interruption. Will you explain what is meant by the combination sampler and concentrator service? I believe you have given an illustration of the sampler and the thaw house service.

A. I am not familiar enough, but I should say at Garfield we would have what we would term a common sampler and concentrator, that is, a plant that is called a sampling and concentrating plant: combination of both.

Q. As I understand, the two dollar and seventy cent charge is purely an intraplant charge, and item 1680 naming the charge as two dollars and twenty-five cents is something that is not an intraplant charge, is it?

A. That is correct.

Q. And inasmuch as the two dollars and twenty-five cents named in item 1680 is not an intraplant charge, will you distinguish or explain the reason why you should assess that charge and not perform the service as a part of the carrier's duty?

A. We do not receive a line haul in connection with that transaction.

Q. Do you collect that charge from the B. & G.?

830

A. No; from the smelter; from the industry. The

B. & G., as I explained, have a freight rate of their own on the concentrates from the sampling plants at Magna and Arthur to Garfield; that freight charge must be paid before that goes to the B. & G.; then the Rio Grande service is necessary for the switching, and we make this charge for switching the concentrates. This is in addition to their freight rate.

Q. It will appear if it was the common carrier duty of respondent carrier to spot this ore and coal in the plant, that it would be the duty of the carriers also to spot this other traffic, although I understand your carrier receives no line haul, at the same time the B. & G. receives a line haul, the two carriers, the B. & G. and the D. & R. G., perform the completed service and collect from the industry a charge of two dollars and twenty-five cents, while in the case of this other traffic no charge is collected, and the respondent considers it a part of its duty to perform the service without a charge?

A. In one instance the Rio Grande gets a line haul and freight rate, and for that freight rate they consider certain terminal service included involved in their common carrier duty. In the case of the two dollar and twenty-five cent switching charge on concentrates which the D. & R. G. receives from the B. & G., we have no line haul whatever; we perform a straight switching service on that for
831 which we get no other remuneration.

Q. I can see the point why the D. & R. G. would want to perform the service without receiving the line haul. My question was directed to this—I will not pursue it further, by reason of the fact the B. & G. is not here—but looking at the carriers on the one hand as one party, the B. & G. and the D. & R. G. on the one hand,—the plant on the other hand,—it would appear the plant was entitled to this service if it was entitled to spot the ore and the coal and the other traffic on which the D. & R. G. does receive a line haul?

A. That is putting all the carriers in one category, Mr. Gwynn, and I do not know of any instance where two or more carriers make the same terminal charges and arrangements that a single carrier makes when it gets a line haul.

Mr. Gwynn: I have no further questions of Mr. Williams.

Re-direct Examination.

Q. (By Mr. GALLAGHER) The line haul, Mr. Williams, you consider absolutely as the duty of the company to deliver the car at the unloading point, do you not?

A. Yes, we have that obligation everywhere, not only at the Garfield smelting plant but at our freight houses and industries all over the system. There is, however, a difference, in my opinion, with respect to ore and concentrate traffic, which requires perhaps a little more additional so-called common carrier service than would be given to ordinary freight. That is by reason of the moisture in the concentrates and also in crude ore, and in the winter time the necessity of thawing it out before it can be unloaded. There is also, as I previously explained, the need of our getting the weights and the need of our getting assay certificates in order to compute our freight charges. We can not do it without computing the weight and the valuation of the ore.

Q. Mr. Williams, do you have any information as to what proportion of ores and concentrates are intrastate and what proportion interstate handled at the Garfield plant?

A. I understand for a yearly period there were approximately four hundred and fifty thousand tons of ore and concentrates received at the Garfield smelter, and that about three hundred and sixty thousand tons of that total was Utah intrastate traffic, about ninety thousand tons was interstate.

Q. In other words, that would be about eighty per cent intrastate and about twenty per cent interstate?

A. Yes, about eighty and twenty per cent—eighty per cent intrastate traffic.

Q. Can you tell us something, Mr. Williams, about the ten-cent rate—the history of that rate?

A. No—I know something about it, but it is not clear enough to make a statement. I did not prepare on that, and it is not our rate. There is a history in connection with it by reason of the fact originally the Rio Grande handled all of this ore, all of this copper ore into the sampling plants and the smelter, and later, when the B. & G. Railway was built, they took over that traffic.

Q. Was that under some sort of contract arrangement, or otherwise?

A. Yes, we had a contract in effect with the B. & G. Railway for some years. It is not in effect now.

Q. And how long ago was that contract terminated?

A. I think that contract was cancelled—my recollection is— in 1921.

Q. And under the terms of that contract the Rio Grande was supposed to receive a certain amount of tonnage, was it not?

A. Yes, we were to receive a minimum tonnage per month under that contract.

Q. And that was the basis for the charges that were assessed under those contracts, was it not, that is, the volume or minimum amount set forth in that contract?

A. I have not seen the contract, Mr. Gallaher, for a good many years.

Q. You do know there was a contract?

A. Yes sir.

Re-cross Examination.

Q. (By Mr. GWYNN) If the line haul rates of the B. & G. on the items of traffic designated in item 1680, 1690 and 1700 were made in contemplation of the same service as the D. & R. G. makes its line haul rates on iron ore, coal and other traffic, the industry would be entitled to his terminal service without a charge, wouldn't it?

A. If they made them in the same way, but they do not; they can not.

Q. That is as far as I want to go. I wouldn't expect you to testify for the B. & G. I understand your line haul rates are made in contemplation of this terminal service?

A. Yes, they include this terminal service.

Q. You mentioned one other consideration under item No. 1690. You stated if the D. & R. G. should set the sand in this yard and then subsequently spot it in the plant you would make an additional charge—that is, a charge in addition to the two dollars and twenty-five cents?

A. Yes, sir.

Q. Do you consider that increases the cost of the terminal service for the engine that brings the car into the plant to let go of the cars and for the switch-engine subsequently to pick the cars up and spot them?

A. Yes, sir.

Mr. GWYNN: That is all.

Mr. GALLAHER: That is all we have, Mr. Examiner.

E. W. DEUEL was thereupon recalled as a witness,
 835 and having been previously sworn, testified as follows:

Direct Examination.

Q. (By Mr. GWYNN) Have you heard the testimony of the witness Williams?

A. Yes, sir.

Q. And you heard the statement made by Mr. Williams regarding the performance of a single service on sand, and you heard him state that in his opinion if the cars would be let go of by the engine that brings them into the plant and they would be subsequently spotted by the switch engines, that the cost would be greater than if there was a single operation.

Now, will you state your opinion with reference to the same situation?

A. We perform all the switching internally in the plant. The B. & G. brings the sand to the plant just the same as the L. A. & S. L. brings their loads in, spots them on its interchange tracks, cuts loose from them and leaves the plant. We pick that sand up and go through the same operation with the sand that we do with the ore, or any other loading; our switch engine takes hold of it, weighs it, and pulls it where it belongs.

Q. In your opinion is the cost of performing the switching service in this plant on ore and coal and other traffic carried by the D. & R. G. increased by reason of the fact
 836 that the cars are set up on these plant tracks or yard and then picked up by an additional locomotive and switched?

A. No.

Q. In your opinion the cost would not be reduced if the switching could be done in a single operation?

A. You mean by the B. & G.?

Q. By the Denver & Rio Grande.

A. On this sand?

Q. On all the traffic.

Probably I should clarify my question. Would the cost be reduced if the train locomotives which bring the cuts of cars into the plant should perform the classification and switching rather than turning loose the cars and leaving the switching to be done subsequently by the engines assigned to the plant?

A. Be greater if our road crew did the switching.

Q. Those are road crews that do bring the cars in?

A. Yes, sir.

Q. If this one locomotive which is assigned to the plant should perform all the spotting service without any waiting for instructions from the plant, how long, in your opinion, would it ordinarily take the locomotive to switch all the cars ordinarily received and delivered into it by this industry?

A. Very, very little delay from orders from the plant. Usually have enough orders ahead to keep the engine
837 busy spotting—doing this work.

Mr. GWYNN: That is all.

Mr. GALLAHER: That is all I have, Mr. Examiner.

Mr. GWYNN: Previously we had a discussion with reference to certain information which I wanted to develop from the witness Wilson. I think that has been satisfactorily developed by the testimony of the assistant superintendent, Deuel, and will not be necessary to supply any additional information.

Mr. GALLAHER: Thank you very much.

(Whereupon, at 12:00 m., a recess was taken until 1 p. m.)

AFTER RECESS 1 p. m.

J. D. WATSON was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. ELLIS) Mr. Watson, I wish you would state your name and residence.

A. J. D. Watson; Provo, Utah.

Q. What is your business, Mr. Watson?

A. Resident engineer for the Columbia Steel Company.

Q. Are you in charge, on behalf of the Columbia Steel Company, of its railroad facilities?

A. Of the yard switching, yes, sir.

Q. How long have you been employed by the Columbia Steel Company?

838 A. Nine years last February.

Q. That is the present company and its predecessors?

A. Yes, sir.

Q. Were you employed there at the time of the construction of the Columbia Steel plant and the accessory facilities?

A. I was, sir.

Q. You have been familiar with it ever since?

A. Yes, sir.

Mr. GWYNN: Did you say the construction of the plant?
(Question read.)

Q. (By Mr. ELLIS) I will ask you to state, Mr. Watson, whether or not any switching services, either in whole or in part, were performed in placing cars at designated locations on tracks of the Columbia Steel Company industrial tracks in positions accessible for loading, unloading or services which connecting common carriers by operation of law is in duty bound to perform?

A. There is not.

Q. I will ask you to state whether in any circumstances where any services are performed by the industry in connection with the movement of loaded or unloaded railway cars any allowances are made for such services by any connecting common carriers as compensation for any work of any nature done by the Columbia Steel Company?

A. Not to my knowledge.

839 Mr. ELLIS: That is all.

Mr. GWYNN: I might ask whether or not it is counsel's position that the trunk line is now performing or has heretofore performed all the services it is in duty bound to perform?

Mr. ELLIS: It is our position that that particular question is simply a question of law.

Mr. GWYNN: I realize that, but I wanted to get your position.

Mr. ELLIS: It is our position that the carriers do not perform any such services on behalf of the industry, switching or otherwise.

Mr. GWYNN: In other words, you are satisfied with your situation as it exists?

Mr. ELLIS: You mean the physical situation at the plant?

Mr. GWYNN: You are satisfied with the services the carriers are performing?

Mr. ELLIS: That its common duties have been satisfactorily performed. If you want my opinion, I will say yes. I don't want to be put in the category of a witness, to be catechized. I am representing one of the parties.

Mr. GWYNN: I was merely interested in knowing what position you were taking on behalf of the industry.

Cross Examination.

Q. (By Mr. GWYNN) I will ask the witness a few
840 questions. I take it from your response that the industry has been performing its own switching since the plant began operations?

A. Yes, sir.

Q. Will you give us some idea as to the aggregate length of the tracks within the plant?

A. We have approximately ten miles of track within our plant.

Q. Where are the interchange tracks located?

A. To the west, and about the center of our plant, about one-half mile distant, I would say.

Q. Half a mile distant from the plant?

A. Yes, sir.

Q. And the interchange track is not located on property owned by the industry?

A. Owned by the railroad company.

Q. Your industry is served only by the Union Pacific System?

A. No, sir, by the Denver & Rio Grande, and the Salt Lake and Utah.

Q. All these carriers place the cars on the same interchange tracks?

A. No, the Rio Grande and the Union Pacific have their own interchange, and the Salt Lake and Utah have their own interchange.

Q. So the respondent carrier that we have represented here this afternoon uses its own interchange tracks for both inbound and outbound traffic?

841 A. Yes, sir.

Q. What is the principal inbound traffic?

A. Iron ore, coal, lime rock, silica and products making up coke and pig-iron.

Q. Coke and pig-iron are the products which are manufactured by the plant?

A. Basic industries.

Q. Give us an idea as to the approximate amount of volume of carload traffic both inbound and outbound at the present time.

A. About nine cars of iron ore per day, about ten cars of coal, two cars of lime rock, one car of gravel or silica.

Q. The aggregate number would be about what, inbound?

A. In the neighborhood of twenty-five.

Q. Outbound about how many?

A. Very variable.

Q. I presume that is only a small fraction of the normal operations of the plant; is that correct?

A. Yes, sir.

Q. Are the cars assembled or classified in any manner or to any extent by respondent before delivery upon the interchange tracks, to your knowledge?

A. The ore comes in in lots of nine and ten cars; the coal comes in in lots of nine and ten cars and placed upon its respective track in the interchange.

Q. In other words, they are classified then to that extent before delivery?

A. As to ore, yes; but there are three different classes of ore.

Mr. Gwynn: I might say that probably I will infringe upon many of the questions which the railroad witnesses would answer; but if they have anything to add or any corrections to make we would be glad to have it later. Probably some of this information we would have gotten from the railroad witnesses if we had proceeded with them first.

Q. Let me ask you if you know, are these cars which are transported to Ironton—is that the location of your plant?

A. Yes, sir.

Q. By the Los Angeles and Salt Lake, delivered into any other yard prior to their delivery upon the interchange tracks? I understand they go to Provo, the terminal I don't know.

A. I don't know how they are placed there. I am not familiar with their yard.

Q. They go to the Provo terminal?

A. Yes, sir.

Q. And you say that they are delivered to you in cuts of how many cars of ore at a time?

A. About nine or ten.

Q. About how many cars of coal?

A. About ten.

843 Q. On that classification, do you know whether it takes place at Provo?

A. I do not.

Q. Is your industry notified of the arrival of those cars at Provo?

A. Yes, sir.

Q. How are you notified?

A. By telephone.

Q. What employee or official of your company received that message?

A. The weigh-master.

Q. Does the respondent carrier to your knowledge wait for instructions before bringing those cars and cuts from the Provo yard to the interchange tracks?

A. Not as a rule. They bring them over upon arrival, I understand.

Q. In other words, the respondent carrier is at liberty to

deliver those cars at any time at its convenience to the interchange tracks.

A. Yes, sir.

Q. And your company performs all switching service, with no exceptions, beyond those interchange tracks?

A. Yes, sir.

Q. You have stated as your opinion that it is not the duty of the common carrier to perform the plant
844 switching or the switching beyond the interchange tracks as a part of its common carrier duty?

Mr. ELLIS: I object to that.

Exam. BARDWELL: He did not state that. That was a statement of counsel.

Mr. GWYNN: I understood the question was asked the witness by counsel previously.

Mr. ELLIS: I object to the question as calling for a conclusion of the witness on a matter of law.

Mr. GWYNN: I will gladly withdraw the question. I understood, however, that the question had been asked the witness and he said in his opinion it was not a common carrier duty. I will pass it.

Q. At approximately how many points or upon how many separate tracks in your plant are cars spotted?

A. Approximately ten.

Q. Ten different tracks?

A. Yes, sir.

Q. That is, you have separate tracks for spotting the ore and separate tracks for the coal and so forth?

A. Yes, sir.

Q. What kind of locomotives or power does the industry use for performing this service?

A. Baldwin 67-ton steam locomotive, two of them.

Q. What is that, a four-wheel or two-wheel switcher?

845 A. Six-wheel.

Q. Does that have a wheel-base of ten or eleven feet?

A. Ten-foot.

Q. I take it you have no severe curvature in your plant?

A. Maximum eighteen degrees.

Q. What weight rail do you use?

A. Seventy-five pounds.

Q. Are the tracks maintained in good condition?

A. Yes, sir.

Q. Must the spotting be performed by your locomotives at particular times to meet the convenience of the plant in order to efficiently and economically operate the plant?

A. Yes, sir.

Q. And are your switch engines under the control of some one person?

A. Yes, sir.

Q. What officer or employee?

A. The general yard foreman.

Q. Who gives the general yard foreman instructions as to that?

A. The superintendent of the different departments.

Q. And that service must be continuous service, I take it?

A. A twenty-four hour service.

Q. And if there was not a switching power available at any and all times to perform this service the plant would be seriously delayed in its operations?

846 A. Yes.

Q. Are there any physical reasons why an ordinary switch power, owned and used by the respondent carrier, could not operate on your tracks?

Mr. ELLIS: I object to that, Mr. Examiner, as wholly irrelevant and immaterial in response to the questions submitted by the Commission.

EXAM. BARDWELL: I think that is one of the questions we would like to know, simply for the purposes of comparison with other plants. It is a thing we would like to have in the record.

Mr. GWYNN: I might say to Mr. Ellis that I am not attempting to develop any information which would be in any way prejudicial to your industry. I am attempting to develop the operating conditions and the services required in so far as it might relate to the question whether or not it is a duty of the line haul carrier or whether it is not a duty which should be performed.

Mr. ELLIS: Well, go ahead.

(Question read.)

A. Most parts, no. There are places within our plant that the ordinary switch power of the railroad could not serve. I think that is due to curvature.

Q. But in any event it would be necessary for the trunk line to furnish continuous service similar to what
847 your own switch power performs?

A. If they did it at all, you mean?

Q. Yes. They would have to furnish continuous service in order that you might be able to economically and efficiently operate the plant?

A. Yes, sir.

Mr. GWYNN: I have no further cross examination, Mr. Examiner, of this witness.

Exam. BARDWELL: Any further questions of this witness?

Mr. ELLIS: That is all, Mr. Watson.

Exam. BARDWELL: Do you have any further witnesses,

Mr. Ellis?

Mr. ELLIS: No.

Exam. BARDWELL: You may proceed, Mr. Smith.

A. L. COEY was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

Q. (By Mr. SMITH) State your name, residence and occupation.

A. A. L. Coey; residence, Salt Lake City.

Q. Occupation?

A. Superintendent, Los Angeles and Salt Lake Railroad.

Q. Are you familiar with the switching operations by which traffic is interchanged with the Columbia Steel Company at Ironton?

A. I am.

848 Q. I will ask you to state whether or not the Los Angeles and Salt Lake Railroad Company is performing any switching within the Columbia Steel plant?

A. No, sir.

Q. Are any allowances being made to the Columbia Steel Company, of any kind or character, for the switching that company does within its plant, from the interchange track?

A. None to my knowledge.

Mr. SMITH: I think, Mr. Gwynn, you may go ahead and develop such facts as you desire to bring out from Mr. Coey.

Cross Examination.

Q. (By Mr. GWYNN) These cars, I understand, are classified as your Provo terminals for delivery upon the interchange tracks of this industry?

A. No, sir.

Q. Are they classified or assembled in any manner at any point prior to their delivery, prior to the interchange?

A. Merely the cut going over to the steel plant, the interchange track.

Q. The service you perform, now, is a very efficient and economical service from the standpoint of the railroad, that is, the delivery of the cars on the interchange track?

A. Will you read that question?

849 Q. The terminal service you perform now for this industry is an efficient and economical service from the standpoint of the railroad company?

A. As economical as we can make it, yes, sir.

Q. Much more so than if you had to spot the cars on any kind of a private track?

A. We place the car on a designated track.

Q. (By Mr. SMITH) You did not answer the question, Mr. Coey.

(Question read.)

Q. —than if you had to go into the plant and spot a car at various places in the plant; it is more economical to put it here?

A. Oh, absolutely; yes, sir.

Q. (By Mr. GWYNN) To your knowledge has the respondent company ever been requested by this industry—I am referring to the Columbia Steel Company—to perform their spotting or to pay any allowance to the industry for performing it themselves?

A. No, sir, not to my knowledge.

Q. Would you have known, as superintendent, had they made such a request?

A. Yes, sir.

Q. Have you been superintendent since this steel plant commenced operations?

A. Not the entire time, no, sir.

Q. But for how long?

850 A. For fourteen months on the Los Angeles and Salt Lake Railroad.

Q. Did you hear the testimony given by the previous witness, Mr. Watson?

A. Yes, sir.

Q. Do you agree with his statement that it would be necessary to perform or furnish continuous service at this industry should the respondent carrier perform the spotting service, if you know?

A. From my knowledge of his operation down there it would.

Q. From your knowledge of the general operation of the steel plant?

A. It would be, yes. That is, I am not familiar with the detail operation of it; it is merely a conclusion formed from my own observation.

Q. So, based upon those considerations, you feel that the line haul carrier has performed its full transportation service when the cars are placed on the interchange track?

A. Yes, sir.

Mr. GWYNN: I think I have no further question of this witness.

Mr. SMITH: That is all, Mr. Coey.

Mr. GWYNN: Have you any further witnesses?

Mr. SMITH: No. We will be glad to supply you with any information we can, but we did not contemplate
851 calling any other witnesses.

Mr. GWYNN: I will direct this question to you, Mr. Ellis. You may have one of your witnesses answer, if you wish, or you might decline to do so. It is information which you may put on the record if you desire.

I would like to know whether or not the Columbia Steel Company has at any time requested the respondent carrier to perform the spotting service or to pay an allowance in lieu thereof, or whether the Columbia Steel Company would even permit respondent carrier to perform the service under any condition?

Mr. ELLIS: I can't answer that question.

Mr. GWYNN: Do you have any one here who can?

Mr. ELLIS: I will inquire.

Mr. ELLIS: The answer to the first part of your question is, no.

Mr. GWYNN: That is, that you have made no request?

Mr. ELLIS: They have never made the request, never sought a request, or compliance to a request.

The second section of your question, whether if requested they would or would not permit the railroad company to perform the service, they can't answer that. It would depend wholly on the circumstances and the time, the place, and the conditions.

Mr. GWYNN: I will withdraw that part of the question, and let the record stand to this effect, that the
852 industry has never made such a request.

Mr. ELLIS: No.

Mr. GWYNN: I think that is all, Mr. Examiner, unless the carriers have another witness.

I might ask this one question of the last witness,—that is, the distance from the Provo terminal over to the interchange tracks of this industry?

Mr. WATSON: Approximately two and a half miles.

(The statement heretofore marked "Respondents' Exhibit No. W-1," for identification was received in evidence and is forwarded herewith.)

EXAM. BARDWELL: If there is nothing further, this hearing is adjourned to Los Angeles, May 23rd.

(Whereupon, at 1:25 p. m., May 19, 1932, the hearing of the above entitled matter was adjourned to Los Angeles, May 23, 1932.)

853

Exhibit W-1

Ex Parte No. 104

Exhibit

Witness

THE DENVER AND RIO GRANDE WESTERN R. R. Co.

*Freight Tariff D&RGW G.F.D. No. 6600, ICC No. 429**Effective September 10, 1931.**Garfield, Utah*

Item No.	Switch Movement	Switching Charge
1670	Delivery of line-haul carload shipment, destined to smelter at Garfield, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter, sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company. For each additional movement not provided for above from track to track within smelter plant (including weighing over scales within plant)	\$2.70 Per Car
1680	Concentrates, carloads, originating at Magna or Arthur, Utah, on B. & G. switched to Garfield, Utah, smelter unloading bins, including service designated in Item No. 1670	\$2.25 Per Car
1690	Sand, carloads, received from B. & G. and switched to Garfield Smelting Company's plant yards	\$2.25 Per Car
1700	All carload freight not provided for above between track connection with B. & G. and points within yards of the Garfield Smelting Company	\$3.60 Per Car
General Freight Department May 16, 1932		

858

*Exhibit H-1 (No. 1325, Civil)**Ex Parte* No. 104 Part II

BG:AW

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

March 24, 1944

UNITED STATES SMELTING, REFINING, AND MINING COMPANY

Ex Parte No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES

PART II. TERMINAL SERVICES

The above-entitled proceeding is assigned for hearing on May 8, 1944, at 9:30 o'clock a. m., at the Shirley Savoy Hotel, Denver, Colorado, before Examiner L. Way, with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting, Refining, and Mining Company at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act.

By the Commission:

W. P. BARTEL,
Secretary.

859

Ex Parte No. 104 Part II

BG:MD

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

March 28, 1944

UNITED STATES SMELTING, REFINING, AND MINING COMPANY

Ex Parte No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES

PART II. TERMINAL SERVICES

Hearing in the above entitled proceeding now assigned May 8, 1944, at Denver, Colorado, is hereby cancelled, and this proceeding is reassigned for hearing April 25, 1944.

9:30 o'clock a. m., at the Shirley Savoy Hotel, Denver, Colorado, before Examiner Way, with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting, Refining, and Mining Company at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act.

By the Commission:

W. P. BARTEL,
Secretary.

A copy of the above entitled notice sent to the following by regular mail March 28, 1944: (1)

* See Next Page

860 *Ex Parte* No. 104 Part II

BG:MD

N. W. RICK, *Pres.*

75 Federal St.

Boston, Mass.

GEO. MIXTER, *Secy. & Treasurer*

75 Federal St.

Boston, Mass.

861

Ex Parte No. 104 Part II

BG:MD

No. CARRIER & AGENT RECEIPT BY AUTHORIZED AGENT
9233 Union Pacific RR. Co.

L. O. Ritchie

L. O. RITCHIE L. W.

H. Swan, Tr.

Assn. of American RRs.

Assn. of Ameciran RRs.

ASSOCIATION OF AMERICAN RAILROADS

L. O. RITCHIE

Per L. W.

W. McCarthy, Tr.

9235 Denver and Rio Grande Western RR. Co.

Assn. of American RRs.

ASSOCIATION OF AMERICAN RAILROADS

L. O. RITCHIE

Per L. W.

862 *Ex Parte* No. 104 Part II

BG:BL

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

April 4, 1944

UNITED STATES SMELTING, REFINING, AND MINING COMPANY

Ex Parte No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES

PART II, TERMINAL SERVICES

Hearing in the above entitled proceeding now assigned April 25, 1944, at Denver, Colorado, is hereby canceled, and this proceeding is reassigned for hearing May 29, 1944, at 9:30 o'clock a. m., at the Shirley Savoy Hotel, Denver, Colorado, before Examiner Way, with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting, Refining, and Mining Co. at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act.

By the Commission:

W. P. BARTEL,
Secretary.

A copy of the above entitled notice sent to the following by regular mail April 4, 1944: (2)

N. W. RICE, *Pres.*

75 Federal St.

Boston, Mass.

GEO. MIXTER, *Secy. & Treas.*

75 Federal St.

Boston, Mass.

863

Ex Parte No. 104 Part II

BG:BL

No. CARRIER & AGENT RECEIPT BY AUTHORIZED AGENT

1312 Union Pacific RR. Co.

L. O. Ritchie

L. O. RITCHIE L. W.

H. Swan, Tr.
 1313 Denver & Rio Grande Western RR. Co.
 Assn. of American Railroads
 ASSOCIATION OF AMERICAN RAILROADS
 L. O. RITCHIE
 Per L. W.

W. McCarthy, Tr.
 1314 Denver & Rio Grande Western RR. Co.
 Assn. of American Railroads
 ASSOCIATION OF AMERICAN RAILROADS
 L. O. RITCHIE
 Per L. W.

865 Before the Interstate Commerce Commission
 UNITED STATES SMELTING, REFINING AND
 MINING COMPANY
 EX PARTE No. 104
 PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
 AND EXPENSES
 PART II, TERMINAL SERVICES.

Reporter's Transcript of Hearing

Denver, Colo., May 29, 1944.
 9:30 a. m.

BEFORE:

LEONARD WAY, Examiner, Bureau of Rail Carriers, In-
 terstate Commerce Commission.
 Met Pursuant to Notice.

APPEARANCES:

ELMER B. COLLINS and L. T. WILCOX, 1416 Dodge Street,
 Omaha, Nebraska, appearing for Union Pacific Railroad
 Company, respondent.

W. M. CAMPBELL and W. M. CAREY, 604 Rio Grande Build-
 ing, Denver, Colo., appearing for The Denver & Rio Grande
 Western Railroad Company (Wilson McCarthy & Henry
 Swan, Trustees), respondent.

866 OMAR O. VICTOR, 906 Newhouse Building, Salt Lake
 City, Utah, appearing for United States Smelting,
 Refining & Mining Company, intervener.

CHARLES A. ROOT, 314 State Capitol, Salt Lake City,
 Utah, appearing for Public Service Commission of Utah,
 intervener.

D. H. WILLIAMS, Interstate Commerce Commission, Wash-
 ington, D. C., appearing for the Interstate Commerce Com-
 mission.

Exam. WAY: Come to order please, gentlemen. The Interstate Commerce Commission has set for hearing at this time and place Docket Ex Parte 104, Part II, Terminal Services, with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting, Refining and Mining Company at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act, and of making such findings of fact and order or orders as may be appropriate under said Act.

Who appears for the respondent railroads?

Mr. COLLINS: Elmer B. Collins and L. T. Wilcox for the Union Pacific.

Mr. CAMPBELL: W. M. Campbell and W. M. Carey for the Denver & Rio Grande Western Railroad.

Exam. WAY: For the plant?

Mr. VICTOR: Omar O. Victor, General Manager of the United States Smelting, Refining and Mining Company, Salt Lake City.

Exam. WAY: The Public Service Commission of Utah?

Mr. ROOT: Charles A. Root, 314 State Capitol, Salt Lake City, Utah.

Exam. WAY: For the Interstate Commerce Commission?

870 Mr. WILLIAMS: D. H. Williams, Washington, D. C.

Exam. WAY: How do you want to proceed?

Mr. VICTOR: Well, for the same reasons that were advanced by Mr. Finerty in the other case, I suggest that we produce an operating man who will identify the plant and movements and what takes place in the plant, reserving him for further testimony if necessary after the carriers and Commission testify in connection with the proceedings.

Exam. WAY: Any objection to that procedure?

Mr. COLLINS: No. As a matter of fact, Mr. Examiner, I think it has been demonstrated it is better to proceed soon with the plant people. The plant people seem to have more familiarity with phases of the thing than the railroad operators.

Exam. WAY: All right, we will proceed along that line then. You may proceed, Mr. Victor.

WILLIAM W. O'BRIEN was sworn and examined as follows:

Direct Examination.

Q. (By Mr. VICTOR) Will you state your name and address?

A. William W. O'Brien, 217 Pioneer Avenue, Sandy, Utah.

Q. By whom are you employed?

A. United States Smelting, Refining & Mining Company, Midvale, Utah.

Q. And for how long have you worked for this company?

A. Oh, about 35 years. I started in December, 1904, but I have been away three times for short periods.

Q. Kindly state your duties at the smelter at the present time.

A. General unloading foreman, and I also assist the carriers by directing movement of their switch locomotives in the plant.

Q. Do they have a railroad yardmaster?

A. No.

Q. Then all of your duties cause you to be familiar with the movements within the plant?

A. Yes.

Q. Where is Midvale, Utah, located?

A. It is about twelve miles south of Salt Lake City.

Q. And on what railroad is Midvale?

A. Well, both railroads, the Union Pacific and the Rio Grande.

Q. By the Rio Grande you mean the Denver & Rio Grande Western Railroad?

A. Yes, sir.

Q. Do you have a map of the Midvale plant of the United States Smelting, Refining & Mining Company?

A. Yes.

Mr. VICTOR: I would like to introduce this map.

Exam. WAY: It will be marked Exhibit 1 for identification.

(Marked for identification "Intervener's Exhibit 872 No. 1, Witness O'Brien.")

Q. (By Mr. VICTOR) Mr. O'Brien, will you kindly explain the various points on this map as they relate to the movements of cars within the plant?

A. Well, the Union Pacific enters our yard on the left-hand corner of the map here. The track is designated by

dot and dash lines and also identified as "B". That extends to the point designated as 24.

Exam. Way: Is that the entrance to the plant, 24?

Mr. VICTOR: That is where their tracks extend to.

The WITNESS: That is as far as their tracks extend.

Q. (By Mr. VICTOR) They enter here at the point "B"?

A. Enter at the gate over there, at "B".

Q. Thus the southerlymost portion of their track is also indicated by the designation of U. P. System with an arrow and a diagonal line, is that correct?

A. That is right.

Q. This track is owned by the Union Pacific and is maintained and repaired by them?

A. The tracks are on the smelting company property on a lease arrangement. The point designated as "H" is a sintering plant or roasting plant.

Q. Let's take that slow, Mr. O'Brien, so we can follow you. Point "H" is under "B"?

A. Yes.

873 Exam. Way: All right.

The WITNESS: These tracks are marked 7 and 9.

Q. (By Mr. VICTOR) The tracks marked 7 and 9 serve the sintering plant?

A. Sintering plant; yes, sir. The point marked "F" is the public oxide mill sampler. "I" is the lead plant where the lead bullion and Speiss are loaded. Track No. 1 is located on a trestle and is used principally to serve the oxide sampler, "F", and that is the way the ore is all dumped into bins for sampling.

Track No. 2 is directly east of No. 1 and that is used principally for return of sampling or from the sampler to the car for subsequent movement. Track No. 3 is located directly east of Track No. 2, taking off of Track No. 2 at the south entrance of the sampler.

Exam. Way: What is that used for?

The WITNESS: I beg your pardon?

Exam. Way: What is that used for?

The WITNESS: Track No. 2?

Exam. Way: Three.

The WITNESS: 3, that is east of 2. That is used for dumping different materials. That is the roast, coke, limerock.

Q. (By Mr. VICTOR) It is located on a trestle, is it Mr. O'Brien?

874 A. Yes, 2 and 3 are both. 1, 2 and 3 are all on trestles.

Q. And over some unloading bins?

A. That is right. Track No. 4 serves for storage platform for scrap iron and ore.

Exam. WAX: Just a minute.

The WITNESS: That is down below.

Q. (By Mr. Victor) In connection with Tracks Nos. 1, 2 and 3, you indicated that Track No. 3 was on a trestle above some unloading bins. Is the same condition true in connection with Tracks 1 and 2?

A. Yes.

Q. Now, proceed with Track No. 5.

A. Track No. 5 serves the wedge roast. It is just east of 4. Track No. 6 is a small stub track taking off of the trestle from the approaches to 1, 2 and 3. Point "L" is high grade sampling plant served by Track 4-A. That is a short track there. Track 8 is used for loading arsenic and 8-A is for loading wedge roast ores, yard cleanings and other materials, flue dust, etc. Track 11 is used for loading flux and sand, for loading to either the smelter or stock. Now, Track No. 15 is a repair track. No. 17 is a shear track where scrap is prepared for use at the smelter's scrap boiler.

Q. What about Tracks Nos. 14 and 19, what is their purpose?

A. 14 and 19 serve the bullion hole, or the point where the bullion is loaded for outbound line-haul movement. Track No. 16 serves the water tank marked "N" where the engine carrier is furnished water. Tracks 21, 22 and 23 and 20 are used for storage. Point "A" is where the D. & R. G. enters the yard and the switch points are located between 26 and 27 on Tracks 26 and 28.

Q. Is this also identified by the words and letters, D. & R. G. W. above an arrow and the diagonal line?

A. Yes, two broken lines there.

Q. That is the southerlymost extent of their tracks in the yard?

A. Yes. This broken-line track is owned and maintained by the Denver & Rio Grande Western Railroad and is located on industrial property.

Mr. Victor: Mr. O'Brien, will you please speak a little louder? They are having trouble hearing you.

The WITNESS: I might say here that all of the tracks except, the rest of the tracks except the U. P. tracks are owned and maintained by the industry.

Q. (By Mr. Victor) By that you mean, Mr. O'Brien, that all of the tracks in the plant except the tracks design-

nated by the broken line extending from point "B" to point near 24 marked U. P. System over an arrow, and the tracks designated by dots from a point near point "A" to a point directly opposite the arrow under the word, the letters, D. & R. G. W., all of the tracks except those 876 are owned and maintained by the industry?

A. Yes. Point "C" is the—

Exam. WAY: In other words, then, the industry owns and maintains all of the tracks except just those few which are used by the two rail carriers up to the entrance of the plant.

Mr. VICTOR: Substantially that is correct. The plant entrance is in here (indicating), so they do have a few tracks located in the plant where they bring their loads into the plant.

Exam. WAY: I see.

The WITNESS: These five tracks here are Union Pacific tracks.

Exam. WAY: Those are the ones shown immediately under the caption of Midvale Branch, Union Pacific System?

Mr. VICTOR: Yes, that is correct.

The WITNESS: This here is outside the plant; these are in (indicating).

Exam. WAY: Yes, Mr. O'Brien, but we have to designate on the record some particular description. When you say from here to here, of course that does not appear on the record. I mean, we are unable to identify it. So when you are giving your explanation of the tracks, be sure to point them out in such a way on the record we can identify them.

The WITNESS: Point "C" is the scale houses.

Q. (By Mr. VICTOR) You refer to scale houses. 877 Are there more than one of these houses that are being used in the weighing of cars?

A. No, there is only the one used. Once in a while, if something happens to it, we might use the other one.

Q. Will you designate which one of the two is the one that is being used in weighing?

A. The west one.

Q. Is that located on Track 29?

A. Yes, 29.

Q. Now, the other scale is located where?

A. 28.

Q. And that scale is not used except if something should happen in connection with the other one, it would become bad order, or otherwise it is not used?

A. No, sir. Point "D" is the old thaw house. That is Tracks 34 and 35.

Q. In other words, Tracks 34 and 35 go into the old thaw house?

A. Yes, sir. Point "G" is the combination sampler and concentrator.

Exam. WAT: Point "G"?

The WITNESS: "G". The high line serving the sampler and concentrator is designated as Track 44, also as Trestle "G".

Q. (By Mr. VICTOR) It isn't designated as Trestle "G", it is referred to as Trestle "G", is that correct?

A. Yes. The ore for the combination sampler and concentrator is unloaded at Trestle "G". Point "K-1", also designated as Tracks 26 and 46, are storage tracks, and point "E" is the new thaw shed, new thaw house.

Q. Both these last two points that you indicate are located at the extreme upper right-hand corner of the map?

A. Yes. Track 41 is also referred to as belt track at "G". That is down below. The other tracks shown on the map are switch tracks for use by the carriers making their cuts, assembling their empties, for loading, to store in-bound loads and empties.

Q. By that you mean that tracks in the south part of the yard, referred to as 26 to 36, inclusive, with the exception of Tracks 34 and 35 and Track 29, are used by the railroad companies in making their—in consolidating their drags, for spotting, and various other types of switching?

A. Yes, sir.

Mr. COLLINS: Mr. Victor, which is south on this map, do you know?

Mr. VICTOR: To the right.

The WITNESS: Track No. 10 is known as the house track, the warehouse.

Q. (By Mr. VICTOR) Mr. O'Brien, going back to the U. P. tracks entering the yard at the upper left-hand side of this map designated as point "B", what are these tracks used for?

A. Well, that is where the U. P. delivers their loads, also receives empties.

Q. In other words, that is where the line-haul or road-haul engine brings cars into the plant and leaves them and takes cars from the plant?

A. Yes.

Q. Received and delivered to that point, from that point, by the switch engine within the plant?

A. Yes.

Exam. WAY: Mr. Victor, I wonder if it would be possible to have a columnar statement prepared showing the tracks in detail, a list showing the number of the track and the use?

Mr. VICTOR: In other words, a supplemental statement made to that map?

Exam. WAY: Yes. If you can have that prepared and mail it to the parties, I will appreciate it.

Mr. VICTOR: All right, sir. Part of that probably will be brought out in our later testimony.

Q. (By Mr. VICTOR) Do both the D. & R. G. W. and the Union Pacific Railroad Company operate switch engines within the plant?

A. No. The engines are furnished by the D. & R. G. and the crews by the Union Pacific.

Q. What railroad company do you issue your orders to or deal with in connection with the switching within the plant?

A. Union Pacific.

Q. Then is my understanding correct, that this other is purely an arrangement between the two railroad companies for their convenience?

A. Yes.

Q. And it has no particular bearing, so far as the industry is concerned in connection with the switching?

A. No.

Q. Your instructions are given to the Union Pacific Railroad Company?

A. Yes.

Q. And any and all switching charges are paid to the Union Pacific Railroad Company?

A. Yes.

Q. Explain in general the operation and movement of switch engines within the plant?

A. We have two switch engines and four crews. One crew comes to work, they leave the Rio Grande roundhouse at seven o'clock.

Q. That roundhouse is located where?

A. The Rio Grande tracks, yard at Midvale.

Q. In their Midvale yards?

A. Yes. And the seven o'clock one handles the switching in the smelter at the north part of the yard.

Q. Will you explain in detail just what you mean by the north part of the yard by designations on Exhibit 1?

A. Well, I mean most of the switching north of the—where the Rio Grande-Bingham Branch goes by, or the bridge-over.

Exam. WAY: Is the bottom part of the map north?

The WITNESS: This is north.

Exam. WAY: The left-hand side is north?

Mr. VICTOR: Yes, sir. The bottom part is west.

Q. (By Mr. VICTOR) The north part of the yard is that part extending then from the broken line shown as the Lark-Bingham Branch of the D. & R. G. W.?

A. Yes.

Q. Extending it to all of that portion of the yard on the left side of that point?

A. Yes. Now, that may not be clear. I don't mean that he does not go south of that because he has to go down to the scale yard to get his cars and weigh his cars, but he does most of the work, his work is mostly north.

Q. North of that broken line part being the branch?

A. Yes. The other engine goes to work at eight o'clock, and he switches the combination concentrator and sampler.

Q. Is that portion of the yard south of this broken line referred to as the Lark-Bingham Branch of the D. & R. G. W.?

A. Yes. And when their work is finished, they take the engine to the roundhouse, the seven o'clock engine we are speaking about, they take the engine to the roundhouse. The other crew gets it at three o'clock, and that crew switches the smelter, the north end.

Q. In other words then, the crew that comes to work at seven o'clock in the morning returns to the D. & R. G. roundhouse at approximately three o'clock?

A. Two-thirty or three in the afternoon.

Q. And then that engine—

A. Is whenever he has his work done.

Q. Or not later than three o'clock?

A. Sometimes it might be a little later than three o'clock. You mean the seven o'clock engine?

Q. Yes.

A. No, he leaves, he has to get into the roundhouse by three o'clock so the other crew can bring it out.

Q. Then does another crew bring that same engine back into the yard?

A. Yes.

Q. At three o'clock?

A. Yes.

Q. Now, explain what happens to the crew that comes into the yard at 8 after he has completed his shift?

A. Well, the same procedure. He takes his engine to the roundhouse and the four o'clock crew brings it back.

Exam. WAY: How long does that crew work?

The WITNESS: Well, the shifts are from seven to three and three to eleven, eight to four, and four to twelve.

Exam. WAY: You work four shifts?

883 The WITNESS: Yes, sir.

Q. (By Mr. VICTOR) Is this the general procedure then followed by the two crews, that is the four crews and the two switch engines?

A. Yes, that is the general procedure. Occasionally it is necessary for any one engine to go anywhere, but this is the general procedure.

Q. That deviation from the general rule is purely for the convenience and at the orders of the railroad companies?

A. Yes. That is, the switch crews help each other.

Q. But it is done purely for the convenience of the railroad companies?

A. Yes.

Q. Are the instructions given by you to the switch engines verbal or written?

A. Both. Most of it is written, but sometimes it is necessary to give verbal instructions, most of which are subsequently confirmed in writing.

Q. Will you explain the location of the Utah Ore Sampling Company?

A. Well, the Utah Ore Sampling Company is located at Murray.

Q. Murray, Utah?

A. Murray, Utah, yes.

Q. Is it an independent public sampler?

A. Yes.

884 Q. You referred or testified that most of the switching instructions were given in writing. When are these instructions given to the crews?

A. Well, the eight o'clock engine gets his instructions as soon as he gets to the scale house, in the morning. The seven o'clock engine gets his later on in the day, but his procedure is all—practically always the same. He knows the work. They both have all been there a long time so they don't really need any instructions.

Q. Well, the instructions to the other three crews, that is the crew that comes there at eight o'clock and the crew that relieves the seven o'clock, seven a. m. crew, and the one that relieves the eight a. m. crew, what instructions are given to them, and how are they given?

A. That is given in writing. They get theirs when they come to work.

Q. And then they have there all their instructions for the entire shift, and their entire day's work at the time that they enter the yard?

A. Yes, sir. Sometimes they receive a verbal order later on.

Exam. WAY: May it be generally understood then that all of the switching that is done then, is done under the instructions of the plant, done under your instructions?

The WITNESS: Yes.

Q. (By Mr. VICTOR) That is the general instructions. You don't tell them how to operate and switch their engines or how to take the cars or in any way handle them?

A. No.

Q. Your instructions, of course, go to just the spotting of the cars and for unloading and loading?

A. Yes.

Q. Does the industry operate any standard gauge railroad locomotives within the plant?

A. No.

Q. Does the industry operate small or narrow gauge locomotives within the plant?

A. Small electric.

Q. Small electric? Is there any interference with the railroad switch engine because of the operation of these narrow-gauge lines?

A. No.

Q. Are there any points where they interfere or where they cross, where the tracks of the narrow-gauge cross the tracks of the standard gauge?

A. Yes, there is one point where the narrow gauge crosses the standard gauge track, but the operation of throwing the switch disconnects the electric engine.

Q. Then the crew in throwing the switch to enter this track, it automatically throws the trolley line of the small narrow gauge electric locomotive without any further handling on the part of the locomotive, the railroad crew?

A. Yes.

Exam. Way: Where is that crossing?

The Witness: That crossing is—

Mr. Victor: Designate it on the map, please.

The Witness: It is just south of the switch going into the high-grade bucking plant.

Exam. Way: What is the number of the track?

The Witness: Track No. 4.

Exam. Way: All right.

Q. (By Mr. Victor) In the switching operations, are there any instances where the capacity of the track affects the switching?

A. No.

Q. Does the maintaining by the industry of trackage in the south yard—or that point right of the broken line shown as the Lark-Bingham Branch of the D. & R. G. used by the carriers in the switching, limit the character of railroad switching outside of the plant?

A. Yes, sir. The Rio Grande, for instance, their receiving track only holds about 13 empties.

Q. When you say their receiving track, what do you mean by that?

A. Well, that is this west track of the two dotted lines. The east track is called a delivery track.

887 Q. Of the two dotted lines entering the plant?

A. Entering the plant from the Bingham Branch.

Q. Also designated as point "A"?

A. Yes.

Mr. Collins: Excuse me. Is that where the D. & R. G. road engines cut loose from the inbound trains?

The Witness: Yes, sir.

Mr. Collins: And pick up the outbound cars?

The Witness: Yes, sir.

Q. (By Mr. Victor) The track that has been designated "A" are the tracks where the road-haul engines break off or leave or enter the yard?

A. Yes.

Q. If these tracks were not provided by the industry, would it be necessary for the railroad companies to make several moves between the smelter yard and their Midvale yard?

A. Yes, sir. It would be for the Denver & Rio Grande. They have, as I say, their receiving track will only hold 13 empties where at times we have 40.

Q. If this trackage in the south yard, Tracks 26 to 36, if that were not provided there, what would the D. & R. G. W.

have to do in connection with breaking up of their trains, etc., to make proper switches in the plant?

A. Well, they would have to take them up to their yard in Midvale.

888 Q. And how far is that from the smelter yard approximately?

A. Approximately half a mile.

Q. Are the same conditions true in connection with the Union Pacific Railroad Company?

A. Well, yes, except that they have five tracks in the yard there where some of this storage is done.

Q. Do they have any other yards at Midvale?

A. No.

Q. This dotted line from point "B", further designated as Midvale Branch, U. P. System, does that track belong to the Union Pacific Railroad Company?

The WITNESS: Ask that again.

Exam. WAY: Read it.

(The question referred to was read by the reporter.)

A. Yes.

Exam. WAY: And what is the distance from that point to Midvale?

The WITNESS: You mean this one that is outside?

Exam. WAY: No, from point "B" to Midvale, from these five tracks to Midvale?

The WITNESS: These five tracks are in the Midvale track.

Exam. WAY: I know.

Mr. VICTOR: May I clear that up?

Q. (By Mr. VICTOR) This track referred to as Midvale Branch, Union Pacific, does that serve the freight
889 station of the Union Pacific at Midvale?

A. Yes.

Q. Do they have any tracks at Midvale other than those within the branch of the United States Smelting, Refining & Mining Company?

A. No.

Q. Then what would be necessary—

Exam. WAY: What is the distance?

Q. (By Mr. VICTOR) I beg your pardon, what is the distance from the Midvale plant to the—

Exam. WAY: Station at Midvale.

Q. (By Mr. VICTOR) —station at Midvale?

A. For the Union Pacific?

Exam. WAY: Off the record.

(Discussion off the record.)

Mr. VICTOR: Read that question again.

(The question referred to was read by the reporter.)

A. Oh, just a 100 yards.

Mr. VICTOR: Just across the fence, Mr. Examiner.

Q. (By Mr. VICTOR) If these five tracks of the Union Pacific located within the plant or industry were not there, what would be necessary for the Union Pacific Railroad Company to do in their switching at the plant?

A. They would either have to have tracks outside the plant or do the work at Pallas.

890 Q. Pallas, Utah?

A. Pallas, Utah.

Q. And how far is Pallas, Utah, from the Midvale plant of the U. S. Smelting Company?

A. About three miles.

Q. And where is its location from Midvale, the Midvale station of the Union Pacific Railroad?

A. The Pallas yards?

Q. Yes.

A. They are north.

Q. Generally north of Midvale?

A. Northeast of Midvale.

Q. Is Pallas also referred to as Murray, Utah?

A. Yes, the Murray station.

Q. And the designation of Pallas refers to the switch yards?

A. Yes.

Q. Does the weighing of cars over the industry scales within the industry plant eliminate extra switching service for the carriers?

A. Yes.

Q. If the cars were not weighed here, what would it be necessary for the D. & R. G. W. to do in connection with weighing of their cars of ore coming from Lark and Bingham, Utah?

A. Well, they would have to take it to Roper, I would say.

891 Q. They do not have a scale then within their own plant yards at Midvale?

A. No.

Q. And how far is Roper from the Midvale station of the D. & R. G. W.?

A. Oh, it is about seven or eight miles.

Exam. WAY: I take it from that, Mr. Victor, that cars are weighed at the plant. Are all of the cars coming in and going out of the plant weighed within the plant?

Mr. VICTOR: They are not. We will bring that out later.

Exam. WAY: All right.

Q. (By Mr. VICTOR) Are the industry scales used by the railroad company for railroad company convenience in weighing traffic other than that belonging to the United States Smelting Company?

A. Once in a while, yes.

Q. This is an accommodation then to the carriers?

A. Yes.

Q. And do you know whether any charges are assessed the carriers for this service?

A. As far as I know, there is none.

Q. Well, is there any other free service given the carriers at the plant?

A. Well, water their engines.

Q. And where is this done?

892 A. It is done down on Track 16, at water tank marked "M".

Q. And does it eliminate any railroad movements?

A. Yes.

Exam. WAY: Let me understand that now. These locomotives are watered at that particular point, those are only switch engines which operate within the plant, or are they road-haul engines?

The WITNESS: No, just switch.

Exam. WAY: You don't have any road-haul engine?

The WITNESS: No.

Exam. WAY: Finishing that sentence, no road-haul engine is water within the plant.

Q. (By Mr. VICTOR) Do the D. & R. G. W. have a sampler at Midvale?

A. No.

Q. Do they provide a thaw house?

A. No.

Q. Does the U. P. have a sampler at Midvale?

A. No.

Q. Do they provide a thaw house at Midvale?

A. No.

Q. In the normal switching operations at the plant, does the switch crew usually handle more than one car at one time?

A. Yes, they handle on the average of from 4 to 10 cars.

893 Q. Have you had prepared a statement showing a typical day's movement of cars at the plant of the industry?

A. Yes.

Q. And was this statement made under your supervision?

A. Yes.

Mr. VICTOR: I would like to have identified as Exhibit 2 this statement.

Exam. WAY: It will be marked Exhibit 2 for identification.

(Marked for identification "Intervener's Exhibit No. 2, Witness O'Brien.")

Q. (By Mr. VICTOR) Mr. O'Brien, will you kindly explain this statement?

A. The statement shows cars that are moved within the plant on March 30, 1944, one of the four days on which the inspectors of the Interstate Commerce Commission were at Midvale. It shows typical movements from day to day, the movements that day. The inspectors were at the plant on March 28, 29, 30 and 31, and I chose March 30 to be able to give a more complete picture, which would include the movements into the plant on the two previous days and held for an outbound movement or other related movements on the 31st.

Q. Does the heading, "Interstate Line Haul" refer to cars originating in the state of Utah coming into the plant, and the movement shown thereon on March 30, or previous or subsequent haul, are they in connection with that line-haul movement?

A. Yes.

894 Q. Taking as an example U. G. R. 21910, the first car, will you explain what happens to that, please?

A. That originated at Bingham. It was brought in to the smelter yard at "B" there by the Union Pacific, and the road engine cuts off usually at the point, No. 7.

Q. You mean opposite point 7 on the tracks?

A. Yes, opposite point 7. Then the switch engine takes that car from "B", it is ordered from "B" to Trestle "G".

Exam. WAY: Where is that trestle?

Mr. VICTOR: The south yard.

The WITNESS: At the sampler concentrator. It is weighed heavy, routed over the scales, set to Trestle "G", unloaded, then taken from Trestle "G" to scale, weighed light, and delivered to whichever carrier brought it in.

Q. (By Mr. VICTOR) That is all done by one of these switch crews that you referred to previously?

A. Yes.

Q. And you show here from U. P. to Trestle "G". Did the movement actually take place from the U. P. interchange opposite point 7 at the entry of point "B"?

A. Yes.

Q. Then the movement on this car was from point "B" to the scales at point "C", to the trestle at point "G", where the car was unloaded?

A. Yes.

895. Q. And after the car was empty it was moved from Trestle "G" to the scales at point "C"?

A. Yes.

Q. And then what? The car was then placed in the south yard or at what point?

A. Either in the south yard or to the receiving track of the Union Pacific, which is the east track of the dotted.

Q. On this exhibit you show in parentheses the letters "W" and "L". Will you kindly explain that please?

A. Well, "W" is weighed heavy and "L" is weighed light.

Q. Is that explained on Page 4 of this exhibit?

A. Yes.

Mr. COLLINS: This shipment, this car had been sampled, Mr. O'Brien?

Mr. VICTOR: I will bring that out.

Q. (By Mr. VICTOR) After the ore is dumped into the trestle, at the Trestle "G", what takes place in the handling of that commodity?

A. It is sampled, milled.

Mr. COLLINS: After it is unloaded?

Mr. VICTOR: Yes.

Q. (By Mr. VICTOR) The next two entries showing from Bingham, are they the same as the one just explained?

A. They are the same.

896. Q. You show on the next five entries as originating at Cranmer, Utah. Is there any difference in this movement at the plant than on the U. C. R. 21910?

A. No.

Q. The next entry, D. R. G. 42492, you show this car as originating at Bingham, Utah, and a movement on March 28 from the U. P., which presumably is point "B" to No. 1.

1. Did this movement, as indicated there, actually originate at point "B", or did it originate in the south yards?

A. This particular car originated at point "B".

Q. Then the designation of U. P. refers to the actual movement, or does it refer to your switching orders?

A. Switching orders.

Q. It doesn't then necessarily infer that the movement was actually from point "B" to Trestle "G"?

A. No.

Q. The car might have been brought in and spotted in the south yard on any one of the tracks, 26 to 36, and left there on a previous movement, and the movement you refer to on this statement, you have ~~no~~ knowledge as to where the car is actually at at the time these orders are issued?

A. No.

Exam. Way: Well now, all of the cars which are received from the Union Pacific come from the five tracks shown at location "B", is that right?

Mr. Victor: That is correct.

897 Exam. Way: All of the cars which would come from the Denver & Rio Grande would be in the south yard?

Mr. Victor: That is correct.

Exam. Way: But it may be that some of the cars which come in over the Union Pacific may move to the south yard?

Mr. Victor: That is our general practice. They take them, Mr. Examiner, at the time they arrive in the yard, move them into the south yard and leave them there.

Exam. Way: I see. So that the designation here, U. P. under the caption "From" simply means that the Union Pacific handled that particular car, but it doesn't mean that it came from either one of these two yards?

Mr. Victor: No. The identity or the actual location of the car at the plant is not perhaps known by the smelting company. Therefore its designation here is an order to the Union Pacific to take it from their point of entry in the yard to the point of unloading. The industry does not know or may not know where that car is actually located in the plant at the time that they order it moved.

Exam. Way: Then does your exhibit accurately show the movement of the car?

Mr. Victor: It doesn't show accurately the movement of the car. It shows the orders that we issue and the reasons, the purpose of the move. As I say, we do not know actually where the car is at the time we issue these instructions. It may be down at the south yard; it may be up here, or it may be at any other of these other points at which the railroad company has placed it at their convenience.

Exam. Way: All right.

Q. (By Mr. Victor) The next designation, Mr. O'Brien, the next one, U. C. R. 21079, you show that as sampled ore. Will you kindly explain that movement on March 30 and its relationship to the car, D. B. G. 42492?

A. Car 42492 was set at No. 1, at the oxide mill and sampled, and the sampled ore, the ore from that car, went in to 21079. The original car is set on No. 1 track and the empty on No. 2.

Q. And ore from D. R. G. 42492 was dumped into the oxide sampler at point 1, and was weighed before being set there?

A. Right.

Q. And then after that car was made empty it was weighed light?

A. Yes.

Q. The ore was then taken to the sampler and the value and the moisture was determined, and then the contents, or the commodity of ore was then reloaded into U. C. R. 21079?

A. Yes.

Q. And that is why you refer to it as sampled ore?

A. Yes.

Q. The entire content of the car is unloaded at 899 that point, point 1 at the oxide sampler?

A. The 42492? Yes.

Q. Then after the ore was reloaded into U. C. R. 21079, then what happened to the car?

A. It is then taken to the south yard and held for disposition.

Q. That holding for disposition is to await the determination of the sampling as to the type of ore?

A. Yes.

Q. Whether the destination will be Midvale or whether it may be some other point in the Salt Lake Valley?

A. Yes.

Q. This particular move from No. 2 to Trestle "G" would indicate the car was one that would be more preferably handled at Midvale?

A. Yes.

Q. The car was then, the contents were then emptied into, or unloaded at Trestle "G"?

A. Yes.

Q. Explain the movement in connection with D. R. G. 42493.

A. Well, that is ore from Lark. The Rio Grande brings that. They handle all the Lark ore, and they bring down from 14 to 16 cars each day, except Sunday, and it is pushed in our yard here, on this delivery track here.

Mr. COLLINS: At what point?

The WITNESS: At point "A". The switch engine takes any eight of those sixteen and sets them to Trestle "G".

Q. (By Mr. Victor) Are they weighed en route?

A. Yes.

Q. Why is it necessary to just take eight of these sixteen?

A. Well, that is as many as they can push up on the trestle.

Q. That is governed by the capacity of the locomotive?

A. Yes.

Q. And after the ore has been unloaded at the combined concentrator-sampler, then what happens to the car?

A. It is weighed light and returned to the Rio Grande, Denver & Rio Grande.

Q. That same movement, is the same movement required in connection with the cars, D. S. L. 34138 through to D. R. G. 40094?

A. Yes.

Q. Explain the movement of D. R. G. 70286.

A. Well, that is the same as 42492 except that it originated at Wendover, Utah.

Q. The original car was spotted at No. 1 where the ore was placed in the sampler, and the sampled ore was then reloaded in U. C. R. 20273?

A. Yes.

Q. And it was the same except that the final destination was No. 5 instead of Trestle "G"?

A. No. 5 instead of Trestle "G".

901 Q. Explain the movements in connection with D. R. G. 66938.

A. Well, that originated at Saddle, Utah. That was a car of burnt lime. That was from the south yard. It might be on any one of those tracks in the south yard.

Q. Placed there at the convenience of the railroad company?

A. Railroad, and taken to No. 4.

Q. You show that this car was weighed heavy and unloaded?

A. Weighed heavy, unloaded on No. 4, and then returned to the Rio Grande.

Q. Was this car weighed by the railroad companies prior to its arrival at the plant?

A. I don't think so.

Q. Was the car light weighed after it was unloaded, after the contents of brick and lime were taken from it?

A. No.

Q. Is this also generally true, or true in connection with shipments of limerock and dolomite as shown in the next entry?

A. Yes.

Q. The next entry, car U. S. 201, shown from flotation mill, explain what takes place there on that movement.

A. Well, 201 is flotation lead. That is loaded at the sampler concentrator on the belt track, also marked "G".

Q. And also identified as No. 41?

A. Yes, 41.

902 Q. And after it is loaded there, what takes place then in the movement?

A. Well, it is pulled out and weighed. There are a number of cars. The belt is set at night, a number of cars, and they are loaded during the night and dropped down.

Q. The empties then are placed above the concentrator on tracks either 41 or 40?

A. 40 or 41.

Q. And then they are run through by gravity?

A. Yes.

Q. Over the track through the mill as indicated on the map, or through the concentrator, and there loaded and dropped down by gravity to a point left of the concentrator?

A. Yes, south of the concentrator.

Q. What is the next move made on this?

A. Well, the belt is pulled, the eight o'clock engine pulls the belt and weighs it. Now, that has flotation lead on it. At this belt set zinc and pyrite.

Q. By zinc you mean zinc concentrates?

A. Yes.

Q. And by pyrite you mean iron middlings concentrate or iron pyrite?

A. Yes.

Q. Explain the movement of flotation lead at this point, please.

A. He weighs the lead and sets it out in the south yard.

903 Q. Is that for the railroad convenience?

A. That is for the railroad convenience.

Q. Then what takes place?

A. Well, then the seven o'clock engine brings it up on No. 3 along with coke, roast, limerock. He pushes a train of about ten cars up No. 3.

Q. Where the flotation lead is dumped into the bins?

A. Into the bins.

Q. On Page 2 of this exhibit— Strike that please. This same condition, the same movement takes place in connection with U. S. 203, 205 and 208 on Page 2?

A. Yes.

Q. The second entry on Page 2, U. C. R. 20061, please explain what happens on the switching of this car?

A. That comes in over the Union Pacific, "B", and is taken down to the south yard.

Q. For whose convenience is that?

A. The railroad convenience, and it is set to No. 1.

Q. And there it is unloaded?

A. Unloaded, yes.

Q. Is the car weighed?

A. No.

Q. Neither loaded nor light?

A. No.

Q. Is this same condition also true in connection with shipments of coke arriving at the plant?

A. Coke.

Q. The movement is similar to coal?

A. Yes.

Q. The next six entries showing ore and sampled ore originating at Wendover, is the movement in connection with these six cars similar to that explained in connection with D. R. G. 70286 and U. C. R. 20273?

A. Yes.

Q. And are the conditions, switching movements in connection with D. R. G. 40802 and the sampled ore in U. P. 62255 similar to the movement in connection with D. R. G. 42492?

A. Yes.

Q. And the companion car, U. C. R. 21079?

A. Yes.

Q. The next entry, D. R. G. 70278, scrap iron, originating at Salt Lake City, please explain this move.

A. That is the same as the car of lime. It is weighed heavy and set to No. 4, unloaded, but not weighed light.

Q. Has this car previously been weighed by the carriers?

A. No.

Q. The empty car is not weighed?

A. No.

Q. And the movement is a simple switching from the point of entry into the yard to the point where it is unloaded?

905 A. Yes.

Mr. COLLINS: Could he tell on that just where the car would move or did move?

Q. (By Mr. VICTOR) Please explain that.

A. Well, it moved from—

Q. I think it is D. R. G.

A. That scrap iron, it was pushed in the yard there at "A" and pulled into the south yard and then weighed and set to No. 4.

Mr. COLLINS: Then pulled from the south yard? How far south would it have to go? It has to go farther south than the point where the scales are?

The WITNESS: Yes.

Mr. COLLINS: Go on down to a point around the figure 26?

The WITNESS: Yes.

Mr. COLLINS: And then come back through the south yard?

The WITNESS: Yes.

Mr. COLLINS: On up, all the way around to this point marked No. 4?

The WITNESS: Yes.

Q. (By Mr. VICTOR) Mr. O'Brien, you just testified the car would have to go beyond the scale. When this car arrives at the plant at point "A", the switch engine is on the right end, or south end of the car?

A. Yes.

906 Q. And in the movement over the scales, would the engine still be in that same relative position?

A. Yes.

Exam. WAY: In other words, you would be pulling the car?

The WITNESS: Yes. They set them here. We have got to pull them or not do any business at all.

Q. (By Mr. VICTOR) This car and the locomotive would pass over the scales?

A. Well, in pulling the car in, he is on the other side of the scales.

Q. Is he traveling on Track 29 or 28?

A. He is traveling on 28.

Exam. WAY: Well, which is the scale track? They are both scale tracks, aren't they, 28 and 29?

The WITNESS: They are both scale tracks, but 28 is what they call the old scale track and is not used for weighing, only occasionally.

Exam. Way: Let me ask you this, do locomotives pass over your scales?

The WITNESS: Yes, sir.

Q. (By Mr. VICTOR) The scales are so constructed that they will permit the movement of locomotives and all cars within the plant freely?

A. Yes. The scale track is really the through track.

Exam. Way: Well, I don't know now that we have 907 got a clear explanation. Read the last.

(The question and answer referred to were read by the reporter.)

Exam. Way: All right. Now, in handling those cars from point "A", do you pull the cars over Tracks 28 and 29?

The WITNESS: We pull them over 28.

Exam. Way: Pull them over 28, and then you back them through 29 and weigh them?

The WITNESS: Yes.

Mr. VICTOR: I think I can clarify that a little better, Mr. Examiner, perhaps.

Exam. Way: All right.

Q. (By Mr. VICTOR) On this movement, the track—the cars are received from the D. & R. G. on the east track of the two entering the yard?

A. Yes.

Q. Would it be possible for this car to be pulled to a point south of the designation line showing D. & R. G. track switch and to a point near 26 or between points 26 and 27, and then moved or pulled back over Track 29 to the scale?

A. Yes.

Q. Then, it would not be necessary, in that move, to go to the point 26 near point K-1, as previously indicated, as previously testified?

A. It wouldn't be necessary, no.

908 Exam. Way: Well, how do you do it?

The WITNESS: We do it like I said.

Q. (By Mr. VICTOR) Well, Mr. O'Brien, do you know that, or is that a railroad handling, do you tell the railroad how they should move that car?

A. No, no, we don't tell them. The track only holds a certain number of cars, and the Rio Grande pushes in there three times a day. That track has to be empty.

Mr. COLLINS: Which one is that, the scale track?

The WITNESS: No, your delivery track.

Mr. COLLINS: Delivery track?

The WITNESS: The Rio Grande, delivery track.

Q. (By Mr. VICTOR) The next entry on page 2 of this exhibit, U. C. R. 21933, scrap originating at Brigham, Utah, please explain the movement on this car.

A. Well, that came in U. P. That comes in at point "B", is taken to the south yard, weighed, and set to the shear track.

Q. That was designated as Track No. 17?

A. Yes, designated as Track No. 17. That was large scrap.

Q. And was this car weighed at the plant?

A. Yes.

Q. Do you know whether it was weighed previously, prior to its arrival at the plant?

A. I don't think so.

Q. The next entry, W. P. 5654, is the movement in connection with that the same as movement in connection with W. P. 5511?

A. The same except this went to stock pile.

Q. At what point?

A. On Track No. 22.

Q. The unloading was at that point instead of—

A. It was unloaded to stock on Track 22.

Q. The unloading was at Track 22 instead of Track 5?

A. Yes.

Q. The next four entries, commencing with U. C. R. 21254 and to inclusive, U. P. 63295, flotation pyrite, please explain this move.

A. It is loaded at the belt, at Track 41, also called "G", and are weighed and are delivered to the U. P.

Q. These cars move out of the plant?

A. They move out of the plant.

Q. Do you know the destination?

A. Either Murray or Garfield. These are at Murray.

Q. The movement is from the belt track, is that from Track 41?

A. 41.

Q. At belt "G" over the scales?

A. Over the scales.

Q. It is road-haul service?

A. Yes.

910 Q. The next six movements from the flotation mill show empty and flotation lead, is that right?

A. Yes.

Q. Are the movements on those cars similar to the movement of the flotation lead as described in connection with U. S. 201, Page 1?

A. Yes.

Q. And the next two cars showing ore and empty from Lark, Utah, is this movement similar to the movement described for D. R. G. 42493, Page 1 of this exhibit?

A. Yes.

Q. The next five entries, ore and empty from Bingham, is this move the same as the first car shown on Page 1 of Exhibit 2, U. C. R. 21910?

A. Yes.

Q. And please explain the movement of U. C. R. 21522 from Stockton, the next to the last entry on Page 2.

A. The car of ore from Stockton went to No. 1, that is from U. P. "B" or the south yard to No. 1, and was sampled, into the bin.

Q. The next one, W. P. 5511, is that movement similar to the previous one, U. C. R. 21522, Page 2?

A. Yes. No, I don't get that one.

Q. Scratch that out and I will bring it out in another way. W. P. 5511, the last entry on Page 2 was originated at Wendover, Utah. Did this car move from point "A" to No. 1 and was weighed loaded en route?

A. That is 5511. Well, I can't explain that particular move. It doesn't look like it is finished, that one there. I don't remember that particular move.

Q. This statement shows it moved from the D. & R. G. to No. 1. Is that a normal move for that type of traffic?

A. Yes.

Q. And after the car was unloaded at No. 1 it was moved from that point to the D. & R. G. and was weighed light. Is that also a normal movement?

A. That is right.

Q. The first five entries on Page 3 of this exhibit, explain these moves.

A. They are the same as the movements over on Page 2. The ore originally originated at Wendover, delivered by the Rio Grande, and from the Rio Grande or the south yard to No. 1, sampled, and 20515, the original car, went into 20352, and that was held for disposition. Then it moved to No. 5 for unloading.

Q. This is similar to the movements as previously explained in connection with D. R. G. 70286 on Page 1?

A. Yes.

Q. You show a heading in this exhibit or statement as intrastate, intraplant. Just what is meant by that?

912 Well, that is ore and sand, etc., handled within the plant.

Q. Has no direct connection with the line-haul movement?

A. No.

Q. Either into or from the plant?

A. No.

Q. Please explain the movement in connection with the first car, U. S. 57.

A. Well, that is a car of roast ore. These cars belong to the industry and they are set north of the roaster plant at night.

Q. Is that point "H"?

A. That is "H", and are loaded during the night and dropped down in the morning. There are usually about eight loads. The first engine, the seven o'clock engine, picks those up as it comes in and takes them down to the scales, weighs them, and pushes them to No. 3.

Exam. WAY: What do you mean by dropping down, moved down by gravity?

The WITNESS: Yes, sir.

Mr. COLLINS: Mr. Victor, do you mind if I get something cleared up here? Maybe this is all right, but I am not sure. The first car on Sheet 3, U. C. R. 20515, origin, Wendover, Utah, it says the contents of the car was sampled ore. Does that mean that the ore had been sampled elsewhere?

The WITNESS: That is why I didn't catch this 913 5511. I think that 5511 was the one that went into that 20515.

Mr. COLLINS: Oh.

Exam. WAY: Well, now, you haven't answered Mr. Collins' question.

The WITNESS: 20515, yes, that is sampled ore.

Mr. COLLINS: Well, if the inbound car was 5511 and consisted of ore, then if the ore has been unloaded, sampled, and put into 20515, then it is clear enough that there was an unloading of the car and sampling of the ore and a reloading of it into car 20515.

The WITNESS: That is right. That 20515 should have been on this other sheet.

Mr. COLLINS: I see.

Mr. ROOT: Was it necessary to unload the car in order to sample it?

The WITNESS: Yes, sir; it has to go through the sampling mill.

Q. (By Mr. VICTOR) Is that a normal way of sampling?

A. Yes.

Mr. VICTOR: I am not sure just how far I got.

(The record was read by the reporter.)

Q. (By Mr. VICTOR) Do you know whether or not there are any intraplant switching charges paid for this movement?

A. Yes.

Q. Do you know the amount?

914 A. \$2.70 per car.

Q. Are there the same switching operations and charges in connection with the next two cars, the same as on U. S. 57?

A. Yes.

Q. Is this also true in connection with the last four cars under the heading "Intrastate (intraplant), U. S. 53 through U. S. 58"?

A. Yes.

Q. Also U. S. 69 and 68?

A. Yes.

Q. Please explain the movement in connection with D. R. G. 70056.

A. 70056 is loaded at the sand loading station on the sand track, No. 11. It is shown there by loading dock.

Q. On Track 11?

A. Track 11, yes.

Q. And from there it moves—

A. From there it moves to the scales and it is weighed and set to No. 1.

Q. And is there an intraplant switching charge paid on this?

A. Yes.

Q. And the amount is similar to the—

A. The same.

Q. The same as on the roasters?

A. Yes.

915 Exam. WAY: Is any charge made for weighing in addition to the \$2.70?

Mr. VICTOR: I don't believe this man is qualified to testify on that, Mr. Examiner. I will, if you would like me to here.

Exam. WAY: All right, you can say whether they do or not.

Mr. VICTOR: The tariff provides weighing in connection with the intraplant switching charge.

Examiner WAY: All right. You will have a tariff man on later any way.

Mr. VICTOR: Yes.

Q. (By Mr. VICTOR) Is the movement in connection with U. C. R. 21125 the same as in connection with 70056?

A. Yes.

Q. The second consecutive entry of car U. S. 68 showing the originating at No. 3, empty for repair, please explain this move.

A. It was unloaded on No. 3. It was found to be in bad order so it was set to No. 15, the rip track, for repair?

Q. And for whose convenience was that done?

A. That is for the smelter.

Q. And do you know whether or not there were any charges paid on that for that movement?

A. Yes.

916 Q. Do you know the amount?

A. \$2.70.

Q. The next entry, D. R. G. 71718, please explain this move.

A. Well, that is flue dust. That was loaded at the wedge roasters on No. 4 and taken down over the scales, weighed, and taken to K-1, stock pile.

Q. That was an intraplant move.

A. Yes.

Q. And an intraplant switching charge was paid similar to the ones previously mentioned?

A. Yes.

Q. The next three entries, U. S. 62, 54 and 67, please explain these moves.

A. Those are yard cleanings. They are picked up in the goath yard, mostly on the scale track, by a locomotive crane, and then they are weighed, set to No. 1.

Q. And this is an intraplant move and an intraplant switching charge is assessed?

A. Yes.

Q. Under the heading interstate (line haul)—

Mr. COLLINS: Excuse me, could we have a brief recess, Mr. Examiner?

Exam. WAY: As soon as he answers this question.

Q. (By Mr. VICTOR) Please explain the movement in connection with the first entry, D. R. G. 40500.

917 A. Well, that is a car from Sargent, Colorado, and that car was sampled at the Utah Ore & Chemical at Murray, came in over the Rio Grande, Denver & Rio Grande

to the south yard, was weighed, and set to Trestle "G" and unloaded.

Q. The empty car was southbound, was it weighed light?

A. No, the sampler weights govern.

Exam. WAY: We will recess for five minutes.

(A short recess was taken.)

Q. (By Mr. VICTOR) Mr. O'Brien, this car, 40500, from Sargent, Colorado, was then not sampled at Midvale?

A. No.

Q. The sampling having previously taken place at the Utah Ore Sampling Company at Murray?

A. Yes.

Q. And the procedure followed at that sampler is similar to the sampling performed at Midvale?

A. Practically the same.

Q. Please explain the next movement relating to C. P. 375051.

A. Well, that is a car of concentrates from Silverton, British Columbia. That car comes in over the Union Pacific at "B", was taken from there to the south yard and weighed, set to No. 4 for sampling.

Q. This is also designated as point "L"?

A. Point "L" yes. That is a concentrate and is pipe sampled.

Q. The contents of the car are not unloaded then?

918 A. No. Then it was set from No. 4 to No. 3 and unloaded at the ore bin.

Q. Also referred to as point "L" to No. 3?

A. Yes.

Q. And from No. 3 it moved—

A. Weighed light and moved to the Union Pacific.

Mr. COLLINS: Did it move all the way back to these scales in the south yard and weighed light? Was the car moved back empty to the scales in the south yard for light weighing?

The WITNESS: Yes, but not when it was moved to No. 3.

Mr. COLLINS: You mean after it was unloaded?

The WITNESS: Yes.

Q. (By Mr. VICTOR) Was it likely this car was held on one of the tracks near or opposite the scale house for railroad disposition and was it actually placed on the tracks near point "B"?

A. Well, it was returned to the Union Pacific or the receiving track.

Q. Do you know it was actually placed at their receiving track?

A. After weighing?

Q. Yes.

A. After weighing light, yes.

Q. And would it be likely that the car might have moved to the south yards opposite the scale for storage or
919 disposition in addition to being weighed empty?

A. No, not that particular type of car, not that car.

Q. Then the move would have been then from No. 3, you would have taken this car, individual car, from No. 3 to the scale and taken it up to point "B" in one move?

A. Yes.

Q. That would be a likely move?

A. Yes.

Q. The next four entries cover zinc concentrates. Please explain the moves on these cars.

A. Well, they are loaded, they are set at the belt empty, on the belt, Track 41, G, and loaded during the night and dropped down.

Q. By gravity?

A. By gravity, then are weighed and delivered to the Union Pacific outbound.

Q. For road-haul movement?

A. Yes.

Q. And this movement consists of being taken from the belt track 41, over the scales and to the carriers for road-haul service?

A. Yes.

Q. Please explain the movement in connection with the last car shown on Page 3.

A. Well, that is a car of ore from Dillon, it originated at Dillon, Montana, and it is set— It comes
920 in on the Union Pacific at "B", and is taken to our south yard, to the south yard and weighed and set to No. 1.

Q. And from there the contents are dropped into the sampler?

A. Sampler, the ore sampled and reloaded into Car 40419.

Q. Where is this car shown on this exhibit?

A. That is on the next page.

Q. Page 4?

A. Yes.

Q. The first entry?

A. The first entry.

Q. And the sampled ore into this car then is moved— on this last car, D. R. G. 40419 is moved from No. 2 to No. 1 at the unloading bins where it is dumped?

A. Yes.

Q. Explain the movement in connection with the next two cars.

A. Well, the next two cars are the same thing except the ore, the sampled ore, 43349, is taken to Trestle G.

Q. The next two entries shown as arsenic empties, please explain this move.

A. Well, those are two arsenic empties we set for loading on Track 8, arsenic loading. They are weighed light before setting.

Q. Well, these two, is this type of traffic the only traffic, that is, where the cars are weighed light where the
921 movement is from the plant?

A. Yes. They are Metal Reserve, they have requested it.

Q. That is requested by the Metal Reserve Company?

A. Yes.

Q. And the arsenic loaded in these cars is the property of the Metal Reserve Company?

A. Yes.

Q. Please explain the next six entries shown as lead bullion and empties and bullion. Explain that move, please.

A. Well, the bullion empties are set, they are delivered either by the Rio Grande or the Union Pacific and are set for loading. The track will hold seven cars. They are loaded and then dropped down as loaded.

Q. By gravity?

A. Yes.

Q. How many cars are loaded per day from this point usually?

A. Oh, I would say it would average about three cars.

Q. And are these cars weighed either loaded or light?

A. No.

Q. Do you know under what weight they move from the plant?

A. Well, they move, the bullion is cast in what you call annodes, are weighed.

Q. Over small scales?

A. Over small scales.

Q. Then there is only one simple switch move from
922 Track No. 14 out from the plant?

A. Yes. They don't move to the scales.

Q. Where are these cars, the empty cars here, prior to their being spotted at Track No. 14?

A. Well, they are held in our yard; they are held in the south yard.

Q. At the convenience of the railroad companies?

A. Yes.

Q. Do you consider the movement shown on this exhibit, as movements occurring on March 30, as being typical and would cover generally the type of movements that would take place within the plant at other times?

A. Yes.

Q. During the winter months, are there any other movements that take place within the plant?

A. Well, during the winter months all the ore has to be thawed before sampling and is put in the thaw shed.

Q. Are all the cars of ore that arrive at the plant sampled, or, I beg your pardon, thawed?

A. Not all.

Q. During the winter months?

A. Not all, but the majority of them.

Q. Why is it necessary to place these cars in the thaw house?

A. Well, you have to. The ore is frozen. Some of it is frozen right through. You have to thaw it out before
923 you can unload it; before you can sample it.

Q. Before you can unload it for sampling?

A. Yes.

Mr. COLLINS: You pay for the movement to the thaw house?

Mr. VICTOR: I don't believe he is the proper witness on that. I don't know whether he knows that or not. If he does, he may answer it.

The WITNESS: I know we do now.

Q. (By Mr. VICTOR) Since 1938?

A. Yes.

Mr. VICTOR: Prior to that time there was no payment for it.

Mr. ROOT: Could I ask a question? You say during the winter months. About how many months, on the average, would be included in this thaw house movement?

The WITNESS: Well, we usually start it in November and close it in March. I could get the dates, but I haven't got them.

Mr. ROOT: Approximately four or five months?

The WITNESS: When we get ore— We have got ore up as late as April from Colorado that is frozen.

Q. (By Mr. VICTOR) Are there any other uses or reasons that the cars are placed in the thaw house other than to thaw the frozen ore?

A. Well, we use the tracks in the old thaw shed all the time. The new one we don't.

Exam. WAY: What do you use them for?

The WITNESS: Storage.

Q. (By Mr. VICTOR) And for whose convenience is this storage?

A. The smelter or the railroad.

Q. Did you ever place cars in the thaw house to keep them from freezing as well as to thaw them out?

A. Yes.

Q. Explain just how this will occur.

A. Well these, some of these cars, that we sample and hold, we place them in the thaw house.

Q. When you say hold, you mean held for disposition as to destination?

A. Yes.

Q. Do you ever have other shipments of ore come into the plant, for instance, come into the plant in the evening, that are placed in the thaw house to keep them from congealing or freezing to permit free unloading the following morning?

A. Yes.

Q. During the summertime what uses are made of the tracks within the thaw house?

A. Well, there is nothing ordered in the thaw house, but the switch crews use those tracks a lot of times for room.

Q. They use them freely for storage purposes?

A. Yes.

925 Q. And it would be just as convenient for the crews to place the cars in the thaw house as to place them on the track adjacent to or next to the thaw house?

A. Yes, any track.

Q. Are the tracks of the industry maintained in such a manner as to assure efficient operation of the railroad locomotive switching?

A. Yes.

Q. Do you have any other statements that you care to make in connection with the switching operations at the plant?

A. No, I don't think so.

Mr. VICTOR: Off the record.

(Discussion off the record.)

Q. (By Mr. VICTOR) Mr. O'Brien, on shipments of ore from Lark, Utah, and also from Bingham, Utah, explain briefly what takes place on this movement.

A. On Lark, for instance, the Rio Grande handles all the Lark ore. It comes down the Bingham Branch here (indicating) and they pull over the switch and back in to the yard.

Q. They are taken in directly to the sampler after weighing en route?

A. Then the line-haul engine cuts off. The switch engine then takes those cars, weighs them, and puts part of them up to the mill and the other part in the yard.

Q. And if the line-haul engine didn't store these 926 cars on the point "A" that you indicate there, it would be necessary for them to hold the cars on their tracks for disposition?

A. Well, if they didn't place them in there, they would have to take them up to the yard in Midvale.

Q. Awaiting disposition?

A. Yes.

Q. This is an assembling or storage track then principally, or for sole use of the carriers in their handling of the switching?

A. Yes.

Exam. Way: What products do you ship into this mine, or I mean into this plant? You ship ore?

The Witness: Ore.

Exam. Way: What else?

The Witness: Limestone.

Exam. Way: What else?

The Witness: Coke, coal, coke breeze, well, the supplies of different kinds.

Exam. Way: Now, what do you ship out?

The Witness: Ship out bullion, zinc concentrates, pyrite, and we divert some of this ore to different—American Smelting Company and the International.

Exam. Way: Now, on all these articles, on all of these commodities that move into the plant, do you weigh all of them?

927 The Witness: No, don't weigh coke.

Exam. Way: Don't weigh coke?

The Witness: No, nor coal.

Exam. Way: You don't weigh coke or coal or coke breeze?

The Witness: No.

Exam. Way: You weigh the rest of them?

The Witness: Yes.

Q (By Mr. Victor) Do you weigh the supplies?

A. Yes.

Q. All of them?

A. We weigh them heavy.

Q. And why is this weighing done?

A. Well, that weighing is done to get the freight rate.

Mr. Victor: Get the weight for freight charge purposes.

Q. (By Exam. Way) The general movement into this plant is that of placing the cars at the point of unloading, but in placnig those cars, you first weigh, you weigh them intending to obtain the gross weight and then the cars are sampled en route?

A. Yes.

Q. And after the shipments are unloaded then you re-weigh the car to get the light weight?

A. Yes.

Q. Is that about the procedure on the inbound traffic?

A. Yes.

Q. Now, on the outbound traffic, do you weigh the cars light?

928 A. The bullion we don't weigh light nor heavy.

Q. Except the bullion. You weigh the cars light?

A. Nor heavy.

Q. You weigh them heavy, but you don't get the light weight? And there is no sampling, of course, as to that, as to the outbound movement?

A. No.

Q. Now, in the wintertime you have one additional movement of the ore, and that is through the thaw house?

A. Yes.

Q. That is to the thaw house and out of the thaw house?

A. Yes.

Q. Now, what do you mean on this exhibit by line-haul movements, the column shown over on the extreme right, where you show 1 or 2, as the case may be. Take the first car.

Mr. Victor: Mr. Examiner, may I explain that I don't believe this man is qualified to do so. Those columns are placed there to show the movements that are in connection with line-haul.

Exam. Way: Illustrate it with the first car, what the first car is and what the second car is.

Mr. Victor: The first movement goes to the sampler for sampling where the car is dumped, and then the second movement, of course, in connection with that, is the movement of the car for light weighing. Both of those.

929 movements, we contend, are in connection with line-haul, directly connected with it. The cars, Mr. Examiner, for the sampling, the majority of them are unloaded both at the concentrator, the sampler concentrator, and at the oxide sampler, points "G" and "F". We do not have very much pipe sampling. This one particular car is about the only type of movement we have pipe sampling.

Exam. Way: Now, as to all of the cars that are under the caption, intrastate line haul, there is no charge made to the plant other than the line-haul charge?

Mr. Victor: Yes, sir; there is. Since 1938 the movement from the sampler to the point of unloading is charged for, \$1.00. The movement to and from the thaw house is charged for at 50 cents per car, and the light weighing is charged for at 50 cents per car. However, we do not agree that these charges are proper.

Exam. Way: No charge is made for the inbound weighing; that is the gross weight?

Mr. Victor: No, no charge is made for that, and as explained on the weighing of the intraplant, that is provided for in the tariff.

Exam. Way: Now, are there any additional moves within this plant that are not in connection with line-haul rates that are not shown on this exhibit?

Mr. Victor: No, not that we order. There may be, 930 of course, in the normal operation of the switching, can be, but not that we order or is necessary to sample, to weigh, to thaw, for value and freight charge purposes.

Q. (By Exam. Way) How many miles of track in this plant?

A. I would say approximately 14 miles.

Q. Now, as to operation of these locomotives, is there any interference?

A. No.

Q. You have at times two locomotives in the south part of the plant?

A. Yes.

Q. How do you avoid interference there?

Mr. Victor: Mr. Examiner, I think you have misunderstood the witness. We do not have any locomotives within the plant, and when he referred to we—

Exam. Way: Well, I am talking about the carriers.

Mr. Victor: That is correct.

Q. (By Exam. Way) Is there any interference as between the carrier's locomotives?

A. Oh, there may be interference like any switching job where one engine might have to wait a little while while the other fellow is on the scales.

Q. Does that happen often?

A. No.

Q. How much delay, would he weigh a whole string
931 of cars, or what?

A. Well, it wouldn't be over fifteen minutes, I wouldn't think.

Q. How about these electric locomotives?

A. No, they don't interfere at all.

Q. They don't? Why not? How do you keep them out of the way?

A. There is only the one that would ever get in the way and he doesn't get in the way.

Mr. VICTOR: Mr. Examiner, may I explain that most of the trackage where the small locomotives operate is on the ground level and it is underneath the trestles where the standard gauge locomotives operate.

Exam. WAY: So, they are not even on the same track?

Mr. VICTOR: They are not on the same track, the same level, except this one particular point he mentioned.

The WITNESS: They are underneath the bins.

Mr. CAMPBELL: Are they on narrow gauge?

Mr. VICTOR: On narrow gauge.

Mr. CAMPBELL: So they could not interfere.

Mr. COLLINS: Well, it is narrow gauge tracks upon which the electric engines operate?

Mr. VICTOR: Yes.

Mr. COLLINS: So the carrier engines couldn't interfere, neither the electric nor the carrier switch engines could interfere with each other.

Mr. VICTOR: That is right.

932 Exam. WAY: What percentage of the traffic is interstate?

Mr. VICTOR: About 10 percent.

Exam. WAY: And intrastate is approximately 90?

Mr. VICTOR: Approximately 90.

Exam. WAY: Does the fact that the traffic is predominantly intrastate result in any interference of the placing of the cars in interstate commerce?

Mr. VICTOR: They move together as far as I know, and to my knowledge there is no interference. I don't see how any could take place.

Exam. WAY: Cross-examine.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. O'Brien, will you refer to Page 3 of Exhibit 2 and car U. C. R. 20515. Now, the load from car W. P. 5511 apparently was transferred to that car on March 30?

A. Yes.

Q. Now, on April 4, the exhibit shows that that car moved from Track No. 2 to Track No. 5. Do you know where that car was during the intervening period?

A. Well, it might have been anywhere.

Q. Could it have remained on No. 2?

A. No.

Q. You would have no approximate idea of where that car would remain during that period except it wasn't on No. 2?

933 A. No. I could get our yard check and tell you. It might have been on one track today and another track tomorrow.

Q. Well now, your answer would apply to similar delays that appear?

A. Yes, those are all held for disposition.

Q. Now, there wouldn't be room on Track No. 2 to hold that during such a period?

A. No.

Q. It would have to be taken out?

A. That is right.

Q. Are both thaw houses used during the winter months for thawing purposes?

A. Yes.

Q. What determines which house shall be used for any particular shipment?

A. Well, we call the new thaw house for the concentrator sampler, and the old thaw house is for the smelter.

Q. Well then, the unloading spot to which the loads are taken from the thaw houses determines which house will be used?

A. Yes, wherever the ore—if the ore is going to the concentrator sampler why it is put in the new thaw house.

Q. Now, this Exhibit No. 2, are the movements described there of the various cars taken entirely from the switch list which the plant gives to the engine crews?

A. Yes.

934 Q. That is the basis for this information?

A. Yes.

Q. And not personal observation on this particular day of the various movements?

A. Yes, that is right.

MR. VICTOR: Mr. O'Brien, were you at the plant on this date, did you say, and seen the movements during this day?

THE WITNESS: I was at the plant, yes. I didn't see all these movements.

Q. (By Mr. WILLIAMS) Well, presumably then there would be quite a few movements of the cars that are not shown on this exhibit.

A. Not necessary movements.

Q. Not necessary movements?

A. No.

Q. What do you mean by necessary movements, just those that you put on your switch list?

A. Yes.

Q. It is a fact, isn't it, that movements of the cars are made which don't appear on this switch list, during the process of the carrier's engines switching the plant?

A. Well, yes.

Q. Have you not designated such movements as for the carrier's convenience?

A. The switch engines may make movements of 935 cars. I don't know how they are going to do this particular job. That is up to them, and how they are going to handle these cars to do this.

Q. Your instructions are—

A. Our instructions, this covers all the movements that we would make. What they do, they do the switching job.

Q. You mean the physical movement which it is necessary to perform on the part of the carrier's engines in carrying out your switching orders is up to the crew of the switch engines?

A. Yes.

Q. They wouldn't be likely to make unnecessary switching moves, would they, in order to carry out your instructions?

A. No, switch engines don't do that.

Q. I believe you stated that a switching charge was paid on the switching of a plant-owned car to the repair track?

A. Yes, sir.

Q. Do you know if switching charges are paid for the switching of the company's cars from any place in the plant to the repair tracks in all instances, or is someone else better able to answer it?

MR. VICTOR: I can answer it if you would like me to.

Mr. WILLIAMS: Are you going to have a tariff exhibit or witness?

Mr. VICTOR: Yes, but I can answer it now if you would like me to. Switch charges are paid on all those movements where we order them to the repair track. There just happens to be one on that particular date.

Q. (By Mr. WILLIAMS) Mr. O'Brien, when the switching exceeds the capacity of the delivery tracks for the D. & R. G. cars, what disposition is made of the excess cars?

A. Well, that doesn't happen very often, that any one train has more than it will take, but if it does, he can come in this other track and push right in the yard.

Q. Now, perhaps you would designate just which track.

A. The west track.

Q. At the point near that marked "A" on the map you are pointing at that?

A. Yes, it comes in.

Q. Comes down from "A" to where?

A. To 26.

Q. The point marked 26. Are those railroad-owned tracks there?

A. No, sir. The railroad track ends with the dotted line.

Q. I am not sure if the tracks which you have designated as being owned and maintained by the two carriers are entirely within the plant area. Is that the case?

A. Well, the Union Pacific's are inside the yard.

Q. Everything beyond the point designated as "B"?

A. Yes.

Q. Is within the plant area?

A. Yes.

937 Q. On plant property?

A. Yes. Now the Rio Grande is also on plant property.

Q. That is, everything beyond the point designated near "A"?

A. Near "A".

Q. What is the plant acreage, if you know?

A. I don't know.

Q. Could you approximate that?

A. No, I can't. Around 25 acres, but then that would be just a guess.

Q. You would merely guess at 25 acres. How far, if you haven't stated, is the Denver & Rio Grande Midvale station from the plant property?

A. It is a half mile, about a half a mile.

Q. Will you explain how the billing of your outgoing loads is handled, who makes up the billing, the bill of lading?

A. That is handled in the office.

Q. At the plant's office?

A. The plant, yes.

Q. And then what is done with the bills of lading when they are prepared?

A. They are taken to the different railroads, the depots.

Q. That is, they are taken to the Midvale station of the Union Pacific and to the Midvale station of the Denver & Rio Grande?

A. Yes, sir.

Q. The carriers do not have representatives with-
938 in your plant to accept and execute those bills of lading?

A. Well, they have them right there. The Union Pacific agent seals the bullion. But they make out their bills of lading in the office, and one of the office boys goes around and takes them to the different stations.

Mr. VICTOR: Neither the D. & R. G. nor the Union Pacific Railroad Companies have any employees that are stationed within the plant?

The WITNESS: No.

Q. (By Mr. WILLIAMS) Do employees of the carrier make daily checks of the plant?

A. The employees of the carriers don't, but the Demurrage—the Western Weighing & Demurrage Association checks the plant every day.

Q. You say the Western Weighing & Demurrage Association?

A. Yes.

Q. Or the Western Weighing & Inspection Bureau?

Mr. VICTOR: The Western Weighing & Inspection Bureau.

The WITNESS: We just call it Demurrage.

Q. (By Mr. WILLIAMS) Do you know whether or not any traffic other than that originating or destined to this plant passes through the Midvale station of the Union Pacific?

A. Do you mean do they have—

Q. Well, I don't know if you have the answer to that, whether or not traffic other than that belonging to
939 the industry is handled at the Midvale station of the Union Pacific?

A. Oh, yes.

Q. There are others?

A. Yes.

Q. It is a main line station of the Union Pacific?

A. It isn't a main line, no. The main line of the Union Pacific cuts off. This is a branch coming in. The main line cuts off at Atwood. They call it Atwood or Pallas, Murray, they are all about the same.

Mr. COLLINS: I might say, Mr. Williams, that the information from our people is that is a general station, a station for general purposes.

Mr. WILLIAMS: Is that true of the Denver & Rio Grande Midvale station?

Mr. CAMPBELL: Yes.

Mr. VICTOR: Yes, that is on their main line.

The WITNESS: Yes.

Mr. WILLIAMS: I don't recall if Mr. O'Brien made the statement or Mr. Victor did, but it was made, I think, that on inbound shipments 90 percent was intrastate and 10 percent was interstate. Now, do you know that relative proportion on outgoing shipments?

Mr. VICTOR: I will have that, Mr. Williams.

Mr. WILLIAMS: You will have that?

Mr. VICTOR: Yes.

940 Q. (By Mr. WILLIAMS) On the outgoing bullion cars, I believe you stated they were weighed heavy only?

A. They are not weighed at all.

Q. They are not weighed at all?

A. No.

Q. Neither heavy nor light?

A. No.

Q. They are merely sent on their way without any weights?

A. The bullion is cast in anodes, and those anodes are weighed on small scales.

Mr. VICTOR: Before placement in the cars?

The WITNESS: Yes.

Q. (By Mr. WILLIAMS) The railroads accept that weight?

Mr. VICTOR: May I add here, that is under a weight agreement with the railroad companies.

Mr. WILLIAMS: No further questions.

Q. (By Mr. COLLINS) Mr. O'Brien, you said a while ago that loaded cars sometimes come in to the south yard and were weighed and then held in the yard for disposition. Why could they not be spotted immediately without being held in the yard?

A. You mean the cars that are sampled?

Q. Well, after the weighing you said they were held sometimes in the south yard awaiting disposition.

A. No, I think you misunderstood me.

Mr. VICTOR: I think you misunderstood him. I
941 think he ~~said~~ sampled.

The WITNESS: The sampled cars are held for disposition.

Q. (By Mr. COLLINS) Where are they held, in the south yard?

A. Yes.

Q. Why are they held?

A. Well—

Q. What are they waiting for?

A. They are waiting for release from the shipper.

Q. From the shipper?

A. Yes, sir, and where they are going to go. They may be going to Garfield or Tooele or Murray.

Mr. VICTOR: Isn't it true, Mr. O'Brien—

Mr. COLLINS: Excuse me, just a minute, Mr. Victor, until I finish.

Q. (By Mr. COLLINS) Now, you mean those are cars that are not to be unloaded within the plant?

A. Well, they don't know until they get the assay.

Q. And where, for example, will the shipper be? Who is the shipper in that case, someone located at some other place?

A. Yes.

Q. And the cars have to wait then for word direct from the shipper as to what he wants done with the cars?

A. Yes.

Q. Whether it is to be sold or disposed of within the plant or whether it goes on outside of the plant to
942 some other plant depends on instructions that will come in while the cars are standing on the tracks, is that right?

A. Yes.

Q. Are any cars being held there on the tracks in the south yard awaiting instructions from the smelter company, that is the U. S. Smelter Company, directions to spot the car for unloading?

A. Well, yes.

Q. Cars wouldn't be moved from that yard without instructions either from the U. S. Smelter Company or the shipper as to where the cars would go after being moved, is that right?

A. Yes. That doesn't mean that the cars might not be moved in the process of switching.

Q. No, I understand that. You spoke of carrier convenience in holding of the cars in the yard there, for being of carrier convenience. Just what convenience of the carrier do you have in mind?

A. Well, the carriers, they bring us empties in whenever they feel like it, such as bullion empties, zinc empties.

Q. Now, I would like to stick to these—

A. They fill up our yard.

Q. Yes, but I would like to stick to the carrier convenience in holding cars on the tracks in the south yard. Do you mean there that if these cars were not held on your tracks within your plant in the south yard that the 943 carriers would have to pull them out and take them some distance away and hold them there instead of the more convenient location on your tracks?

A. Well, I guess I know what you are talking about, but I am not sure.

Q. Well, I am suggesting to you, in my own judgment it would be more convenient to the carriers, if they had to hold these cars some place, hold them right there where they are weighed, I am just wondering if that is what you had in mind.

A. Yes. I think we said that they would have to take them either to Pallas or the Midvale yard.

Q. But in any event, whether they are held there or at some other place, the holding is necessary, at some point, until instructions are received for further movement of the car?

A. Yes.

Mr. COLLINS: Why, Mr. Examiner, I don't know whether this is the point at which to say it or not, but I have had sitting with me two Union Pacific operating men checking very carefully Mr. O'Brien's description of the plant and the operations, switching operations performed by the railroads within the plant, and they inform me that his description is about as nearly perfect as it could be of that switching. We have nothing further to add with respect to the switch movements. I would like to mention in the record the names of these gentlemen.

Exam. Way: Wouldn't it be more appropriate to 944 put them on the stand and have them confirm the testimony, if that is your idea?

Mr. COLLINS: Well, I think perhaps that would be better, to just let them be sworn and say that.

Exam. Way: I think so.

Mr. COLLINS: I think that would be more orderly.

Exam. WAY: Now, with respect to these cars held in the south yard that you have just been talking about, to what extent do you hold cars in the south yard? How many are there of them? Is it just an occasional proposition, or do you hold many cars?

The WITNESS: Not many, no, just a few. There would be days we wouldn't hold any, and maybe we would hold—

Exam. WAY: And then on other days you would hold a good many, or just one or two?

The WITNESS: Not over three or four.

Exam. WAY: And those cars are held for shipment to some other places, perhaps?

The WITNESS: Yes, some of those cars are diverted to these other plants.

Mr. VICTOR: Under the sampling in transit?

The WITNESS: Yes, and sometimes the shipper is not satisfied and held for a car to go back to Murray for sampling.

Exam. WAY: Any further cross examination?

Mr. VICTOR: I would like to ask another question or two.

945 Exam. WAY: All right.

Re-direct Examination.

Q. (By Mr. VICTOR) Mr. O'Brien, what percentage of the inbound traffic of ores and concentrates, etc., and supplies, what percent of it is spotted directly to the point of unloading?

A. Oh, I would say about 80 percent.

Q. And are instructions given to the carriers to spot certain cars or to spot any cars at these unloading points, are those instructions given prior to the actual arrival of the cars at the plant?

A. At times, yes.

Q. In other words, do I understand that you get a consist of what is coming from the mine and that you give prior instructions as to the spotting of certain cars?

A. The Lark mines, for instance, there is no telling what time any of these trains are delivered. They are liable to come in five o'clock in the afternoon, four o'clock in the afternoon, and they might not come in until midnight, and we know that there are going to be 45 or 16 cars of Lark mines coming down. The engine is told when they arrive to grab eight of them and weigh them and set them up. We set the high line, or what is called Track G at night, so it is ready for them to work.

Q. So there is actually no interruption, on delivery
946 these cars are taken immediately upon their arrival
and spotted there?

A. That is right.

Q. Do you designate any particular number, bin number
or car numbers?

A. No.

Q. Just take any set amount of cars?

A. They know that.

Exam. WAY: The general instructions are, take them
over the scales and weigh them?

The WITNESS: Yes, sir.

Exam. WAY: And place them where they belong?

The WITNESS: Yes, sir.

Exam. WAY: And then take them out and weigh them?

The WITNESS: That is right.

Exam. WAY: Deliver the cars to the carriers at the re-
ceiving tracks?

The WITNESS: Yes.

Exam. WAY: Any further questions?

Mr. VICTOR: That is all.

Exam. WAY: You are excused.

(Witness excused.)

Mr. VICTOR: Mr. Examiner, I offer in evidence exhibits
1 and 2 of Witness O'Brien.

Exam. WAY: Any objection?

(No response.)

947 Exam. WAY: They are received.

(Intervener's identification exhibits Nos. 1 and
2, Witness O'Brien, received in evidence.)

Exam. WAY: We will adjourn until one-thirty.

(Whereupon at 12 o'clock noon, a recess was taken un-
til 1:30 p. m. of the same day.)

AFTERNOON SESSION 1:30 p. m.

Exam. WAY: All right, Mr. Victor.

Mr. VICTOR: That is all the evidence I have at this par-
ticular moment in connection with the operations. I un-
derstand now the carriers and the Commission will carry
on.

Exam. WAY: Will you proceed, Mr. Williams?

Mr. WILLIAMS: Do you care to proceed with such tes-
timony as the carrier has?

Exam. WAY: Off the record.

(Discussion off the record.)

JOHN F. KELLEY was sworn and testified as follows:

Direct Examination.

Q. (By Mr. COLLINS) State your name, please.

A. John F. Kelley.

Q. And your occupation?

A. Assistant general yardmaster, Union Pacific Railroad, Salt Lake City, Utah.

Q. Are you familiar with, from your own personal
948 knowledge, the switching operations conducted by the Union Pacific Railroad Company at the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah?

A. Yes, sir.

Q. Does your employment include the operations of that plant?

A. Yes.

Q. By that you mean you supervise the operations?

A. Yes, sir.

Q. Did you hear the testimony of Mr. William O'Brien this morning with respect to the switching operations performed in that plant by the Union Pacific Railroad?

A. Yes, sir.

Q. And to your knowledge was his description of those operations substantially correct?

A. Yes, sir; as far as I know.

Q. You concur in the statements that he made in respect to the operations, the switching operations performed there?

A. Yes, sir.

Mr. COLLINS: That is all.

Exam. WAY: Any questions?

(No response.)

Exam. WAY: You are excused.

(Witness excused.)

D. F. WENGERT was sworn and testified as follows:

Direct Examination.

949 Q. (By Mr. COLLINS) State your name.

A. D. F. Wengert.

Q. By whom are you employed?

A. Union Pacific.

Q. What is your title?

A. Terminal Trainmaster, Salt Lake City.

Q. Does that include the operations conducted by the Union Pacific Railroad at the Midvale plant of the United

States Smelting, Refining & Mining Company, Midvale, Utah?

A. Yes, sir.

Q. Are you familiar with the switching operations conducted in that plant?

A. Yes, sir.

Q. Did you hear the testimony of Mr. O'Brien this morning?

A. I did.

Q. Do you concur in the statements he made in describing the switching operations of that plant?

A. Yes, sir.

Mr. COLLINS: That is all.

Exam. WAY: Any other questions?

Mr. WILLIAMS: I would like to ask a question or two.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. Wengert, is the switching at this plant handled efficiently?

A. Yes, sir; it is.

950 Q. Would it be an advantage in regard to the switching for both the Denver & Rio Grande Western Railroad and your company to perform the switching within the plant?

A. No, sir.

Q. Would it be possible, in view of your agreement with the union brotherhood, for your road-haul locomotives to go in the plant?

A. Not with the switch engine employed there at this time.

Mr. WILLIAMS: I believe that is all I have.

Q. (By Mr. WILLIAMS) Could your road-haul engines conveniently and safely switch that plant?

A. They could, but the amount of work that is done at this smelter, we wouldn't be able to do the amount of work and still use the engine for road-haul service.

Q. Could they perform the service as efficiently and safely as the smaller switch engines which are now performing it?

A. No, sir.

Q. They could not?

A. No, sir.

Mr. WILLIAMS: No further questions.

Exam. WAY: You are excused.

(Witness excused.)

Exam. Way: Is switching at Midvale performed under contract as between the Denver & Rio Grande and the Union Pacific?

951 **Mr. WENGERT:** Yes, sir.

Mr. COLLINS: I so understand.

Exam. Way: Have you copies of the contract?

Mr. COLLINS: I don't have. That is one of the three I am going to try to get, and will get and furnish you if we have a contract at each of the three places.

Exam. Way: All right, sir. Any further witness? Have you anything to offer, Mr. Campbell at this time?

Mr. WILLIAMS: Off the record.

(Discussion off the record.)

W. M. CAREY, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) Please state your name?

A. W. M. Carey, C-a-r-e-y.

Q. Where do you live, Mr. Carey?

A. Denver.

Q. What position do you hold?

A. Freight traffic manager of the Denver & Rio Grande Western Railroad Company.

Q. In that capacity are you familiar with the switching tariffs at the various and sundry places on the Rio Grande?

A. Yes, sir.

Q. Have you prepared some exhibits, Mr. Carey, to be used in connection with the switching at Midvale?

A. One exhibit.

952 **Mr. CAMPBELL:** Now, for identification purposes, I would like to have this exhibit marked No. 3, and it consists of 9 pages.

The WITNESS: Eight pages and the table of contents.

Mr. CAMPBELL: That is nine altogether.

(Marked for identification "Respondent's Exhibit No. 3, Witness Carey.")

Exam. Way: Off the record.

(Discussion off the record.)

Q. (By Mr. CAMPBELL) Will you proceed to explain this exhibit?

A. I think the exhibit is self-explanatory. It is a historical statement of the tariff charges on switching from 1915 to date; however, I want to elaborate on certain portions of it.

Q. Very well.

A. It will be noted that prior to February 25, 1920 free switching was accorded all freight which had paid transportation charges to the plant, and on that date change was made to the effect that the free switching was limited to one movement of a line-haul shipment within the smelter plant over track scales to and from smelter, sampler or to and from combination sampler and concentrator to a designated unloading point indicated by the smelting company, all other switching within the plant being charged \$2.50 per car, and that on November 27, 1920, a free switch was 953 also given such line-haul shipments moving to and from the thaw house. The change on June 25, 1938 was a result of an understanding reached by representatives of the smelting companies and the Union Pacific and Rio Grande Railroads as to the intent of the findings of the Interstate Commerce Commission in Ex Parte 104, Part II, Terminal Services, decided May 14, 1935. All of the free movements within the plant under the line-haul rate were eliminated except the movement over the scales and subsequent delivery to any designated track within the plant which could be accomplished by one uninterrupted movement.

While it was felt at the time the changes were made in 1938, the findings of the Commission of May 14, 1935, in the above proceedings required these changes, it is my thought that in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration for the following reasons. The railroads now allow free movement over the scales on line-haul traffic. This is necessary in order to assess our freight charges. By referring to Pages Nos. 6 and 7 of the exhibit it will be noted it is also necessary for the railroads to have the valuation of the ore and concentrates before freight charges can be assessed. This is because of the fact 954 that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, scales, thaw houses and samplers are owned by the smelters, the railroads would have to supply and operate them for their own purposes if the smelters did not. In the latter event, in all probability, after the railroad had performed for itself the operation

over the scales, through the thaw house and to the sampler, a free movement to a designated point of unloading would be accorded, provided that movement could be accomplished without interruption resulting from orders from or requirements of the smelter.

That is all I have.

Mr. CAMPBELL: I think that is all.

Exam. Way: Cross-examine.

Cross Examination.

Q. (By Mr. VICTOR) Mr. Carey, in your testimony you referred to the effective tariff, December 22, 1915, as a free movement?

A. Yes, sir.

Q. Was that interpreted, and did it mean to all parties concerned that the line-haul rates included this service, that it actually was not something that was given without compensation?

A. That was the result of a prior arrangement reaching back many years whereby it was understood between 955 the smelters and the railroads that that switching would be performed free and included in the line-haul rates.

Q. And your compensation would come from the line-haul rates?

A. That is right.

Q. It was actual compensation then through that medium, that source?

A. That is right.

Q. Now, one more question. You, I think referred to the June 25, 1938 date. Is that the intrastate effective date?

A. That is the intrastate effective date.

Q. And the date below, July 5, 1938, I think you referred to that as intrastate rather than interstate. I think maybe that should be cleared.

A. You are correct, June 25, 1938, on intrastate traffic and July 5, 1938, on interstate traffic.

Mr. CAMPBELL: Do you need to correct your exhibit?

The WITNESS: No, the exhibit is O. K.

Mr. VICTOR: The exhibit is O. K.

Q. (By Mr. VICTOR) Mr. Carey, your position in connection with the switching as assessed in 1938 at the Midvale plant, is your position the same at the Midvale plant as the testimony that you put in the record in the Ex Parte 104, Part II proceeding of the American Smelting & Refining Company at their Garfield and Murray plant?

A. At this proceeding?

956 Q. Yes, sir, the proceeding that has just finished.

A. Yes, sir.

Exam. WAY: You can't refer to those proceedings as a matter of reference. This is a different docket, and the other docket cannot be incorporated by reference.

Have you any questions?

Mr. WILLIAMS: No questions.

Mr. CAMPBELL: May I offer this in evidence as Exhibit No. 3?

Exam. WAY: It will be received.

(Respondent's identification Exhibit No. 3, Witness Carey, received in evidence.)

Exam. WAY: You are excused.

(Witness excused.)

Mr. COLLINS: I want to offer in evidence by reference the tariffs of the Union Pacific Railroad Company, its published rates governing switching at its Midvale plant involved in this hearing. The 7th Revised Page 22 of Union Pacific Railroad Company Terminal Tariff No. 7114, I. C. C. No. 565, and the particular item that states the charges and the rules, Item 520-E. That item also refers to certain other items that have effect in the application of the rates, and they are on the 15th Revised Page 32 of the same Union Pacific Tariff; the 6th Revised Page 34, the same tariff; the 5th revised Page 35, the same tariff. The
957 tariffs that I refer to are mentioned in the item, 520-E, and they are 790-B, 900-B, and 920-C. I believe only 900-B is directly pertinent to the Midvale plant. The offer is to have those tariff provisions included in the record by reference.

Exam. WAY: The tariffs and items referred to may be considered as a part of the evidence in this case. Anything further?

Mr. COLLINS: That is all.

Exam. WAY: Does that complete the respondents' case as to the carriers? I understand you have have some more testimony.

Mr. VICTOR: Yes.

Mr. COLLINS: Just a second, Mr. Examiner. There is a statement that I perhaps should make. We accept Mr. Carey's historical statement of rates which he has introduced here, which we need not introduce in order to avoid repetition. We can accept his statement up to the point of his views with respect to what may or may not be neces-

sary to correct the situation resulting from the agreement which brought out in published form in 1938 additional switching charges. As to that, as I said in the other proceeding, we thought then that we were right, and we still think we are.

Exam. Way: That is a matter of argument in the brief any way, Mr. Williams?

F. C. MacDONALD WAS SWORN and testified as follows:

Direct Examination.

958 Q. (By Mr. WILLIAMS) Will you please state your name, address and occupation?

A. F. C. MacDonald, Chief, Section of Safety Appliances, Bureau of Safety, Interstate Commerce Commission.

Q. How long have you held your present position?

A. About six or seven years.

Q. And what is your prior experience?

A. Seventeen years in the field service in the Bureau of Safety, seventeen years as locomotive engineer, fireman.

Q. In your present position were you directed by the Interstate Commerce Commission to conduct and supervise an investigation of switching operations at the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah?

A. I was.

Q. Was such an investigation made?

A. It was.

Q. Upon what dates?

A. On March 28, 29, 30 and 31, 1944.

Q. Whose investigations did you supervise?

A. The investigations of four investigators employed by the Interstate Commerce Commission. Do you want to know the names?

Q. Yes, you might give the names.

A. A. C. Boyd, Special Agent, Bureau of Inquiry; Coleman Richardson, Special Agent, Bureau of Inquiry;
959 W. O. McCormick, Safety Appliance Inspector, Bureau of Safety; and C. B. Higgins, Service Agent, Bureau of Service.

Q. Did these representatives of the Commission make a personal investigation of the switching operations upon the dates which you mentioned?

A. Yes, sir.

Q. And that was done under your supervision?

A. Yes, sir.

Q. Did they report to you their observations?

A. Yes, sir.

Q. Did you also personally observe the switching operations in this plant?

A. I did, from the outlined switching operations, but I made no notes in respect to any particular cars.

Q. You didn't take up the individual cars, your investigations were more of a general nature?

A. Yes, sir.

Q. Can you state from your observations whether or not the standard gauge track is used both by locomotive cranes of the industry as well as by switch engines of the carrier?

A. It is.

Q. A correction, I think, has been brought to my attention. I believe you stated Mr. A. C. Boyd was one of the Commission representatives.

A. That should be stricken. It is J. J. Melaney.

960 Q. Mr. Melaney, a Service Agent for the Bureau of Service rather than Mr. Boyd?

A. Yes.

Q. Upon what section of the plant are the narrow gauge tracks located?

A. The narrow-gauge tracks are all located in the north district of the plant, that is north of Highway 48.

Q. From these investigations to which you have referred, was information obtained showing how the bills for switching were made out by the plant?

A. Yes. That is, I have information about the method and the basis for bills rendered the U. S. R. & M.

Q. Rendered by the carriers, you mean, to the industry?

A. That is right.

Q. All right, proceed.

A. These bills are based upon Union Pacific Railroad Company forms, Nos. 887, 889 and 890. Form 887 is designated thereon as Smelter Yard Switch List. On it are listed the various switches required by the industry, usually by car number. At the bottom of these forms places are provided for the signature of the industry employee who has ordered the switch performed and also the engine foreman who performed the switch. In some cases it appears that the engine foreman neglects to sign these forms. Form 889 is designated thereon as, "Record of Cars Transferred at Sampling Mill." It provides
961 separate columns for listing the car number, the kind of ore, the load number, the car movement,

Form 890 is designated thereon as "Intraplant Switching Orders." It provides separate columns for listing the car initial and number, the commodity, load number, the nature of the switching required, and by sample whether or not the car listed was satisfactory. At the bottom of this form places are provided for the signatures of the industry foreman who ordered the switching and also the signature of the freight agent.

Q. Now, at the time these investigations were being made, can you state whether or not you observed any repairs affecting the tracks within the plant as being made?

A. Some repairs were being made to one of the bridges over Highway 48.

Q. By the way, what is the size of the two switch engines used in this plant, if you observed them?

A. They are six-wheel shifters, probably 75 tons in weight.

Q. Each?

A. Yes, each.

Q. Did you take note of the curves within the plant area as they affected the trackage?

A. Only to the extent that it did not appear that there were any excessively sharp curves in the plant.

Q. How about grades within the plant?

A. The only two heavy grades are those connect-
962 ed with the approaches to the trestles in the flotation mill and in the smelter mill or oxide mill, I think they call it sampling mill.

Q. Are you in a position to estimate those grades?

A. Well, I should say they were over three percent, probably more than that.

Q. Mr. MacDonald, did you observe the grade on the bullion track?

A. Oh, yes. That is a fact. It is a grade, it is downhill practically all the way from Highway 48 to the bullion hole or bullion house, and that too is a rather heavy grade, probably two and a half or three percent.

Q. How about the grade on the matte track?

A. Well, the matte track is the same lead as the bullion track.

Q. The same lead?

A. I think so, yes.

Q. What did the investigation show with respect to cars insufficiently loaded, if anything?

A. There were reported to me cases where cars, after being loaded with concentrates in the flotation mill, were

weighed and found to be insufficiently loaded. In such cases they were returned to the loading spout for additional loading and were again weighed after such additional loading had been done. It doesn't appear that any charge 963 was made for the additional moves involved.

Q. Do you know whether or not that occurs frequently, at least during the four-day period of the investigation?

A. My recollection, we had at least two cases of it while we were there.

Q. Can you locate on the map, if it has not been done, an overhead bridge above one of the tracks?

A. I think the arsenic house track is numbered 8 on that map, and at a point, or at the point where cars are shoved into the arsenic track, the narrow gauge tracks are located on a trestle and the trestle is so low that it is necessary to raise part of the trestle by hand in the form of a bridge to permit spotting of the cars there.

Q. Does that appear to be an obstruction?

A. It is an obstruction, but the delay encountered is very small.

Exam. Way: They have to do what?

The WITNESS: Raise a part of the narrow gauge tracks. The narrow gauge tracks are on a trestle above the ground level where the standard gauge tracks are, and they are so low and so close to the standard gauge tracks at that point that it is necessary to raise the track in the form of a bridge over the standard gauge track running to the arsenic house.

Exam. Way: Is it light enough to raise it by hand?

The WITNESS: Yes, it is raised by manual labor.

964 Mr. VICTOR: Mr. Examiner, for clarification of the record, I would like to state that this bridge is now being replaced by an electrically-operated bridge, and it is in the course of construction at the present time.

Q. (By Mr. WILLIAMS) Mr. MacDonald, do you know whether or not the Commission's representatives whom you have named made notes of their observations of the switching of individual cars?

A. Yes, sir; they did.

Q. And from their notes did they prepare reports of their observations for you?

A. Yes, sir.

Mr. WILLIAMS: May we go off the record for a moment, please?

Exam. Way: Off the record.

(Discussion off the record.)

Mr. WILLIAMS: May I have this marked for identification?

Exam. WAY: This will be marked Exhibit 4.

Mr. CAMPBELL: Is it Assignment 1?

Exam. WAY: Assignment No. 3 it happens to be. Give me No. 1. That will be 4; 2 will be 5; 3 will be 6; and 4 will be 7.

(Marked for identification "Commission's Exhibits Nos. 4 to 7, both inclusive, Witness MacDonald.")

Q. (By Mr. WILLIAMS) Mr. MacDonald, I hand 965 you Exhibits marked for identification Nos. 4, 5, 6 and 7 and ask you if they are the reports made by the Commission's representatives whom you named, to you, covering their observations of the switching operations at the plant?

A. Yes, sir; they are.

Q. Now, do you know whether or not the crews of the switching engines give names to these tracks other than the names, other than the numbers and the letters that are designated on the map, which is Exhibit No. 1?

A. Yes, sir; they do.

Q. Will you please refer to that map and identify the name which the engine crews commonly apply to the different tracks and which names appear in exhibits marked for identification 4, 5, 6 and 7.

A. I will start from the north section with the trestle. Tracks 1, 2, 3 and 6 are all known by the name Trestle Tracks 1, 2, 3 and 6, and they are located on the north trestle. The tracks shown on the map as Nos. 4 and 5 are known as Trestle Tracks 4 and 5, although they are not on a trestle. Track shown on the map as 4-A is known as trestle 4 spur, or the bucking room track. Tracks 7 and 9 are known as the roasting hole tracks. Track 8-A is the wedge hole track. Track 8 is the arsenic track. Track 10 is the house track. Track 11 is the sand hole track. I don't see any Track 12. Track 13 as the lead to the bullion 966 track. Track 14 is the bullion track. Track 15 is the refinery track or is the United States shear track. Track 16—Track 13 also leads to the refinery. Track 16 is called the calcine track. Track 17, I believe, is the repair track. Track 18 is the matte track. Track 19 is the refinery spur. Tracks 20 and 21, 22 and 23 are slag yard tracks, and they are used for stock piling coke and other commodities. I think the numeral 24 here is used to designate a location rather than anything else. I don't see any

25. 26 is a part of a lead of the south yard and is also shown as the outside track. That is the farthest west track in the south yard. 27 is an extension of that track to a point near Highway 48. 28 is the old scale track, which is also a lead to the D. & R. G. W. delivery track. Track 29 is the new scale track which also acts as a lead to the D. & R. G. W. outbound track or receiving track. Tracks 30, 31, 32 and 33 are known as Tracks 2, 3, 4 and 5 in the south yard. Tracks 34 and 35 are known as the east thaw house and the west thaw house tracks respectively. Track 36 is known as Track 6 of the south yard, and as I said before, Track 26 is known as the No. 7 track. It will be noted that 26 continues to the southeast for a considerable distance below the end of the south yard tracks. I don't see any Track 37, and I am not familiar with Track 38. I don't see any 39 and 40 is a spur off the end of what is known as the belt track; 41 is also another spur from that same track.

42 is the crusher spur; 43 is the middle belt; 44 is the 967 flotation mill trestle; 45 is the lead to the flotation mill trestle; 46 is known as the middle shear. All these tracks down in this section are known as being in the orchard. Tracks 47, 48, 49 and 50 are tracks leading into the new thaw house. I think that covers them all. That is the way in which these tracks are designated in the reports that were made.

Q. Mr. MacDonald, these reports of the Commission's representatives which were made to you, do they purport to include every movement, every switching movement made by the car, and the movements are not confined to those movements on the switch list which the plant prepares?

A. No, sir. These should show every move made by the plant and by the cars during the four days of our investigation.

Q. Do you know, Mr. MacDonald, generally if the unloading capacity of the tracks within this plant that are used for that purpose, generally are sufficient to accommodate at one time all of the loaded cars?

A. I hardly think so. I wouldn't want to say for sure, but in the case of say the flotation mill, even though the capacity of the track was such as to take all those cars it would require at least two movements onto the track because of the heavy grade in order to put the material on that trestle. I think the same could be said of the north trestle.

Q. Are there any other unloading tracks, so far as you

968 know, are frequently not sufficient to accommodate all of the loads tendered at one time?

A. I wouldn't like to say that I know of any others.

Mr. VICTOR: You do not know of any others?

The WITNESS: No.

Q. (By Mr. WILLIAMS) Based upon your examination of these reports and your conferences with the Commission's representatives who made them, what have you to say about delays which happened during the switching operations?

A. We had a few delays there.

Q. These were on the days upon which the investigations were made?

A. Yes, sir; that I think are worthy of note. On March 28, from 10:30 a. m. to 11:10 a. m. Engine 62 was delayed by Engine 58 at the scale track. However, that particular delay may have been due to the fact that the brake rigging on the tender of Engine 58 had become in some way disconnected or broken down. On March 28 Engine 58 was delayed from 7:30 p. m. to 12:30 a. m. waiting for loading of cars at the roast hole. On March 29, Engine 62 was delayed from 10:50 a. m. to 11:05 a. m. by Engine 58 working on the scales. On March 30, Engine 62 was delayed from 9:25 a. m. to 9:45 a. m. by Engine 58 switching in the south yard. On March 30, Engine 58 was delayed from 7:30 p. m. to 10:46 p. m. waiting for loading of cars at the roast hole. On March 31, Engine 62 was delayed from 9:55 a. m. to 10:15 a. m. by Engine 58 switching in the south
969 yard. On March 31 Engine 58 was delayed from 8:25 to 8:40 a. m. by Engine 62 pulling out of the Union Pacific yard.

Q. Do you have any testimony which you wish to offer in addition to that already given respecting the switching operations in this plant?

A. Oh, I might say that in addition to my designation of the names used of tracks there that the Union Pacific yard, the tracks are numbered 1 to 5 from east to west, and the lead furthest east from the Union Pacific, toward the south yard, is known as the east siding, and the parallel lead west of it is known as the running lead. I think that is all I have in mind.

Mr. WILLIAMS: I offer in evidence exhibits marked for identification as Nos. 4, 5, 6 and 7; with the understanding that only the typewritten material in each exhibit be considered and that all pencil marks, whether they be red, black, or blue, be disregarded. These pencil marks do not

appear upon the copies handed counsel and have no significance other than they were check marks when these reports were checked.

Mr. COLLINS: Will you supply copies of No. 7?

Mr. WILLIAMS: Yes.

Exam. WAY: Any objection?

(No response.)

Exam. WAY: They are received.

(Commission's identification Exhibits Nos. 4, 5, 6
970 and 7, Witness MacDonald, received in evidence.)

Exam. WAY: Off the record.

(Discussion off the record.)

Mr. WILLIAMS: Can I have marked for identification an exhibit consisting of 40 pages as Exhibit No. 8?

(Marked for identification "Commission's Exhibit No. 8, Witness MacDonald.")

Q. (By Mr. WILLIAMS) Mr. MacDonald, I hand you exhibit marked for identification as No. 8 and ask you to state what that is.

A. This exhibit is intended to show the movement of cars through the plant of the United States Smelting, Refining & Mining Company during the period of our investigation. These movements are believed to be typical of a great many of the movements made within the plant.

Q. Were these, the movements of these shipments, among those included in the reports of the Commission's representatives which have just been introduced in evidence?

A. Yes, sir.

Q. Did you select them yourself, or were they selected and this exhibit prepared under your direction?

A. I selected these cars.

Q. And they appeared to you to be typical of the considerable number which were observed?

A. Yes, sir.

Q. You might select a page, if you will, Mr. Mac-
971 Donald, and go through it for the purpose of explaining generally the nature of each page.

A. Page 13, U. C. R. 21915, this car came into the plant as a load from the Union Pacific on the 27th of March. It contained ore from Bingham, Utah. On the 29th at 8:15 a. m., containing ore, it was taken from the Union Pacific delivery yard by the engine which we call Assignment 2 to the scales and weighed. On the same day at 8:45 a. m., still containing ore and handled by the same engine, it was taken from the scales to the belt track of the new mill. That

is the flotation mill. On the same day at 10:05 a. m., still containing ore and being handled by the same engine, it was moved from the belt track to the high line of the new mill, which is the trestle into the flotation mill. On the same day at 12:05 p. m., as an empty, it was handled by the same engine from the high line to the scales and weighed light, and on the same day at 1:35 p. m., empty, it was taken from the scales to the Union Pacific interchange track. There was one charge appeared in the bill for the movement of this car, and that was an empty weight of 50 cents on the 29th of March.

Q. There appeared in Exhibits Nos. 4, 5, 6 and 7 and Exhibit marked for identification as No. 8 certain assignment numbers. Will you explain the meaning of those assignment numbers, please?

A. In order to identify on sheets of that character 972—the engine and the observer who made the notes in connection with the movement of the car as shown on these sheets, we gave to each investigator an assignment number. That is the number that appears under assignment, in the column shown as assignment number on these sheets.

Q. That merely then was a convenient symbol for you?

A. That is right.

Mr. WILLIAMS: You may cross-examine.

Cross Examination.

Q. (By Mr. VICTOR) Mr. MacDonald, in Exhibits 4, 5, 6, 7 and 8, you didn't witness the moves that were made, shown on these exhibits?

A. Myself?

Q. Yes.

A. No, sir.

Q. You had no actual knowledge of those moves?

A. No, sir.

Q. Do you know the purpose of the moves?

A. Not always, no.

Q. You indicated that certain switch forms were issued by the smelting company. Do you know when they are issued?

A. No. I presume they are issued the same day however.

Q. Did you hear Mr. O'Brien's testimony this morning?

A. Yes, sir.

Q. You heard he testified they were given certain 973 switch orders in the morning upon their arrival in the plant?

A. Some of them, yes.

Q. Do you know whether or not these might be the same forms?

A. No, I don't know.

Q. You don't know whether the information then might be had as to the charges, etc.?

A. No, sir.

Q. You referred to a movement of the concentrates, I believe, from the belt track to the scale, stating that there was insufficient weight in there.

A. Yes, sir.

Q. Do you know what the weight was on the one car or more cars that you had reference to?

A. No, I don't.

Q. You don't know then whether they complied with the tariff provisions as to minimum weight?

A. No, sir.

Q. You don't know whether they complied with the provisions of O. D. T. 18?

A. No, sir.

Mr. VICTOR: I would like to add, if this is the proper place to do so, Mr. Examiner, that these moves were made at the request of the Service Division, the Association of American Railroads, for maximum utilization of that equipment, not for the convenience of the industry.

974 Q. (By Mr. VICTOR) You also indicated that the track, or the Trestle G was limited in its capacity and stated that because of the grade the locomotives could not put any more of the cars up there than that.

A. I didn't say it was limited in capacity. I don't know.

Mr. VICTOR: Strike that. Well, let it stand.

Q. (By Mr. VICTOR) I understood you to say that it was the grade that limited the movement of cars.

A. Yes, sir; that even though there was sufficient room on top of the trestle that it would require at least two moves to fill the trestle.

Q. A larger locomotive could take more cars up there?

A. Yes, sir; it takes them. Of course, I don't know what the capacity of this tail is down here. The capacity of that tail, were it less than the capacity of the trestle, would determine the number of cars that could be taken up that hill.

Q. You referred to some delays. Do you know whether or not these delays are a result of the industry or whether they are just the result of normal switching in the plant between the two locomotives?

A. Of course, I couldn't tell that. It was a delay, that is all I know.

Q. That could happen in any switch yard?

A. Yes, sir.

975 Q. It not only could, but it does?

A. It does; yes, sir.

Q. You referred, I believe, to delay in the spotting of the car after its arrival in the plant. If these cars were held outside of the plant under constructive placement and then ordered into the plant when they could be handled, they could then be spotted directly to the place of unloading?

A. I presume they could. I imagine they could be ordered in that manner.

Q. Then the carriers, the absence of the carriers' tracks outside of the plant or in the vicinity of the plant would cause this, the cars having to go into the plant and being held there for their convenience rather than outside of the plant?

A. I didn't get that.

Exam. Way: Read it please.

(The question referred to was read by the reporter.)

Exam. Way: Do you understand it?

The Witness: I think I do.

Mr. Victor: I can restate it.

Q. (By Mr. Victor) If the carriers—Strike that. The carriers' lack of tracks outside of the plant, or in the vicinity of the plant, would that cause them to use the yards for storage purposes, waiting for disposition from the industry?

A. You mean to use their own yard?

976 Q. Yes, if they had to take them to Pallas or to Midvale. In other words, they have no tracks that they can store of their own outside of the plant. The lack of those tracks would cause them to use the tracks within the plant rather than take the cars to Midvale or Pallas?

A. They would have to store the cars somewhere and wait on your order. You pay demurrage.

Q. That is right. We could place them outside the plant on constructive placement and then order them in when we want them.

A. That is my understanding of demurrage. I am not an expert on it.

Mr. Victor: I believe that is all.

Exam. Way: You are excused.

(Witness excused.)

Mr. WILLIAMS: I offer in evidence Exhibit marked for identification as No. 8.

Exam. WAY: Without objection, it is received.

(Commission's identification Exhibit No. 8 Witness MacDonald, received in evidence.)

OMAR O. VICTOR was sworn and testified as follows:

Direct Examination.

The WITNESS: I am Omar O. Victor. I am General Traffic Manager of the United States Smelting, Refining & Mining Company, with offices at 906 Newhouse Building, 977 Salt Lake City, Utah. I have held this position for over four years, ten years prior to which I was handling rate matters in the Traffic Department of the same company, and approximately ten years prior to that time in various traffic and accounting positions with the railroads. I am a practitioner before the Interstate Commerce Commission.

The last two columns referred to on O'Brien's Exhibit No. 2 show the number of moves on March 30, the first on those cars handled as purely intraplant movements, for which intraplant switching charges of \$2.70 per car is paid; the second column covers those movements that are handled directly in connection with the line-haul and which are necessary to determine the final destination through the sampling, and which are also necessary to secure the weights and the value for railroad freight charge purposes. It will be noted on Page 4 of this exhibit that the total number of moves within the plant on March 30th was 109.

Mr. COLLINS: Which exhibit is that?

The WITNESS: That is Exhibit 2.

Exam. WAY: Well, Mr. Victor, I would like to have you take the first item on that exhibit and explain it to me, how you get two line-haul movements, what is the first and what is the second.

The WITNESS: The first move— This statement, of course, is set up based on the movements that took place at the plant on March 30.

Exam. WAY: All right.

The WITNESS: The first move is the movement from the Union Pacific entry into the yard. Now, as previously explained by the witnesses, we do not know where this car might actually be located. Therefore, our instructions are to take it from the carrier that brought the car in road-haul service. We order that car then from that railroad company, either the Union Pacific or D. & R. G., in this par-

ticular instance, the Union Pacific. It was ordered to Trestle G, I believe.

Exam. Way: Well, never mind.

The WITNESS: All right, Trestle G, and the car was weighed en-route over the industry's scales.

Exam. Way: You count that as one move?

The WITNESS: We count that as a series of moves necessary to determine the sampling, the value and the weight, but we consider that as all still in line-haul until we can get the sampling, determine the character of the ore, and at which time the destination is determined as either being Midvale or Murray, Garfield or International.

Exam. Way: All right.

The WITNESS: Now, the same thing holds true, of course, if the car is going into the oxide sampler, or Tracks 1 and 2.

Exam. Way: Let's confine ourselves to that one.
979 I am trying to find out how you get two movements and how you consider that as being two movements. Where is the other movement?

The WITNESS: If it is considered two movements it is actually misleading. It is actually one movement from the railroad to the trestle and the continuation of that move from the trestle to the scales for light weighing, and then the car is, of course, entirely at the disposition of the railroad company.

Exam. Way: Now, if you had a movement beyond the scales to the sampler, that would be three moves, wouldn't it?

The WITNESS: A series of three moves in connection with that car, all in connection with that shipment, let's refer to it, because in the sampling, the contents are dumped into the mill and they come out as sampled ore, or sampled commodity into another car, but the identity of the shipment is the same. It is the same shipment through the sampler.

Exam. Way: All right. Now, on Sheet 3 you have got a carload of ore from Sargent, Colorado, which moved from, evidently, came in over the Denver & Rio Grande.

The WITNESS: That is correct.

Exam. Way: Came in probably at point "A"?

The WITNESS: That is right.

Exam. Way: And from there it was delivered to Trestle G?

980 The WITNESS: That is correct. The car was weighed en route.

Exam. Way: And the weighing you consider as being the second move? I mean, is included—

The Witness: No, that is another series of the same type of move again, Mr. Examiner. On March 30 it moved from the D. & R. G. to the trestle.

Exam. Way: Now, is that one move?

The Witness: Yes, it is one move under the sampling in transit.

Exam. Way: All right. Now then, the second move is—

The Witness: As I say again, this is just shown as a series of moves. It is technically not two moves. It is a series of two moves on that particular car in the sampling in transit.

Exam. Way: So that second move only applies in connection with sampling?

The Witness: Yes. In other words, that move is to take the car away. Now, this particular car, Mr. Examiner, was not sampled at Midvale. This had a previous sampling at the Utah Ore Sampling Company at Murray. We did not sample it, so it was placed there at the trestle loaded and then it was moved from the trestle as an empty car. Now, it is a series of two moves on that particular car. However, technically it is only one move of the loaded car and the return of the empty.

Exam. Way: Well, how do you distinguish that 981 car from the one that is right next to it, concentrates, where you only had one move?

The Witness: This particular shipment of concentrates was pipe sampled. It was not mill sampled, and the sampling is done in the original car.

Exam. Way: So I may understand then, that it is the sampling that causes the second move?

The Witness: That is correct. The commodity is dumped from the original car and then it comes out and placed in a second car that has been placed alongside of it to receive the ore. Now, the reason for that is that if we were to load it in the same car it would be necessary to line that car up there, and take it, move it out. So they take the loaded cars in for sampling and a series of empty cars. That goes into the mill and comes out into the other car.

Exam. Way: Now, does the carrier make a charge for that second move?

The Witness: At the present time, if that car stays at Midvale, it is \$1.00 from the sample to the point of unloading, or the bin or stock pile in the plant, but if the car goes from Midvale to International, Murray or Garfield,

there is no charge for taking it out of the plant nor is there a charge in placing it to a similar point of unloading at the other smelter it is eventually reforwarded to.

Exam. WAY: And likewise you make a charge of 50 cents a car for the weighing?

The WITNESS: The weighing light.

Exam. WAY: The weighing light?

The WITNESS: That is correct. The tariff provisions permit the weighing of the loaded car inbound, that is the present tariff provisions.

Exam. WAY: All right.

The WITNESS: The total number of moves within the plant, as shown in the total of Columns 1 and 2, is 109. The total movements in connection with the—

Exam. WAY: You say in Columns 1 and 2?

The WITNESS: Columns marked intraplant movements and columns marked line-haul movements.

Mr. CAMPBELL: What page?

The WITNESS: That is on three pages, or on four pages rather.

Mr. CAMPBELL: Yes, that is right.

The WITNESS: There is a total of 109 movements shown in those two columns. Of the 109 movements, 76 movements, as shown on Page 3, top of Page 3, were directly in connection with the shipments moving in intrastate traffic, and under the heading of intrastate, intraplant, an additional 16 car movements were made, taking a total, a grand total of 92 of the 109 movements on that day as being intrastate, 17 movements, as shown on Page 4 of that exhibit, being in connection with interstate traffic. Of the 17 movements in connection with interstate traffic, 12 of them moved directly, or were moved directly from the point of loading to the railroad connection, only six of which were weighed at the plant, and such weighing was specifically permitted and provided for by tariff authority. All the inbound movements of the interstate ore and concentrate traffic were made in the sampling and securing of weights and value for railroad purposes. Summing this up, 92 moves were in connection with intrastate; not involved herein, 12 of the interstate moves were only a simple switch from the plant, and the other five moves were in connection with securing weights and values.

The earload traffic shown in Exhibit No. 2 consisting of coal, lime rock, burnt lime, scrap iron, and also other similar commodities or supplies received in the plant on other days that are not reflected on this day, such as coke, flotation re-

agents and other milling and smelting supplies when received at the Midvale plant are spotted directly to the places of unloading without interruption from the smelting company. Where these shipments have not previously been weighed before arrival at the plant, it is the practice to weigh them, which weight is used in determining the freight charges. None of the empty cars on this traffic are weighed light.

984 Outbound shipments of lead bullion, Speiss, zinc concentrates, iron middling concentrates, also referred to as flotation pyrite, and arsenic are handled directly from the plant by the carriers. These shipments, except bullion, are weighed gross by the carriers under specific tariff provisions. Lead bullion moves under weight agreement.

Due to the complex nature of ores produced in the intermountain district and shipped to Utah smelters, it was found necessary for the mutual benefit of carriers, shippers and smelters and to assure maximum recovery of vital metals and elements to publish in carriers' tariffs an arrangement that would permit a free interchange of ores and concentrates between the various smelters. This assures payment of maximum transportation charges to the carrier, brought about by the carriers' tariffs specifically providing for assessment of transportation charges based on the value of the ore as ascertained from the settlement between the shipper and the consignee. These provisions allow shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then reforwarded to the smelter that would be most advantageous. These provisions have been in effect since the smelters were built and the line-haul rates have all been established with the full knowledge of this fact and that such line-haul rates include compensation to the carriers

985 for the services involved. A typical example of the sampling in transit provisions is found in Item 165.

Local Utah Freight Tariff No. 6, F. W. McManus, Agent, I. C. C. No. 3.

By reference, I would like to have that included in the record.

Exam. WAY: All right, it may be considered.

The Witness: I have had prepared a statement showing typical cars that were received at Midvale during the period January 1 to March 31, 1944, which shipments were subse-

quently reforwarded from Midvale to other Utah smelter plant destinations under the sampling in transit provisions.

I would like to have this statement identified.

Exam. WAY: It will be Exhibit No. 9.

(Marked for identification "Intervener's Exhibit No. 9, Witness Victor.")

The WITNESS: This statement shows that shipments of ores and concentrates moving in intrastate and interstate traffic are now stopping under the line-haul rates at Midvale, Utah, for sampling and then reforwarded to another smelter in the Salt Lake Valley, and this service is permitted in the tariffs to insure maximum payment for the values contained therein. Similar cars as the ones shown herein from the same and other similar origins during the same period were retained at Midvale, Utah, to insure the greatest recovery and return to both shipper and carrier,

but on such cars, under the presently effective tariffs, 986 extra switching charges were assessed for placement to a similar point of unloading at Midvale, while no such switching charges were assessed for placing these cars for unloading at similar places at the other smelter destinations.

Likewise, similar shipments as these may be sampled in transit at the Utah Ore Sampling Company's independent public sampler at Murray, Utah, and then reforwarded to Midvale, International, or Garfield, Utah, without the payment of additional switching charges, which is preferential to shippers using that service as compared with shippers using the public sampler at Midvale.

It is necessary that cars of ores and concentrates, upon arrival at the plants, be weighed, thawed, when necessary to unload, and then sampled. It is only after the sampling has been completed that the final destination is known, and therefore such cars are still in line-haul. It is only after the sampling in transit has been fully completed and the line-haul service terminated that the cars could come within the scope of this investigation.

The Midvale plant, together with the other Utah smelters, was placed in operation about the beginning of the twentieth century, at which time agreements were entered into between the railroad companies and the smelting companies to provide proper line-haul and terminal services for the handling of ores, concentrates and other necessary 987 and resulting traffic. An agreement was made with the carriers in consideration of the smelting company providing yard trackage, scales, etc., to furnish at the smel-

ter all terminal services necessary in handling of ores and concentrates, compensation for which to be included in the line-haul rates.

I would like to have identified as exhibits copies of correspondence that has taken place between our company and the carriers in connection with these agreements and these understandings.

Mr. COLLINS: About what time?

The WITNESS: This particular correspondence is in 1919.

Exam. WAY: It is going back pretty well, isn't it, to have any particular effect on the situation today?

The WITNESS: The purpose, of course, of this, Mr. Examiner, is to show a long-standing arrangement and an agreement that has been entered into that the line-haul rates and all other services were provided in contemplation and with that understanding in mind.

Exam. WAY: It is part of the historical set-up?

The WITNESS: That is correct.

Exam. WAY: They will be marked 10 and 11.

(Marked for identification "Intervener's Exhibits Nos. 10 and 11, Witness Victor.")

The WITNESS: These understandings were incorporated in the carriers' tariffs in provisions stating that
988 switching at Midvale from track to track within smelter plants served by the carriers of cars containing freight which had paid transportation charges to the plant would be free. These provisions were published in the carriers' tariffs prior to 1910. The reason I haven't anything specific, Mr. Examiner, my files do not show, my regular tariff files are not that far back. They remained in the tariffs without material change until on or about February 25, 1920.

On or about June 1, 1916, a joint investigation was instituted by the railroad companies into the lawfulness of the switching practices at the Utah smelters. This consideration resulted in the filing of a suit in the Federal Court at Salt Lake City with a decision in favor of the defendant smelting companies, holding that the services at the smelters published by carriers were in accordance with the Interstate Commerce Act and the plaintiff carriers' prayer for damages in the form of compensation for switching services rendered was denied. The Circuit Court of Appeals for the Eighth Circuit in 269 Federal 898 upheld the decision of the lower court. In the decision by Judge Johnson of the Federal District Court at Salt Lake City, he stated—

Exam. Way: Never mind what he stated. It was rendered.

The Witness: On February 25, 1920, in keeping with order of the Director General of the United States Railroad Administration in Rate Advice 901, which involved 989 only the minimum charge per car for intraplant switching, the Oregon Short Line Railroad, now the Union Pacific Railroad Company, and the Denver & Rio Grande Railroad established the following provisions in their Tariffs 2029-H, I. C. C. 2208, O. S. L. Railroad, and 4486-E, I. C. C. 2770, D. & R. G. Railroad, that: "Delivery of a line haul earload shipment destined to smelters at Midvale, Utah, will include one movement of commodity within the smelter plant over track scales to and from smelter sampler, or to and from combination sampler and concentrator, to a designed unloading point indicated by the smelting company. Also from track to track within smelter plant for each additional movement not provided for, \$2.50 per car".

Prior to the publication of the item just cited, considerable correspondence and discussions were had in connection with the switching problems at the Utah smelters, and it was the opinion of the railroad companies that the line haul rates included full compensation for the transportation services at the plants required in the weighing, thawing and sampling. This view is borne out in correspondence had between the Union Pacific Railroad Company and the American Smelting & Refining Company and the United States Smelting, Refining & Mining Company, and I would like to have identified copies of this correspondence.

Exam. Way: Attach it altogether and introduce them as one exhibit.

990 **The Witness:** All right, sir. I would like to have them identified, three letters or six pages.

(Marked for identification "Intervener's Exhibit No. 12, Witness Victor.")

Mr. Collins: They will all constitute one exhibit, is that right?

Exam. Way: That is right.

The Witness: It is noted that this correspondence all took place during 1919 or prior to the modification of the switching tariff of February 25, 1920, which publication, as previously stated, was only necessary to incorporate in the tariff a provision for the \$2.50 intraplant switching charge at the smelters.

The switching services and practices of the Utah smelters were again under consideration in May of 1932. In a hearing before C. M. Bardwell, Attorney and Examiner of the Interstate Commerce Commission at Salt Lake City on May 19, 1932, for the purpose of investigating terminal services performed by the railroads for Utah Smelters in *Ex Parte* 104, Part II, the carriers again testified that the line-haul rates included all of the services then being performed, except the purely intraplant switching, which was compensated for by legally published switching charges.

In January, 1938, traffic officials of the Denver & Rio Grande Western Railroad Company and the Union Pacific Railroad Company advised the Traffic Manager of the American Smelting & Refining Company and our company that to conform to the Commission's decision in *Ex Parte* 104, 209 I. C. C. 11, it was their opinion it would be necessary to make certain changes in the terminal tariffs at the Utah smelters. As it was the consensus of this company that the then present conditions as published in the carriers' tariffs were entirely in conformity with the Interstate Commerce Act, opposition was expressed. This opposition was continued from that date until the present; correspondence and conferences have been held between the smelting companies and the carriers, some of which have taken place as late as February 7, 1944.

The carriers published effective on Utah intrastate traffic June 25, 1938, and on interstate traffic July 5, 1938, the tariff provisions requiring the payment of \$1.00 per car for the movement of ores and concentrates from the sampler to the point of unloading, 50 cents per car for the services to and from the thaw shed, and 50 cents per car for light weighing. This publication was in fourth revised page 22 of Union Pacific Tariff 7114, I. C. C. 565.

I think that is all fully explained in Mr. Carey's exhibit. I don't recall the number of it, introduced this morning.

It is still our opinion that the conditions in effect prior to July 5, 1938, were proper and should be re-established by the carriers. This opinion is supported by the provisions in effect at other smelters throughout the country, such as at Black Eagle, Montana, and many other points. The tariff provisions confirming established understandings covering the Black Eagle Plant of the Anaconda Copper Mining Company were established as late as 1941, or three years after the Denver & Rio Grande Western

Railroad and Union Pacific Railroad officials amended the tariffs applicable at the Utah smelters.

Exam. Way: Now, Mr. Victor, you are getting into a matter of comparison of rates, a comparison of service with other plants that is beyond the issues in this proceeding.

The Witness: My purpose is to show, Mr. Examiner, a misunderstanding in connection with this, or perhaps a misinterpretation, I should say, of the Commission's decision in 209 I. C. C. 11.

Exam. Way: All right, if you are putting it in for that purpose.

The Witness: The amending of the tariffs applicable at the Utah smelters just mentioned caused the assessment and collection of charges at these smelters for like and similar services included without additional charges in the line-haul tariffs of other carriers serving other similar smelters and plants.

I have had prepared a statement of typical shipments of ores and concentrates moving into Midvale, Utah.
993 I would like to have this identified.

(Marked for identification "Intervener's Exhibit No. 13, Witness Victor.")

The Witness: This statement is self-explanatory and shows that the present line-haul rates are entirely compensatory for the services that carriers now perform in the road-haul and in providing the switching services at the plants necessary for the weighing, thawing and sampling of the ores.

Exam. Way: Now, what is the purpose of this one, Mr. Victor?

The Witness: The purpose of that is to show that the line-haul rates are compensatory for the services, that they are built and established with the full knowledge of these rates and made high enough to compensate the carriers for the extra service they perform in the handling of ores and concentrates.

Mr. Williams: I believe that is objectionable, Mr. Examiner.

Exam. Way: Well, under the issues of this case, the whole thing that is involved here is the carriers' obligation, to determine whether the carriers are obliged to perform this switching. It is a Section 6 case and not Section 1 nor 3 nor 13.

The Witness: Well, my purpose, Mr. Examiner, in addition to what I said, was to show that these shipments, as I

994 have tried to in our exhibits here, are still in line-haul and therefore they are not in this, and along with that evidence, the carriers are being compensated for this service.

Exam. WAY: All right, we will take it.

The WITNESS: I wish to reiterate the fact that the weight determined by the weighing over the industry scales within the plants is used by the railroad companies in the assessment of freight charges. The majority of the ore and concentrate shipments originate at points where the railroad companies do not provide facilities for weighing, and if the weighing were not permitted within the plants, then it would be necessary for the carriers to either provide costly facilities for weighing or to transport the tonnages considerably greater distances to ascertain the weights. As previously stated, the ore and concentrate rates are all subject to and predicated on values, and it is therefore necessary for the carriers to determine the value before it is possible for them to assess freight charges. The weighing, thawing when necessary, sampling and assaying at the plant determines the value, and this information is required by the carriers for freight charge purposes. All of the costs incidental to the weighing of the ores and concentrates and the furnishing of the valuation certificates is borne entirely by the industry. The industries have provided and maintain the tracks, the scales, pay the salaries of the bonded weighers, and furnish the carriers with valuation certificates to be used in determining 995 freight charges.

Mr. O'Brien in his testimony stated that the carriers watered their engines within the industry plant. This is another free service that is provided by the industry. The water tank is maintained solely for the use of the railroad and makes it unnecessary for the engines to leave the yard to secure water for their operation.

The line-haul tariffs now provide that destination weights will govern in the assessment of freight charges on ores and concentrates and that the value as determined at destination based on the settlement between the shipper and the consignee before deducting the freight charges will be used in determining the value for freight charge purposes. I would like to have identified statement showing the tariff provision now applicable in connection with this matter.

Mr. COLLINS: The tariff provisions now applicable?

The WITNESS: In connection with the waybilling and the weights.

(Marked for identification "Intervener's Exhibit No. 14, Witness Victor.")

Exam. WAT: Apparently that is self-explanatory.

The WITNESS: That is self-explanatory.

I have also had prepared a statement showing the traffic handled into and from Midvale based on the period from January 1, 1944, to March 31, 1944, showing the number of cars moving in intrastate traffic and interstate traffic. I would like to have this identified.

(Marked for identification "Intervener's Exhibit No. 15, Witness Victor.")

The WITNESS: It will be observed that this statement shows that 77.8 percent of the cars are moving intrastate and only 22.2 percent interstate. The period January 1, 1944, to March 31, 1944, is typical of the present unusual war time, but reflects a greater percentage of interstate traffic than actually took place prior to the war. This statement also shows that the interstate traffic is only incidental to the intrastate traffic. All of the 579 interstate outbound carloads shown on this statement were handled directly from the plant without interruption, only one simple switch being involved. Of the 330 interstate inbound shipments shown on this exhibit, 17 carloads contained miscellaneous supplies which were spotted directly to unloading point. The balance, or 313, contained interstate ore shipments handled under the sampling in transit tariff provisions.

It will be noted that of the inbound shipments received during this period that 89.7 percent are intrastate and only 10.3 percent interstate. Of the 875 cars outbound, 33.8 percent are intrastate and 66.2 percent interstate. However, on the outbound movements the shipments are accorded only one uninterrupted move from the plant to the carrier handling the car from Midvale in line-haul service.

Mr. COLLINS: Are they weighed?

The WITNESS: The shipments of bullion are not weighed, as previously testified.

Mr. COLLINS: Let me put it this way, even if they are weighed, you consider it uninterrupted movement?

The WITNESS: That is correct, and I will later state here why.

During the war the outbound interstate shipments are greater than during peace times.

I have also had prepared a statement which shows the ore and concentrates tonnages received at Midvale as evidenced by freight bills paid during the month of March.

1944, and which shipments move under the sampling in transit, and which are weighed, thawed and sampled for railroad purposes. I would like to have this identified.

(Marked for identification "Intervenor's Exhibit No. 16, Witness Victor.")

The WITNESS: It is noted that 90.2 percent of the traffic is intrastate and only 9.8 percent interstate, further showing that the interstate traffic at the Midvale smelter is only incidental to the intrastate traffic. This statement is typically indicative of the normal flow of similar traffic to Midvale.

I desire to add this further comment, that our 998 Company requests affirmative relief from the charges that have been imposed upon our Company by the carriers since July 5, 1938, on interstate traffic and that this Commission should consider our testimony in the light of defending the conditions that prevailed at the Midvale smelter prior to the above mentioned date, and not to consider it in the light of the existing charges as published in Item 520-D of Union Pacific Tariff 7114, I. C. C. 565.

Exam. WAY: You are saying you are asking affirmative relief?

The WITNESS: Or that the Commission should consider our testimony in the light of what was in effect prior to 1938.

Exam. WAY: I am just trying to find out, Mr. Victor, just what you are asking for, just what affirmative relief you are requesting here.

The WITNESS: Mr. Examiner, I would like to withdraw that request, and I will phrase it differently.

Exam. WAY: All right, strike it.

The WITNESS: I think that the Interstate Commerce Commission should consider our testimony in the light of defending the conditions that prevailed at the Midvale smelter prior to the above mentioned date of July 5, 1938, and not to be considered in the light of existing charges as published in Item 520-D of Union Pacific Tariff 7114, I. C. C. 565.

Exam. WAY: Now, I just don't know what you 999 mean by that. Do you mean to say that you think that the Commission should reverse its position as found in 1938?

The WITNESS: The Interstate Commerce Commission?

Exam. WAY: Strike what I said.

The WITNESS: No. Maybe an explanation would be proper. We are opposed to the switching charges that

were published and which we have been paying, namely, \$1.00 from the sampler to the unloading point in the yard, 50 cents to and from the thaw house, and 50 cents for a light weighing, and we would like the Commission to consider the evidence, what was in effect as far as the switching charges were concerned, prior to 1938, is the proper measure, consider the testimony in evidence in that light.

Exam. Way: All right.

Mr. COLLINS: Have the added charges, those added in 1938, been made the subject of a complaint before either the I. C. C. or the Utah Commission?

The WITNESS: Not before the I. C. C. Now, I don't know which you have reference to, a present complaint?

Mr. COLLINS: The rates and extra charges, or the added movements for which charges were made subsequent to the understanding reached in 1938. I understand that you favor the situation that existed before?

The WITNESS: That is correct.

Mr. COLLINS: Before 1938, Mr. Victor. But now 1000 what I was * * * have you ever filed a complaint?

The WITNESS: Have we filed a complaint? No, there has been no complaint filed. It has purely been through correspondence with the carriers.

Exam. Way: I still say with respect to that matter, Mr. Victor, it is beyond the issues in this proceeding.

The entire transportation and handling at the various smelters with subsequent reforwarding is an arrangement that is required because of its commercial necessity, and which results in an advantage to the railroad companies and the shipper. The furnishing of the value and weight information for freight charge purposes is one in which the carriers are the recipients. All expenses of this service is borne by the industry.

Likewise the Midvale plant does provide extensive switching facilities for the use of the carriers in storing empties for prospective loading, in switching cars reforwarded from the plant under the sampling in transit privileges and maintaining at our entire expense costly scale facilities which makes it unnecessary for the railroad companies to provide similar facilities of their own within their own yards. An added imposition in the form of terminal switching charges at this time would increase the marginal ore, reducing the carriers' tonnages and also reduce the recovery of the metals and elements, resulting in a loss to the railroads, shipper and the general public.

1001 In view of that, and in view of the present war-time conditions, labor shortages, etc., it is my opinion that this proceeding should be dropped, at least for the present, or at least it should be held in abeyance. The Commission, I do not believe, are getting a true picture.

Exam. Way: That is a matter of argument. Just give us the facts.

The Witness: The demurrage tariffs applicable at Midvale allows extra time in the thawing of congealed or frozen ores or concentrates. We also are operating under an average agreement which would permit constructive placement outside of the plant, which would make it unnecessary for us to allow these cars to come in until we could allow disposition. I don't know whether it has been brought in here today, but the dry weight, or rather the light weighing of the car is necessary in order for the smelting company to determine the dry weight, or actual dry weight of the concentrates therein. The difference between the marked tare and the actual tare will often times reflect considerable difference in the value of the ores, put it from one freight rate bracket into another one. Therefore, it is to the definite advantage of the carriers to have this to determine the actual transportation charges thereof.

Exam. Way: Cross-examine.

Mr. WILLIAMS: I think no cross-examination.

1002 Mr. COLLINS: What?

Mr. WILLIAMS: No cross-examination.

Cross Examination.

Q. (By Mr. COLLINS): Isn't it necessary also, Mr. Victor, I would say absolutely necessary, that the smelter company have both the weighing and the sampling done in order to accomplish its own transaction?

A. That is true. However, I see no objection from the smelting company's standpoint, why they wouldn't accept the weights and the value that would be furnished to us by the railroad companies.

Q. Well, of course, are you familiar with the tariff provision which says that the smelter shall certify the assayed values to the carriers?

A. I am.

Q. I just wanted to make the point that the services, both services are necessary to both the carriers and the smelter.

A. It is quite true. It is another one of the many mutual conditions that are necessary in this mining game in order to get along.

Q. Neither one, the railroads couldn't apply its rates and the smelter could not consummate its transactions—

A. Unless it was done sometime in the course of transportation.

Mr. COLLINS: I have no further questions. I have 1003 some comments about some of these exhibits when he offers them.

Exam. WAY: Then you are excused.

(Witness excused.)

Exam. WAY: Now, do you offer the exhibits?

Mr. VICTOR: I would like to offer in evidence exhibits 9 through to 16, inclusively.

Exam. WAY: Any objection?

Mr. COLLINS: I call attention to the fact in some of the correspondence here, in Exhibits 10, 11 and 12, all that correspondence on these rates is with the United States Railroad Administration, which is operating, as the Commission knows, under some kind of supervision with the railroads, which nevertheless gave the Railroad Administration the authority to make commitments of the sort set forth in this correspondence. The railroads themselves as private people would not be bound on this even if this were relevant. I object to it on the grounds of its relevancy.

Exam. WAY: It is accepted as a matter of historical information only.

Mr. WILLIAMS: Well, Mr. Examiner, I don't mean to press the point, but it does seem to me that Exhibits 10, 11 and 12 have not any material bearing to a Section 6 case. It might be otherwise if this hearing were a Section 3 case.

Exam. WAY: I have all the way through stated that much of the testimony with respect to these matters was 1004 irrelevant and immaterial to the issues that are involved in this particular proceeding, and I think there is some objection to the exhibits. However, they will be received.

(Intervener's identification Exhibits Nos. 9 to 16, both inclusive, Witness Victor, received in evidence.)

Exam. WAY: Anything further?

Mr. VICTOR: I have nothing.

Mr. WILLIAMS: The Commission has nothing.

Mr. COLLINS: We have nothing further for the railroads.

Exam. WAY: This will be a proposed report case, and the briefs will be due on July 15. If there is nothing further the hearing is closed.

(Whereupon at 4 o'clock p. m. May 29, 1944, the hearing in the above-entitled matter was closed.)

STATEMENT SHOWING CAR MOVEMENTS WITHIN (TRACK DESIGNATIONS CORRESPOND WITH THE

Car		Origin	Contents	Date	From	To
Int.	No.					
UCR	21910	Bingham, Utah	Ore	3-30	UP	Tres
DRG	41982	" "	"	"	"	"
"	41781	" "	"	"	"	"
UP	63810	Cranmer, Utah	"	"	"	"
UP	62800	" "	"	"	"	"
UP	63930	" "	"	"	"	"
UP	62762	" "	"	"	"	"
UP	62043	" "	"	"	"	"
DRG	42492	Bingham, Utah	"	3-28	"	#1
UCR	21079	" "	Sampled Ore	—	—	—
DRG	42493	Lark, Utah	Ore	3-30	DRG	Tres
DSL	34138	" "	"	"	"	"
UCR	21423	" "	"	"	"	"
UCR	20239	" "	"	"	"	"
UCR	21358	" "	"	"	"	"
UCR	20439	" "	"	"	"	"
DRG	43169	" "	"	"	"	"
DRG	40040	" "	"	"	"	"
DRG	43309	" "	"	"	"	"
DRG	42412	" "	"	"	"	"
DRG	40049	" "	"	"	"	"
DRG	43079	" "	"	"	"	"
DRG	42049	" "	"	"	"	"
DRG	40094	" "	"	"	"	"
DRG	70286	Wendover, Utah	"	3-29	"	#1
UCR	20273	" "	Sampled Ore	—	—	—
DRG	66938	Saddle, Utah	Burnt Lime	3-27	DRG	#4
WP	5933	Dolomite, Utah	Lime Rock	3-30	"	#1
US	201	Flotation Mill	Flotation Lead	"	Belt G	#3
US	203	" "	" "	"	"	"
US	205	" "	" "	"	"	"

Exhibit No. 2
Witness: O'BRIEN

[illegible]

1006

Page 2
Exhibit No.
Witness:

Car		Origin	Contents	Date	From	To	Date	From	To	Date	From	To	Intraplant	Line Haul
Int.	No.												Movements	Movements
													March 30	March 30
US	208	Flotation Mill	Flotation Lead	3-30	Belt G	#3 (W)	3-31	#3	Belt G (L)					1
UCR	20061	Kingmire, Utah	Pea Coal	"	UP	#1								1
SLU	1102	Wendover, Utah	Ore	"	DRG	#1 (W) (L)								1
UCR	20352	"	Sampled Ore				4-5	#2	#5					
WP	5855	"	Ore	3-30	DRG	#1 (W) (L)								1
UCR	21613	"	Sampled Ore				4-5	#2	#5					
DRG	70076	"	Ore	3-30	DRG	#1 (W) (L)								1
WP	5511	"	Sampled Ore				4-5	#2	#5					
DRG	40802	Bingham, Utah	Ore	3-30	DRG	#1 (W) (L)								1
UP	62255	"	Sampled Ore				3-31	#4	Trestle G					1
DRG	70278	Salt Lake City, Utah	Scrap Iron	3-30	DRG	#4 (W)								1
DRG	41822	Flotation Mill	Flotation Lead	"	Belt G	#5 (W) (L)								1
DRG	42078	"	"	"	"	"								1
UCR	21933	Brigham, Utah	Large Scrap	"	UP	#17 (W)								1
WP	5654	Wendover, Utah	Sampled Ore	"	#2	#22								1
UCR	21254	Midvale, Utah	Flotation Pyrite	"	Belt G	UP (W)								1
UCR	21138	"	"	"	"	"								1
UCR	21957	"	"	"	"	"								1
UP	63295	"	"	"	"	"								1
UCR	20751	Flotation Mill	Empty & Flot. Lead	"	Yard	Belt G (L)	3-31	Belt G	#5 (W)					1
SP	94935	"	"	"	"	"	"	"	"					1
US	207	"	"	"	"	"	"	"	#3 (W)					1
US	210	"	"	"	"	"	"	"	"					1
US	202	"	"	"	"	"	"	"	"					1
US	200	"	"	"	"	"	"	"	"					1
DRG	42161	Lark, Utah	Ore and Empty	3-29	DRG	Trestle G (W)	3-30	Trestle G	DRG (L)					1
DRG	40643	"	"	"	"	"	"	"	"					1
DRG	71363	Bingham, Utah	"	"	UP	"	"	"	"					1
DRG	71175	"	"	"	"	"	"	"	"					1
DRG	40776	"	"	"	"	"	"	"	"					1
UCR	21795	"	"	"	"	"	"	"	"					1
UCR	21310	"	"	"	"	"	"	"	"					1
UCR	21522	Stockton, Utah	"	"	"	#1 (W)	"	#1	UP (L)					1
WP	5511	Wendover, Utah	"	"	DRG	#1 (W)	"	"	DRG (L)					1

Car		Origin	Contents	Date	From	To	Date	From	To	Date	From	To	Intraplant	Line Haul	
Int.	No.												Movements	Movements	
													March 30	March 30	
UCR	20515	Wendover, Utah	Sampled Ore	—	—	—	—	—	—	4-4	#2	#5	—	—	
UCR	20352	" "	Ore	3-29	DRG	#1 (W)	3-30	#1	DRG (L)	—	—	—	—	1	
DRG	40229	" "	Sampled Ore	—	—	—	—	—	—	4-4	#2	#5	—	—	
UCR	21613	" "	Ore	3-29	DRG	#1 (W)	3-30	#1	DRG (L)	—	—	—	—	1	
UCR	20270	" "	Sampled Ore	—	—	—	—	—	—	4-5	#2	#5	—	—	
DRG	42458	Midvale, Utah	Speiss	3-30	#14	DRG (W)	—	—	—	—	—	—	—	1	
INTRASTATE (Intraplant)														Total	76
US	57	Roasters	Roast	3-30	H	#3 (W)	—	—	—	—	—	—	1	—	
US	50	"	"	"	"	"	—	—	—	—	—	—	1	—	
US	56	"	"	"	"	"	—	—	—	—	—	—	1	—	
DRG	70056	Sand Hole	Fluxing Sand	"	#11	#1 (W)	—	—	—	—	—	—	1	—	
UCR	21125	"	"	"	"	"	—	—	—	—	—	—	1	—	
US	69	Roasters	Roast	"	H	#3 (W)	—	—	—	—	—	—	1	—	
US	68	"	"	"	"	"	—	—	—	—	—	—	1	—	
US	68	#3	Empty for repair	"	#3	#15	—	—	—	—	—	—	1	—	
DRG	71718	Wedge Building	Dust	"	#4	K-1 (W)	—	—	—	—	—	—	1	—	
US	62	U. S. Yard	Yard Cleaning	"	C	#1 (W)	—	—	—	—	—	—	1	—	
US	54	" "	" "	"	"	"	—	—	—	—	—	—	1	—	
US	67	" "	" "	"	"	"	—	—	—	—	—	—	1	—	
US	53	Roasters	Roast	"	H	#3 (W)	—	—	—	—	—	—	1	—	
US	66	"	"	"	"	"	—	—	—	—	—	—	1	—	
US	52	"	"	"	"	"	—	—	—	—	—	—	1	—	
US	58	"	"	"	"	"	—	—	—	—	—	—	1	—	
Total														16	
INTERSTATE (Line Haul)															
DRG	40500	Sargent, Colo.	Ore	3-30	DRG	Trestle G (W)	3-30	Trestle G	DRG	—	—	—	—	2	
CP	375051	Silverton, B. C.	Concentrates	"	UP	L (W)	3-31	L	#3	4-1	#3	UP (L)	—	1	
UP	87584	Midvale, Utah	Zinc Concentrates	"	Belt G	UP (W)	—	—	—	—	—	—	—	1	
UI	87592	" "	" "	"	"	"	—	—	—	—	—	—	—	1	
UP	62259	" "	" "	"	"	"	—	—	—	—	—	—	—	1	
UP	63649	" "	" "	"	"	"	—	—	—	—	—	—	—	1	
UP	88706	Dillon, Mont	Ore	3-29	UP	#1	3-30	#1	UP (L)	—	—	—	—	1	

1008

662

Page 4

Exhibit No.

Witness:

Car		Origin	Contents	Date	From	To	Date	From	To	Date	From	To	Intraplant Movements March 30	Line Haul Movements March 30
Int.	No.													
DRG	40419	Dillon, Mont.	Sampled Ore	—	—	—	—	—	—	—	—	—	—	—
UP	62255	Basin, Mont.	Ore	3-29	UP	#1	3-30	#1	UP (L)	4-3	#2	#1	—	—
DRG	43349	"	Sampled Ore	—	—	—	—	—	—	—	—	—	—	—
UP	92004	Midvale, Utah	Arsenic Empty	3-30	UP	#8 (L)	—	—	—	4-4	#2	Trestle	—	1
UP	92073	"	"	"	"	"	—	—	—	—	—	—	—	—
C&O	8389	"	Lead Bullion	"	#14	UP	—	—	—	—	—	—	—	1
NYC	110333	"	"	"	"	"	—	—	—	—	—	—	—	1
SLSF	148795	"	Empty & Bullion	"	DRG	#14	—	—	—	—	—	—	—	1
L&N	96546	"	"	"	"	"	3-31	#14	DRG	—	—	—	—	1
PA	78821	"	"	"	"	"	"	"	"	—	—	—	—	1
NYC	109414	"	"	"	"	"	"	"	"	—	—	—	—	1
														1

(L)—Denotes weighed light.
(W)—Denotes weighed heavy.

Total 17
Grand Total All Moves 109

Witness: W. M. Carey

Before the
Interstate Commerce Commission
Ex Parte 104, Part II, Terminal Service
At Midvale, Utah Smelter

Page
Numbers
(Inclusive)

CONTENTS

- 1-4 Statement showing History of Switching at Midvale, Utah, Smelter on Line-Haul Shipments, and Intra-Plant Switching at Such Smelter.
- 5 Statement Showing Present Tariff Switching Provisions and Charges For: Delivery of Line-Haul Carload Shipments at Midvale, Utah, Smelter: Additional Movements of Such Shipments Within the Plant: And Intra-Plant Switching at Midvale, Utah Smelter.
- 6 Statement Showing Present Tariff Provisions Covering Manner of Waybilling, Rule for Determining Rate Upon Which Freight Charges Shall be Assessed, and Weights Applicable on Shipments of Ore and Concentrates Destined Smelters at Midvale Utah.
- 7 Statement Showing Present Tariff Provisions Covering Manner of Waybilling and Rules for Determining Rate Upon Which Freight Charges Shall be Assessed on Shipments of Ore and Concentrates Destined Smelter at Midvale, Utah.
- 8 Statement Showing Present Tariff Provisions of Rules Governing the Weighing of Carload Freight at Stations on the D&RGW.

1010

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Midvale, Utah

Witness: W. M. CAREY

*Statement Showing History of Switching at Midvale,
Utah, Smelter on Line Haul Shipments, and
Intra-Plant Switching at Such Smelter*

Effective Date

Dec. 22, 1915 Item 440 of Freight Tariff D&RG GFD
No. 4486-C, ICC 2400:

Switching at Midvale, from track to
track within smelter plants served by
the D&RGW Railroad Company, of
cars containing freight which has
paid transportation charges to the
plant.....FREE

Feb. 25, 1920 Item 15 of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

Delivery of a Line-Haul carload ship-
ment destined to smelters at Durango,
Leadville, Pueblo, Blende, and Salida,
Colorado, Garfield, Murray, and Mid-
vale, Utah, will include one movement
of Commodity within a smelter plant
over track scales to and from smelter
sampler (or to and from combination
sampler and concentrator), to a desig-
nated unloading point indicated by
the Smelting Company.

Item 20 of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

From track to track within smelter
plant for each additional movement
not provided in Item No. 15, \$2.50
per car.

Aug. 26, 1920 Item 20 of Freight Tariff D&RG GFD
(Interstate) No. 4486-E, ICC 2770:

For each additional
movement not pro-
vided for in Item
No. 15, from track

to track within smelt- Coal and Ore,
er plant (including \$2.50 per car (1).
weighing over scales All other freight
within plant) \$3.00 per car.

- (1) Applies on Intrastate Traffic only. Rate on Interstate Traffic \$3.00 per car.
- Nov. 6, 1920 (2) Item 20-B of Freight Tariff D&RG GFD No. 4486 E, ICC 2770:
For each additional movement, not provided for in Item 15, from track to track within smelter plant (including weighing over scales within plant)\$3.00 per car
(2) Advance on coal and ore on Utah Intrastate Traffic only.
- Nov. 27, 1920 Item 15-A of Freight Tariff D&RG GFD No. 4486 E, ICC 2770: Delivery of a line-haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende, and Salida, Colorado, Garfield, Murray, and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales TO AND FROM THAW HOUSE, to and from a smelter sampler,
- Page 2
Exhibit No.
Ex Parte 104, Part II, Terminal Service—Midvale, Utah
Witness: W. M. CAREY
- or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.
- July 1, 1922 Item 20 of Freight Tariff D&RG GFD No. 4486 F, ICC 24:
Intra-Plant or internal switching at Smelters in Colorado and Utah. For each additional movement not provided for in Item No. 15, or as amended, from track to track within Smelter Plant (Including weighing over scales within plant.)\$2.70 per car
- Feb. 1, 1932 Item 1661 of Freight Tariff D&RGW GFD No. 6600, ICC 429:
(Intrastate)

May 5, 1932
(Interstate)

Delivery of a line haul carload shipment, destined to smelter at Midvale, Utah will include movement within smelter plant over track scales, to and from thaw house, to and from a smelter sampler,

1012

Page 3

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Midvale, Utah

Witness: W. M. CAREY ?

Effective Date

Feb. 1, 1932
(Intrastate)
May 5, 1932
(Interstate)
(Cont'd)

or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant)\$2.70 per car

March 28, 1938
(Interstate)

Item 2270 of Freight Tariff D&RGW
GFD No. 6600-B, ICC 577:

Delivery of a line-haul carload shipment, destined to smelter at Midvale, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler, or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant)\$2.97 per car

June 25, 1938
(Utah Intrastate)

Item 2322 of D&RGW Freight Tariff
No. 6600-B, ICC 577:

July 5, 1938
(Interstate)

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant

which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By “uninterrupted movement” is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ores or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.
- (c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from the track scales for such light weighing shall be charged for at 50 cents per car.

1013

Page 4

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Midvale, Utah

Witness: W. M. CAREY

Effective Date

June 25, 1938

(Utah Intrastate)

July 5, 1938

(Interstate)

(Cont'd)

(c) The line haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

1014

Exhibit No.

Ex Parte 104, Part II, Terminal
Services, Midvale, Utah

Witness: W. M. CAREY

STATEMENT SHOWING PRESENT TARIFF SWITCHING PROVISIONS AND CHARGES FOR: DELIVERY OF LINE-HAUL CARLOAD SHIPMENTS AT MIDVALE, UTAH, SMELTER; ADDITIONAL MOVEMENTS OF SUCH SHIPMENTS WITHIN THE PLANT; AND INTRA-PLANT SWITCHING AT MIDVALE, UTAH, SMELTER

Item 2320 of Rio Grande Freight Tariff No. 6600-D, ICC 736:

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see Note) from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By “uninterrupted movement” is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore, concentrates, or other commodities are delivered to the smelting plants in a frozen condition, the switching carriers at the request of the smelting company will switch cars containing frozen ore, concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the

cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within plant) will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

(f) Open top cars loaded with Baghouse Fume or Arsenical Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

D&RGW Freight Traffic Dept.
May 19, 1944.

1015

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Midvale, Utah

Witness: W. M. CARR

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS COVERING
MANNER OF WAYBILLING, RULE FOR DETERMINING RATE
UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED, AND
WEIGHTS APPLICABLE ON SHIPMENTS OF ORE AND CONCENTRATES
DESTINED SMELTERS AT MIDVALE, UTAH**

Item 40 of Local Utah Freight Tariff No. 6-F, Agent F. W. McManus ICC 3:

Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value.

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such

mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

Item 115 of Local Utah Freight Tariff No. 6-F, Agent F. W. McManus' ICC 3:

The provisions of T.C.F.B. Tariff No. 58-D, Agent L. E. Kipp's I.C.C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)

Shipments of Ore and/or Ore Concentrates originating at points on the Union Pacific Railroad may be weighed at point of origin without extra charge.

Exception—Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges.

D&RGW Freight Traffic Dept.

May 19, 1944

1016

Exhibit No.

Ex Parte 164, Part II, Terminal
Services, Midvale, Utah

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS COVERING
MANNER OF WAYBILLING AND RULES FOR DETERMINING RATE
UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED ON
SHIPMENTS OF ORE AND CONCENTRATES DESTINED SMELTER
AT MIDVALE, UTAH**

Item 130 of D&RGW Freight Tariff No. 6000-F, ICC 641:

Ore and Concentrates, for which rates based on value per ton are published herein will be waybilled from point of origin at the rate applicable to Ore for \$100.00 per ton value. If no rate is published for Ore of \$100.00 per ton value, then at the highest rate per ton for which a rate is published.

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to

carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

D&RGW Freight Traffic Dept.

May 19, 1943

017

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Midvale, Utah

Witness: W. M. CAREY

STATEMENT SHOWING PRESENT TARIFF PROVISIONS OF RULES
GOVERNING THE WEIGHING OF CARLOAD FREIGHT AT STA-
TIONS ON THE D&RGW

Item 475 of Rio Grande Freight Tariff No. 6450-G, ICC
29:

All freight in carloads should be weighed. Track scales are placed at certain stations for that purpose. All cars will be weighed on nearest track scale to point of origin unless there is good and sufficient reason for weighing elsewhere.

All cars forwarded from track scale stations will be weighed at such stations, except as above.

Cars forwarded from stations where there are no track scales, and passing beyond that district will be weighed at the end of the district on which the forwarding station is located except where consigned to a track scale station, when the cars will be weighed at the station to which consigned.

Cars forwarded from one station to another in the same district, neither of which station has a track scale, will be weighed at the first track scale they pass.

Forwarding agents at non-track scale stations will enter upon way bills the estimated weights, and, for the information of conductors, will note on the face and back of the way-bill. In Ink, the station where the cars are to be weighed.

If, from any cause, a car is not weighed at a track scale station, as provided for herein, the agent at such station will state the cause, and note on way-bill that it must be weighed at the next track scale station, provided the destination of the car is beyond the next track scale.

Agents at intermediate stations, where cars in transit are weighed, will stamp the gross, tare and net weights on the way-bills, and agents at receiving stations will extend the charges on the weight thus shown.

Carload shipments originating at, and destined to, non-track scale stations, and which do not pass track scales enroute, should be carefully checked at destination and weight estimated as accurately as possible.

D&RGW Freight Traffic Dept.

May 19, 1944

1018

Exhibit No. 4

Assignment No. 1 United States Smelting, and Refining, and Mining Co. Page 1
Midvale, Utah.

Report of Observer C. B. Higgins at the Plant of the United States Smelting, Refining and Mining Company, Midvale, Utah. March 28, 1944. D&RGW Engine 58.

At this plant the D&RGW Railway furnishes the switch engine, and the Union Pacific Railway furnishes the switching crews.

The switching crew consisted of:

Conductor	U. W. Jaquays
Engineer	Frank Dillingham
Fireman	E. L. Anderson
Helper	J. O. Wall
Helper	C. W. Raymond

This switching crew's hours are 7:00 a. m. to 3:00 p. m. daily.

After receiving work instructions, Engine 58 went to the Roast Hole, picked up USSR Company (68), Roast, USSR 56, and USSR (69). Moved to scales weighed all 3 loads, then set out on trestle No. 3 at 7:50 a. m.

Then picked up on trestle No. 3

D&RGW 43325 ore to South yards track No. 6 at 8:00 a. m.

Picked up on trestle No. 3

UCR 20025 ore, south yards track No. 6 at 8:00 a. m.

Picked up trestle No. 3

USS Co. 50 empty

" " 57 empty

To Roast track at 8:10 a. m.

Picked up on trestle No. 2 the following car:

UP (63013) ore

set out to south yards track No. 6 8:00 a. m.

Picked up the following empties on trestle No. 3 and set out to Roast Track at 8:10 a. m.

USS Co. 58

" " (53)

" " 52

" " 65

The following empty was picked up on trestle No. 3 and set out to the D&RGW interchange at 8:02 a. m.

WP 5768

Then to trestle 5, and picked up 9 empties and 1 load as follows

D&RGW 45188 empty, to D&RGW interchange at 8:45 a. m.

" 40214 empty, to D&RGW interchange at 8:45 a. m.

" 70304 empty, to D&RGW interchange at 8:45 a. m.

" 70609 empty, to D&RGW interchange at 8:45 a. m.

1019 Assignment No. 1 Midvale, Utah Page 2

USS CO (207) empty, to Belt track at 8:30 a. m.

" " (210) empty, to Belt track at 8:30 a. m.

USS CO (202) empty, to Belt track at 8:30 a. m.

" " 200 empty, to Belt track at 8:30 a. m.

UP 32474 empty to UP Interchange at 8:47 a. m.

UCR 20178 ore, to south yards track No. 6 at 8:22 a. m.

Then went to track No. 7 at South Yards, picked up

SP 95050 concentrates, weighed & set to Bucking Room Track 4 at 9:05 a. m.

Then to trestle No. 1, and picked up the following 7 empties and set to track No. 5:

UCR (21125) USS CO 8

UP 63794 PRR 93534

DRGW 70333

UP 64951

USS CO 12

Then went to Sand Hole and picked up 2 loads, weighed both and set to trestle No. 1

D&RGW 40229

D&RGW 71391

Engine then went to track No. 1 east yards, picked up 1 load of ore, weighed same and set to trestle No. 1

D&RGW 42492

Then proceeded to Wedge Roast track, and picked up 1 load at Wedge Roast, weighed, and set to Trestle No. 1.
USS CO (2)

Then moved to Arsenic Hole, shoved 2 empties, about 5 car lengths, one to spot, and pulled the other back about 3 car lengths.

UP (92021) set to spot

UP (92003) pulled back about 3 car lengths

(Notation) (This move was requested by Arsenic plant foreman at 10:05 a. m.)

(These empties were spotted above and overhead bridge and usually are dropped down by the USS CO employees to spot. Today the crew was working, beside this track, and the Foreman requested that they do this work.)

Then to South yards to track No. 3, and picked up 1 load of ore, weighed same, and set to trestle No. 1.

UCR 21566

Then to track 2, picked up 1 car lime rock, weighed, and set to trestle No. 1

WP 4473

Engine 58 delayed 10:25 a. m., until 11:05 a. m. account dropping a brake rigging on engine tender.

1020 Assignment No. 1 Midvale, Utah Page 3

These last 2 cars were finally spotted to Trestle No. 1 at 11:25 a. m.

Engine 58 then went to Bucking Room Track No. 4, picked up SP 95050, concentrates, and set to Trestle No. 1 at 11:40 a. m. Account of being frozen and was necessary to thaw concentrates before unloading.

DRGW road crew blocked engine 58 until 12:10 p. m., then went to lunch.

Returned to work at 12:30 p. m. went to Roast Hole, picked up:

ASS CO (51) Roast, weighed same, and set to trestle No. 3 at 1:45 p. m.

Then picked up on trestle No. 3, 4 empties as follows

ASS CO (69) empty, set to Roast Hole at 2:00 p. m.

" " 56 empty, set to Roast Hole at 2:00 p. m.

" " (68) empty, set to Roast Hole at 2:00 p. m.

Then to South Yards, and picked up from track No. 4
UP 62471 coke, to trestle No. 3 at 1:45 p. m.

Picked up from South Yards track No. 2

WP 5924, lime rock, weighed, to trestle No. 3 at 1:45 p. m.

Then to track No. 6, picked up:

USS CO 205 concentrates, set to Trestle No. 3 at 1:45 p. m.

" " 208 concentrates, set to Trestle No. 3 at 1:45 p. m.

" " 201 concentrates, set to Trestle No. 3 at 1:45 p. m.

" " 203 concentrates, set to Trestle No. 3 at 1:45 p. m.

WP 5351 special concentrates, to trestle No. 2 at 1:52
p. m.

Crew tied up at 3:00 p. m.

1021 Assignment No. 1

Page 4

Report of Observer C. B. Higgins at the Plant of
the United States Smelting, Refining and Mining
Company, Midvale, Utah. March 29, 1944. D&RGW Engine
58

The switching crew consisted of

Conductor U. W. Jaquays

Engineer Frank Dillingham

Fireman C. W. Proctor

Helper J. O. Wall

" C. W. Raymond

Called at 7:00 a. m.

7:25 a. m. lite to Trestle No. 3, and picked up:

UP 63794 ore to South yards track 4 7:45 a. m.

D&RGW 70333 ore to south yards track 4 at 7:45 a. m.

Then to track 5, picked up:

USS CO (51) empty, to Roast Track at 8:35 a. m.

UCR 21978 ore to South yards track 4 at 7:45 a. m.

USS CO 208 empty, to belt track 7:50 a. m.

" " 205 empty, to belt track 7:50 a. m.

" " 203 empty, to belt track 7:50 a. m.

" " 201 empty, to belt track 7:50 a. m.

SP 95050 concentrates, to South yards track 4 7:45
a. m.

USS CO 59 empty to Roast track 8:35 a. m.

" " 66 empty to Roast track 8:35 a. m.

Then to track 5 and picked up the following:

D&RGW 41306 ore to south yards track 4 7:45 a. m.

UCR 21079 ore to south yards track 4 7:43 a. m.

Then to trestle No. 3, picked up as follows:

USS CO 56 empty, to Roast track 8:35 a. m.

USS CO 50 empty, to Roast track 8:35 a. m.
 " " 57 empty, to Roast track 8:35 a. m.
 WP 5924 empty, to D&RGW Interchange track at
 8:22 a. m.
 UP 62471 empty, to UP interchange track at 8:25 a. m.

Then to Roast track and picked up

USS CO (68) Roast, weighed and set out to trestle No. 3
 at 8:55 a. m.
 USS CO (53) Roast, weighed and set out to trestle No. 3
 at 8:55 a. m.

Then to Trestle No. 1, and picked up the following:

D&RGW 45419 empty, weighed and set to D&RGW inter-
 change track at 9:13 a. m.

UCR 20273 empty, weighed and set to Trestle No. 2
 9:30 a. m.

UCR 20270 empty, weighed and set to Trestle No. 2
 9:30 a. m.

D&RGW 40419 empty, weighed and set to Trestle No. 2
 9:30 a. m.

WP 4482 empty, weighed and set to Trestle No. 2
 9:30 a. m.

D&RGW 40854 empty, weighed and set to Trestle No. 2
 9:30 a. m.

UP 64241 empty, weighed and set to Trestle No. 2
 9:30 a. m.

UCR (20612) empty, not weighed, set to Trestle No. 2
 9:30 a. m.

1022 Assignment No. 1

Page 5

Then picked up on Trestle No. 2

UP 64887 ore, South Yards set on Track No. 7

Picked up on Trestle No. 3

USS CO (68) empty, to Roast Track at 10:18 a. m.

" " (53) empty, to Roast Track at 10:18 a. m.

Then to Sand Track, and picked up the following:

WP 4473 empty, to D&RGW Interchange track 9:50
 a. m.

USS CO (2) empty, to House track at 9:53 a. m.

UCR 21741 empty, to UP interchange track 9:54 a. m.

Then back to Sand Track and picked up

D&RGW (71530) sand, weighed, set to Trestle No. 1 at
 11:15 a. m.

PU 62077 sand, weighed set to Trestle No. 1 at
 11:15 a. m.

UCR (20812) sand, weighed, set to Trestle No. 1 at
 11:15 a. m.

Then to UP Yards track 4, and picked up

UCR (21522) ore, weighed, to trestle No. 1 at 11:15 a. m.

UP (88706) ore, weighed, to trestle No. 1 at 11:15 a. m.

Picked up from UP Yards track No. 3

UP (62459) ore, weighed, to trestle No. 1 at 11:15 a. m.

UP (64118) ore, weighed, to trestle No. 1 at 11:15 a. m.

Then to South Yards Track No. 5, picked up

(ATSF 175069) ore, weighed, to trestle No. 1 at 11:15 a. m.

Then to track No. 4 South Yards, picked up

D&RGW 43349 ore, weighed, to trestle No. 1 at 11:15 a. m.

Lunch from 12:10 to 12:30 p. m.

Then to Roast Track, picked up

USS CO 58 Roast, weighed, set to Trestle No. 3 12:55 p. m.

" " 52 Roast, weighed, set to Trestle No. 3 12:55 p. m.

Then to South Yards track No. 7, picked up

D&RGW 70611 coke, set trestle No. 3 at 12:55 p. m.

" 71552 coke, set to Trestle No. 3 at 12:55 p. m.

Then to track No. 5 South Yards and picked up

USS CO (202) concentrates, set to Trestle No. 3 12:55 p. m.

" " 200 concentrates, set to Trestle No. 3 12:55 p. m.

" " (210) concentrates, set to Trestle No. 3 12:55 p. m.

" " (207) concentrates, set to Trestle No. 3 12:55 p. m.

Then to trestle No. 2, and picked up

UP 63687 ore, set to track No. 4 at 1:00 p. m.

Tied up at 3:00 p. m.

The USS R&M COMPANY have 3 cranes which handle loads and empties on any track in the yards, whenever necessary. There was several delays in switching due to a crane removing timbers from a newly constructed bridge over the public highway.

1023 Assignment No. 1

Page 6

Report of Observer C. B. Higgins at the Plant of the United States Smelting, Refining and Mining Company, Midvale, Utah. March 30, 1944. D&RGW Engine 58

Same engine crew and same switching crew as of March 29, 1944.

Crew called at 7:00 a. m. life to trestle No. 3, and picked up

D&RGW 40423 empty, to south yards track 3 7:44 a. m.

" 40419 ore, to south yards track 6 7:43 a. m.

UP 62077 empty, to Belt line 7:42 a. m.
 D&RGW 43349 ore, to south yards track 6 at 7:40 a. m.
 UCR 20515 ore, to south yards track 6 at 7:40 a. m.

Then to track 5, and picked up

D&RGW 40854 ore, to south yards track 6 7:40 a. m.
 WP 4482 ore, to south yards track 6 7:40 a. m.
 USS CO 58 empty, to Roast Track 8:30 a. m.
 " " 52 empty, to Roast Track 8:30 a. m.

Then to Trestle No. 3, and picked up:

USS CO 65 empty to Roast Track 8:30 a. m.
 " " 59 empty to Roast Track 8:30 a. m.
 " " (51) empty to Roast Track 8:30 a. m.
 DRGW 70611 empty to D&RGW interchange 8:25 a. m.
 " 71552 empty to D&RGW interchange 8:25 a. m.

Then to Roast Track and picked up

USS CO 56 Roast, weighed, and set to Trestle 3, 8:50 a. m.
 UUS CO 50 Roast, weighed, and set to Trestle 3, 8:50 a. m.
 " " 57 Roast, weighed, and set to Trestle 3, 8:50 a. m.

Then to sand Hole track and picked up

D&RGW 70056 sand weighed and set to trestle No. 1 at
 10:12 a. m.
 UCR (21125) sand, weighed and set to trestle No. 1 at
 10:12 a. m.

Then to south yards and picked up on track No. 3

WP (5933) lime rock, weighed and set to trestle No. 1 at
 10:12 a. m.

Then to south yards track 6 and picked up:

CP 375051 concentrates, weighed, and set to Bucking Room
 track 9:55 a. m.

Then to trestle No. 1 and picked up:

D&RGW 41579 coke breeze, to UP yards set to track 3 at
 11:10 a. m.
 UCR (20812) empty, set to sand hole track at 10:32 a. m.
 UP (88706) empty, weighed and set to UP interchange
 at 10:30 a. m.
 UCR (21522) empty, weighed and set to UP interchange
 at 10:30 a. m.
 UP (62255) empty, weighed and set to trestle No. 2 at
 10:45 a. m.
 WP 5511 empty, weighed and set to trestle No. 2 at
 10:45 a. m.
 UCR 20352 empty, weighed and set to trestle No. 2 at
 10:45 a. m.

UCR 21613 empty, weighed and set to trestle No. 2 at 10:45 a. m.

Then picked up on trestle No. 2

D&RGW 40229 ore, to UP yards track 2 at 11:10 a. m.

Then to track 5 and picked up

D&RGW 71718 ore, weighed, set to Shears track in Orchard 12:50 p. m.

1024 Assignment No. 1

Page 7

Then to arsenic Hole, and picked up

UP (92021) arsenic, weighed and set to UP interchange at 1:03 p. m.

Then to Roast track, and picked up

USS CO (68) Roast, Weighed, set to trestle No. 3 at 1:00 p. m.

" " (69) Roast, weighed, set to trestle No. 3 at 1:00 p. m.

Then picked up on Trestle No. 3

UP (63682) concentrates, for Track 5, but set out on Roast Hole account of Track No. 5 blocked by a USS CO crane working on track 5 at 1:05 p. m.

USS CO 56 empty, set to Roast track at 1:05 p. m.

" " 50 empty, set to Roast track at 1:05 p. m.

" " 57 empty, set to Roast track at 1:05 p. m.

Then to south yards track 5, and picked up

USS CO 201 concentrates, set to Trestle No. 3 at 1:00 p. m.

" " 203 concentrates, set to Trestle No. 3 at 1:00 p. m.

" " 205 concentrates, set to Trestle No. 3 at 1:00 p. m.

" " 208 concentrates, set to Trestle No. 3 at 1:00 p. m.

Before setting these last 4 loads to trestle No. 3, it was necessary to pick up UCR 20270, ore, that had been dropped down on Trestle No. 3 from trestle No. 2, and shoved this car back on trestle No. 3, because it blocked the Frog and fouled trestle No. 3.

Crew tied up at 3:00 p. m.

There was several interruptions today by company crane working and cleaning up debris from a newly constructed bridge over the public highway.

There are several track in these yards on an incline, and the empties and loads are shoved above the unloading bins, and later dropped down by gravity by the company employees.

There is one overhead bridge which has to be moved when cars are handled on this track. This bridge is operated automatically by an electric motor, and controlled by a derail. When the derail is closed the overhead bridge opens, and when the derail is open the overhead bridge closes. The only delay to car movements is the opening and closing of this derail.

There is another overhead bridge leading to the Arsenic Hole which has to be operated manually by USS CO employees. A delay of 3 minutes was encountered today waiting for company employees to raise this overhead bridge.

1025 Assignment No. 1 Midvale, Utah Page 8
Report of Observer C. B. Higgins at the United States Smelting Refining and Mining Company, Midvale Plant, Midvale, Utah. March 31, 1944. 7:00 a. m. Engine No. 58 D&RGW

Conductor U. W. Jaquays
ENGINEER Frank Dillingham
Fireman C. W. Proctor
Helper J. O. Wall
" H. D. Taylor

Crew called for 7:00 a. m. Went lite to Trestle No. 2, and picked up

UP (62255) ore, to south yards track 5 at 7:45 a. m.

WP 5511 ore, to south yards track 5 at 7:45 a. m.

Then to Track 5, and picked up

DRGW 43325 empty, to south yards track 4 7:46 a. m.

USS CO 203 empty, to Belt Track 7:50 a. m.

" " 201 empty, to Belt Track 7:50 a. m.

" " 208 empty to Belt Track 7:50 a. m.

" " 205 empty, to Belt Track 7:50 a. m.

Then to trestle No. 3 and picked up

USS CO 58 empty, to Roast Track 8:46 a. m.

" " 52 empty, to Roast Track 8:46 a. m.

" " (53) empty, to Roast Track 8:46 a. m.

" " 66 empty, to Roast Track 8:46 a. m.

UCR 20273 ore, to UP Yards track 4 8:25 a. m.

UCR 20270 ore, to UP Yards track 4 8:25 a. m.

Blocked by D&RGW Switch Engine 62 until 8:40 a. m.

Then to Roast Track and picked up

USS CO 56 Roast, weighed, set to Trestle No. 3 9:05 a. m.

" " 50 Roast, weighed, set to Trestle No. 3 9:05 a. m.

USS CO 57- Roast, weighed, set to Trestle No. 3 9:05 a. m.
 " " 65 Roast, weighed, set to Trestle No. 3 9:05 a. m.

Then to Sand Hole track and picked up

UCR 20178 sand, weighed, set to sand stock track 11:10
 a. m.

UCR (20812) sand, weighed, set to sand stock track 11:10
 a. m.

UP (63013) sand, weighed, set to sand stock track 11:10
 a. m.

UP 64826 sand, weighed, set to Trestle No. 1 10:42
 a. m.

Then to south yards and picked up on Track 5

DRGW 40116 ore, weighed, set to Trestle No. 1 at 10:42
 a. m.

Then to track No. 2, and picked up

DRGW (40320) ore, weighed, set to Trestle No. 1 at 10:42
 a. m.

Then to track 7 and picked up

UP (63142) ore, weighed, set to Trestle No. 1 at 10:42
 a. m.

UP 64485 ore, weighed, set to Trestle No. 1 at 10:42
 a. m.

DRGW 42322 ore, weighed, set to Trestle No. 1 at 10:42
 a. m.

1026 Assignment No. 1 Midvale, Utah

Page 9

Then picked up on trestle No. 1

UP 63856 empty, not weighed, set to trestle 2 11:25
 a. m.

DRGW 40802 mty, weighed, set to Trestle No. 2 at 11:25
 a. m.

DRGW 70076 mty, weighed, set to Trestle No. 2 at 11:25
 a. m.

SLU (1102) mty, weighed, set to Trestle No. 2 at 11:25
 a. m.

WP 5855 mty, weighed, set to Trestle No. 2 at 11:25
 a. m.

Then picked up on Trestle No. 2

UCR 20352 ore, to south yards track No. 2 at 12:50 p. m.

Then to trestle No. 3 and picked up

USS CO 65 mty, to Roast Track at 12:20 p. m.

" " 56 mty, to Roast Track at 12:20 p. m.

" " 50 mty, to Roast Track at 12:20 p. m.

" " 57 mty, to Roast Track at 12:20 p. m.

Then to Lunch.

After lunch picked up on Roast track

USS CO 59 Roast, weighed, set to trestle No. 3 at 1:05 p. m.

Then to South Yards picked up on track 2

DRGW (71058) coke, to trestle No. 3 1:05 p. m.

DRGW 71197 coke, to trestle No. 3 1:05 p. m.

Then to track 7 Sth Yd and picked up

UP 32682 coke breeze, set to trestle No. 3 at 1:05 p. m.

USS CO (207) concentrates, to trestle No. 3 at 1:05 p. m.

" " 200 concentrates, to trestle No. 3 at 1:05 p. m.

" " (202) concentrates, to trestle No. 3 at 1:05 p. m.

" " (210) concentrates, to trestle No. 3 at 1:05 p. m.

Tied up at 3:00 p. m.

Ore from Lark, Utah, mines moves direct from interchange to Flotation Mills. Ore from the USSR&M Company mines goes direct from Interchange to Flotation Mills. Ore from USSR&M CO. from "M-P" mines, sample on trestle No. 1, and reloaded into another car on Trestle No. 2. Ore from Montana-Bingham is handled the same way. Ore from the Newpark mines goes direct from interchange to Flotation Mills. All custom ores goes from interchange to trestle No. 1 is sampled and reloaded into another car on trestle No. 2. There is some ore that is sampled at Murray, Utah, by the Utah Ore Sampling Mill that goes to Trestle No. 1 to be fine rolled, then is handled direct to Ore Bins and does not transfer into other cars. Ore from the USSR&M Company Hidden Treasure Mine is sampled and fine rolled at same time and does not transfer into other cars. Form UNL No. 10 is a sample and hold ore shipments form. Sometimes this ore after being transfered and assayed comes back to Trestle No. 1, or is sent to the Flotation Mills. If the assay does not meet certain requirements the ore is shipped to some other smelter.

1027

Exhibit No. 5

Assignment No. 2 Midvale Utah

Page 1

Report of Observer Coleman Richardson at the plant of the United States Smelting, Refining and Mining Company. Midvale, Utah. March 28, 1944. D&RGW Engine 62.

Switching is done by Union Pacific Railroad crews using Rio Grande Engine. D&RGW Engine 62.

Crew reported for work at 8:00 a. m. March 28, 1944.

Crew as follows:

Foreman R. M. Smith
 Engineer L. L. Peterson
 Switchman J. F. Jones
 Switchman C. H. Schicketanz
 Fireman R. R. Sanders

At 8:25 a. m. Pulled from Track 2 UP Delivery Yard as follows:

PRR 66038	box mty, left on track 3 south yard 9:20 a. m.
UCR 21566	gon Ld ore, left on track 3 south yard 9:20 a. m.
SP 94935	gon Ld ore, left on track 3 south yard 9:20 a. m.
UCR 21150	gon Ld ore, left on East shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
" 21703	gon Ld ore, left on East shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
" 21698	gon Ld ore, left on East shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
(" 21957)	gon Ld ore, left on East shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
" 20751	gon Ld ore, left on track No. 3 at 9:13 a. m. South Yard
" 20537	gon Ld ore, Left on East Shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
UP 64318	gon Ld ore, Left on East Shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
UCR 21280	gon Ld ore, Left on East Shed of Old Thaw Shed 9:19 a. m. Sth. Yd.
" 21938	gon Ld ore, left on Track No. 3 at 9:11 a. m. South Yard
" 21111	gon Ld ore, left on Track No. 3 at 9:11 a. m. South Yard
" 20293	gon Ld ore, left on Track No. 3 at 9:11 a. m. South Yard

Pulled down to scales at 8:55 a. m., and weighed the following:

Cars	Load ore.	Weighed
UCR 21280	Load ore.	8:58 a. m.
UP 64318	Load ore.	9:00 a. m.
UCR 20537	Load ore.	9:02 a. m.

(UCR 21957) Load ore, 9:03 a. m.

" 21689 Load ore, 9:05 a. m.

" 21703 Load ore, 9:06 a. m.

" 21150 Load ore, 9:07 a. m.

8:42 a. m. to 8:45 a. m. waiting for crew on 58 to clear Scale Track 3 minutes.

At 9:23 a. m. crew went to Shear Track in the orchard, and pulled UCR 21194, load ore, to scales & weighed at 9:41 a. m. & left on track 6 South Yard 9:50 a. m.

At 9:30 a. m. Pulled from West track Old Thaw Shed to scales & weighed the following cars:

UP 63649 gon Load ore, weighed 9:35 a. m. left on Tk No. 6 South Yd. 9:50 a. m.

" 62322 gon Load ore, weighed 9:37 a. m. left on Tk No. 6 South Yd. 9:50 a. m.

" 62259 gon Load ore, weighed 9:38 a. m. left on Tk No. 6 South Yd. 9:50 a. m.

" 63180 gon Load ore, weighed 9:40 a. m. left on Tk No. 6 South Yd. 9:50 a. m.

1028 Assignment No. 2

Page 2

At 9:52 a. m. Pulled the following cars from Middle Track of New Mill, lined them up and weighed same on scales for P. M. Belt Track setting.

(USSC 207) gon emty, weighed 10:07 a. m. Reset on Middle track New Mill 10:15 a. m.

(USSC 210) gon emty, weighed 10:06 a. m. Reset on Middle Track New Mill 10:15 a. m.

UP 63739 gon emty, not weighed, Reset on Middle Track New Mill 10:15 a. m.

UP 62649 gon emty, weighed 10:08 a. m. Reset on Middle Track New Mill 10:15 a. m.

(UCR 21544) gon emty, not weighed, Reset on Middle Track New Mill 10:15 a. m.

USSC 200 gon emty, weighed 10:09 a. m. Reset on Middle Track New Mill 10:15 a. m.

(USSC 202) gon emty, weighed 10:10 a. m. Reset on Middle Track New Mill 10:15 a. m.

UCR 21659 gon emty, weighed 10:11 a. m. Reset on Middle Track New Mill 10:15 a. m.

UCR 21955 gon emty, not weighed. Held onto and left on Middle Track New Mill 10:15 a. m.

UCR 21254 gon emty, not weighed. Held onto and left on Middle Track New Mill 10:15 a. m.

At 10:20 a. m. started to pull from Belt Track South Yard, then, due to delay of engine 58, at 11:50 a. m. returned to Belt track and pulled the following to the scales and weighed:

Cars	Weighted
SP 92603 gon Load ore,	12:11 p. m. Delivered to UP. Later left in south yard 12:15 p. m.
UCR 20290 gon Load ore,	12:10 p. m. delivered to UP. Later left in south yard 12:15 p. m.
UP 87030 gon Load ore,	12:09 p. m. delivered to UP. Later left in south yard 12:15 p. m.
WP 5351 gon Load ore,	12:08 p. m. set to track 6 South Yard 12:25 p. m.
(UCR 20426) gon Load ore,	12:07 p. m. Reset to Belt Track New Mill lite load 12:35 p. m.
USSC 201 gon Load ore,	12:06 p. m. Set to track 6 south yard 12:25 p. m.
" 203 gon Load ore,	12:05 p. m. Set to track 6 south yard 12:25 p. m.
UP 63035 gon Load ore,	12:04 p. m. Set to track 6 south yard 12:25 p. m.
UP 86197 gon Load ore,	12:03 p. m. Delivered to UP. Later left in south yard 12:15 p. m.
UP 62061 gon Load ore,	12:02 p. m. Delivered to UP. Later left in south yard 12:15 p. m.
UCR 21987 gon Load ore,	12:00 noon Delivered to UP. Later left in south yard 12:15 p. m.
UCR 20515 gon Load ore,	11:59 a. m. Set to track 6 south yard 12:25 p. m.
(UP 87178) gon Load ore,	11:58 a. m. Reset to Belt Track New Mill lite load. Left on Middle Trk 12:30 p. m.

UCR 21989 gon Load ore, 11:57 a. m. Reset to Belt Track New Mill lite load. Left on Middle Trk 12:30 p. m.

USS CO 205 gon Load ore, 11:55 a. m. Set to track 6 south yard 12:25 p. m.

USS CO 208 gon Load ore, 11:54 a. m. Set to track 6 south yard 12:25 p. m.

1029 Assignment No. 2

Page 3

10:30 a. m. to 11:10 a. m., delayed 40 minutes waiting for engine 58 crew to clear scales tracks and South Yard.

11:10 a. m. cut loose from above cut of cars on Belt Track and went to High line track New Mill and pulled the following empty cars to scales 11:18 a. m., but not weighed until we reset high line with loads: The following cars were set on Track 5 south yard for D&RGW to pull out of plant after weighing:

		Weighted	
D&RGW 41307	gon empty	11:45 a. m.	Del'd to DRGW 11:48 a. m.
D&RGW 40816	gon empty	11:44 a. m.	Del'd to DRGW 11:48 a. m.
DSL 34138	gon empty	11:44 a. m.	Del'd to DRGW 11:48 a. m.
D&RGW 40174	gon empty	11:43 a. m.	Del'd to DRGW 11:48 a. m.
" 40257	gon empty	11:42 a. m.	Del'd to DRGW 11:48 a. m.
" 41722	gon empty	11:41 a. m.	Del'd to DRGW 11:48 a. m.

All delivered to D&RGW at 11:48 a. m.

DRGW 41933 gon empty, weighed 11:40 a. m. Del'd to DRGW 11:48 a. m.

" 42493 gon empty, weighed 11:45 a. m. Del'd to DRGW 11:48 a. m.

" 40468 gon empty, weighed 11:46 a. m. Del'd to DRGW 11:48 a. m.

All of above listed 3 D&RGW cars were set on Track 5 South Yard for D&RGW to pull from plant and delivered to D&RGW at 11:48 a. m.

At 11:20 a. m., from track 6 pulled the following cars of ore to High Line Track of New Mill

UCR 21194 gon Ld ore, set on high line track 11:27 a. m.
New Mill

UP 63649 gon Ld ore, set on high line track 11:27 a. m.
New Mill

UP 63180 gon Ld ore, set on high line track 11:27 a. m.
New Mill

UP 62322 gon Ld ore, set on high line track 11:27 a. m.
New Mill

UP 62259 gon Ld ore, set on high line track 11:27 a. m.
New Mill

East Shed Trk Old Thaw House

At 11:30 a. m. pulled from ~~Old Thaw East Shed House track~~ the following cars of ore to High Line track New Mill:

UCR 21150 gon Ld ore, set on High line track 11:35 a. m.
of New Mill

UCR 21703 gon Ld ore, set on High line track 11:35 a. m.
of New Mill

UCR 21689 gon Ld ore, set on High line track 11:35 a. m.
of New Mill

At 12:30 p. m. pulled from track 2 South Yard. Set to Belt track New Mill for outbound loading:

UP 86672 empty gon 12:35 p. m.

UP 87952 empty gon 12:35 p. m.

12:40 p. m. Tied up for lunch to 1:40 p. m. on Belt Track.

1:40 p. m. pulled (UCR 20426), load ore, from Belt Track New Mill to scales at 1:42 p. m., weighed at 2:16 p. m. Delivered to the UP Later.

1:45 p. m. engine went lite to High Line track New Mill and pulled 4 empty cars to scales:

UCR 21150 empty gon, weighed 2:20 p. m. delivered to UP Later.

" 21703 empty gon, weighed 2:19 p. m. delivered to UP Later.

" 21689 empty gon, weighed 2:18 p. m. delivered to UP Later.

" 21194 empty gon, weighed 2:17 p. m. delivered to UP Later.

1030 Assignment No. 2

Page 4

1:50 p. m. went lite to East Shed Old Thaw House and pulled the following loads of ore and set same to High Line New Mill for unloading:

(UCR 21957) gon Load ore, set on High Line 2:00 p. m.
 UCR 20537 gon Load ore, set on High Line 2:00 p. m.
 UP 64318 gon Load ore, set on High Line 2:00 p. m.
 UCR 21280 gon Load ore, set on High Line 2:00 p. m.

2:05 p. m. went lite to Middle Track South Yard and pulled to and set on Belt Track New Mill

UCR 21254 mty gon, set on Belt track New Mill for lding 2:12 p. m.
 UCR 21955 mty gon, set on Belt track New Mill for lding 2:12 p. m.
 (UP 87178) part load, reset for more ore to be added on Belt Track New Mill 2:12 p. m.
 UCR 21989 part load, reset for more ore to be added on Belt Track New Mill 2:12 p. m.
 UCR 21659 mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 (USS CO 202) mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 " " 200 mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 (UCR 21544) mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 UP 62649 mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 UP 63739 mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 (USS CO 207) mty gon, set on Belt Track New Mill for loading 2:12 p. m.
 (" " 210) mty gon, set on Belt Track New Mill for loading 2:12 p. m.

2:20 p. m. Left scales with cut for UP and arrived at UP delivery track 2:30 p. m. with following cars:

SP 92603 gon Load ore, delivered UP 2:30 p. m.
 UCR 20290 gon Load ore, delivered UP 2:30 p. m.
 UP 87030 gon Load ore, delivered UP 2:30 p. m.
 (UCR 20426) gon Load ore, delivered UP 2:30 p. m.
 UP 86197 gon Load ore, delivered UP 2:30 p. m.
 UP 62061 gon Load ore, delivered UP 2:30 p. m.
 UCR 21987 gon Load ore, delivered UP 2:30 p. m.
 UCR 21150 gon mty, delivered UP 2:30 p. m.
 UCR 21703 gon mty, delivered UP 2:30 p. m.
 UCR 21689 gon mty, delivered UP 2:30 p. m.
 UCR 21194 gon mty, delivered UP 2:30 p. m.

Tied up at 2:45 p. m.

1031 Assignment No. 2

Page 5

Report of Observer Coleman Richardson at the plant of the United States Smelting, Refining and Mining Company, Midvale, Utah. March 29, 1944.

At 8:00 a. m., started to work with same engine and crew as on March 28, 1944.

8:15 a. m., pulled from UP Receiving Yard Track 1 to South Yard, 8:30 a. m.

PRR 565212 box mty, not weighed, Set on track 6 south yard 9:00 a. m.

NYC 117676 box mty, not weighed, Set on track 6 south yard 9:00 a. m.

UCR 21795 gon Load ore, not weighed, Set on track 6 south yard 9:00 a. m.

UCR 21310 gon Load ore, not weighed, Set on track 6 south yard 9:00 a. m.

DRGW 71751 gon Load ore, weighed 8:44 a. m. set on track 2 south yard 9:35 a. m.

DRGW 71347 gon Load ore, weighed 8:43 a. m. set on belt track 8:50 a. m.

" 41982 gon Load ore, not weighed, set on track 6 south yard 9:00 a. m.

UCR 21054 gon Load ore, weighed 8:42 a. m. set on Belt Track south yard 8:50 a. m.

(UCR 21915) gon Load ore, weighed 8:41 a. m. set on Belt Track south yard 8:50 a. m.

UCR 21003 gon Load ore, weighed 8:40 a. m. set on Belt Track south yard 8:50 a. m.

UCR 21910 gon Load ore, not weighed, set on track 6 south yard 9:00 a. m.

DRGW 41781 gon Load ore, not weighed, set on track 6 south yard 9:00 a. m.

PRR 76407 box mty, not weighed, set on track 4 south yard 8:50 a. m.

9:01 a. m. Engine went lite to West Track Old Thaw Shed and pulled and weighed the following:

CP 375051 gon Load ore, not weighed, set on track 6 south yard 9:05 a. m.

(UP 63401) gon Load ore, weighed, 9:28 a. m., set on track 2 south yard 9:35 a. m.

UP 63540 gon Load ore, weighed, 9:29 a. m., set on track 2 south yard 9:35 a. m.

9:10 a. m. engine went lite to Track 2 South Yard and pulled and switched out and lined up and went to scales.

SP 94935 gon Load ore, not weighed, set on Track 2 south yard 9:35 a. m.
 DRGW 42425 gon Load ore, weighed 9:30 a. m., set on Track 2 south yard 9:35 a. m.
 UP 63295 gon Load ore, not weighed, set on Track 2 south yard 9:35 a. m.
 UCR 20293 gon Load ore, weighed, 9:31 a. m. set on Track 2 south yard 9:35 a. m.
 UCR 20751 gon Load ore, weighed, 9:32 a. m. set on track 2 south yard 9:35 a. m.

9:15 a. m. pulled from Track 2 and set to Track 6 the following cars:

UP 87592 gon empty, 9:20 a. m.

UP 87584 gon empty, 9:20 a. m.

9:40 a. m. engine went lite to High line New Mill and pulled to scales

D&RGW mty gon, 41822 weighed 9:55 a. m., set to track 6 south yard 10:03 a. m.

D&RGW mty gon, 42078 weighed 9:54 a. m., set to track 6 south yard 10:00 a. m.

1032 Assignment No. 2

Page 6

DRGW 41048 mty gon, weighed at 9:53 a. m., set on DR&GW Delivery Transfer track 10:00 a. m.

DRGW 43068 mty gon weighed at 9:52 a. m., set on DRGW Delivery Transfer track 10:00 a. m.

DRGW 40546 mty gon weighed at 9:51 a. m., set on DRGW Delivery Transfer track 10:00 a. m.

DRGW 43293 mty gon weighed at 9:50 a. m., set on DRGW Delivery Transfer track 10:00 a. m.

10:05 a. m. engine went lite to Belt Track, pulled and set to High line New Mill for unloading.

UCR 21003 gon ore, 10:10 a. m., set on high line track New Mill

(" 21915) gon ore, 10:10 a. m., set on high line track New Mill

" 21054 gon ore, 10:10 a. m., set on high line track New Mill

DRGW 71347 gon ore, 10:10 a. m., set on high line track New Mill

10:12 engine lite, returned to Belt and made up Belt setting as follows: Pulled from Belt track to scales.

USS CO 201 mty gon, weighed 10:30 a. m.

" " 203 mty gon, weighed 10:31 a. m.

" " 205 mty gon, weighed 10:34 a. m.

" " 208 mty gon, weighed 10:33 a. m.

10:15 a.m. pulled from Middle track to scales:

UCR 21138 empty gon, not weighed.
 (UCR 21957) empty gon, not weighed
 UCR 20537 empty gon, left on scales
 UP 64318 empty gon, left on scales
 UCR 21280 empty gon, not weighed

10:20 a.m. pulled from Middle Track to Scales

UP 62322 empty gon, left on scales
 UP 62259 empty gon, not weighed
 UP 63649 empty gon, not weighed

10:25 a.m. Pulled from track 6 Sth. Yd. to scales:

DRGW 41822 mty gon, weighed 10:32 a.m.
 " 42078 mty gon, not weighed
 UP 87584 mty gon, not weighed

Pulled from Scales Track at 10:35 a.m. Belt Setting set to Middle track south yard 10:40 a.m.

UCR 21138 mty gon
 (UCR 21957) mty gon

DRGW 42078 mty gon

UP 87584 mty gon

UP 62259 mty gon

USSCO 205 mty gon

" 208 mty gon

UCR 21280 mty gon. (This car found to be bad order & pulled from setting)

DRGW 41822 mty gon

UP 63649 mty gon

USSCO 201 mty gon

" 203 mty gon

1033 Assignment No. 2

Page 7

10:45 a.m. from Belt track New Mill pulled to scales and weighed.

UCR 21254 load ore, weighed 11:23 a.m., Reset to Belt lite load set on Middle track 11:38 a.m. Left on Middle track

UCR 21955 load ore, weighed 11:22 a.m., Delivered to UP later

(UP 87178) load ore, weighed 11:21 a.m., Delivered to UP later

UCR 21989 load ore, weighed 11:20 a.m., Delivered to UP later

UCR 21659 load ore, weighed 11:19 a.m., set to track 5 South yard 11:30 a.m.

(USSC 202) load ore, weighed 11:18 a.m., set to track 5 south yard 11:30 a.m.

USSC 200 load ore, weighed 11:17 a. m., set to track 5 south yard 11:30 a. m.
 UP 87952 load ore, weighed 11:16 a. m., Delivered to UP later
 UP 63180 load ore, weighed 11:15 a. m., Reset to Belt Track life load 11:40 a. m.
 (UCR 21544) load ore, weighed 11:14 a. m., delivered to UP later
 UP 62649 load ore, weighed 11:13 a. m., set to track 5 south yard 11:30 a. m.
 UP 63739 load ore, weighed 11:11 a. m., delivered to UP later
 (USS CO 207) load ore, weighed 11:10 a. m., set to track 5 south yard 11:30 a. m.
 (USS CO 210) load ore, weighed 11:09 a. m., set to track 5 south yard 11:30 a. m.
 UP 86672 load ore, weighed 11:08 a. m., delivered to UP later.

10:50 a. m. to 11:05 a. m., waiting for engine crew 58 to clear south yard.

11:35 a. m.

UP 87592 empty gon, from track 6 to Belt Track New Mill for loading 11:40 a. m.

11:38 a. m.

UCR 21138 empty gon, from Middle track to Belt track New Mill for loading 11:40 a. m.

11:45 a. m. crew tied up for lunch to 12:25 p. m.

12:30 p. m. pulled from Belt track New Mill loads as follows:

UP 63180 gon Ld ore, to scales 12:35 p. m., weighed 1:11 p. m. delivered to UP later

UCR 21138 gon ore to Middle track 12:35 p. m., and reset later on Belt track for disposition

12:40 p. m. lite engine went to High Line New Mill and pulled empties at 12:45 p. m. to scales.

DRGW 71347 mty gon, weighed 1:17 p. m., set to track 3 for delivery to DRGW 1:18 p. m.

UCR 21054 mty gon, weighed 1:16 p. m. set to Middle track south yard for Belt track loading

(UCR 21915) mty gon, weighed 1:15 p. m. ~~set to middle track south yard for belt track loading~~
 Deld. to UP later

UCR 21003 mty gon, weighed 1:14 p. m. ~~set to middle track south yard for belt track loading~~
 Deld. to UP later

UCR 21938 mty gon, weighed 1:13 p. m. ~~set to middle track south yard for belt track loading~~
Deld. to UP later

UCR 21111 mty gon, weighed 1:12 p. m. ~~set to middle track south yard for belt track loading~~
Deld. to UP later

1034 Assignment No. 2

Page 8

12:50 p. m. From track 2 Sth. Yd. pulled the following loads to High Line New Mill for unloading

UCR 20751 gon Ld. ore, set to High line 1:00 p. m.

UCR 20293 gon Ld. ore, set to High Line 1:00 p. m.

UP 63295 gon Ld. ore, set to High line 1:00 p. m.

DRGW 42425 gon Ld. ore, set to High line 1:00 p. m.

SP 94935 gon Ld. ore, set to High line 1:00 p. m.

DRGW 71751 gon Ld. ore, set to High line 1:05 p. m.

UP 63540 gon Ld. ore, set to High line 1:05 p. m.

(UP 63401) gon Ld. ore, set to High line 1:05 p. m.

1:10 p. m. Lite engine returned to scales track and weighed empty gons above that were pulled from High line at 12:40 p. m.

1:20 p. m. Pulled from Middle track to Belt Track New Mill for loading

USSCO 203 mty gon, set to Belt Track 1:30 p. m. for loading

" " 201 mty gon, set to Belt Track 1:30 p. m. for loading

UP 63649 mty gon, set to Belt Track 1:30 p. m. for loading

DRGW 41822 mty gon, set to Belt Track 1:30 p. m. for loading

UCR 21280 mty bad order left on scales track 1:22 p. m. delivered to UP later

UCR 21054 mty gon, set to belt track 1:30 p. m. for loading

USSCO 208 mty gon, set to Belt track 1:30 p. m. for loading

" " 205 mty gon, set to Belt track 1:30 p. m. for loading

UP 62259 mty gon, set to Belt track 1:30 p. m. for loading

UP 87584 mty gon, set to Belt track 1:30 p. m. for loading

DRGW 42078 mty gon, set to Belt track 1:30 p. m. for loading

UCR 21957) mty gon, set to Belt track 1:30 p. m. for loading

UCR 21254 lite load ore, reset to Belt Track 1:30 p.m.
for heavier loading
UCR 21138 load ore, reset to Belt track 1:30 p. m. for
disposition

1:35 p.m. Left scales track with the following for delivery
to UP delivery tracks.

UCR 21280 mty gon, bad order, delivered to UP 1:50
p.m.
(UCR 21915) mty gon, delivered to UP 1:50 p.m.
UCR 21003 mty gon, delivered to UP 1:50 p.m.
UCR 21938 mty gon, delivered to UP 1:50 p.m.
UCR 21111 mty gon, delivered to UP 1:50 p.m.
UP 63180 load ore, delivered to UP 1:50 p.m.
UCR 21955 load ore, delivered to UP 1:50 p.m.
(UP 87178) load ore, delivered to UP 1:50 p.m.
UCR 21989 load ore, delivered to UP 1:50 p.m.
UP 87952 load ore, delivered to UP 1:50 p.m.
(UCR 21544) load ore, delivered to UP 1:50 p.m.
UP 63739 load ore, delivered to UP 1:50 p.m.
UP 86672 load ore, delivered to UP 1:50 p.m.
UCR 20537 mty gon, delivered to UP 1:50 p.m.
UP 64318 mty gon, delivered to UP 1:50 p.m.
UP 62322 mty gon, delivered to UP 1:50 p.m.

Tied up 2:00 p.m.

1035 Assignment No. 2 Midvale, Utah Page 9

Report of Observer Coleman Richardson at the plant
of the United States Smelting, Refining & Mining Com-
pany, Midvale Plant, Midvale, Utah.

March 30, 1944, 8:00 a. m., started to work. Same crew and
same engine as on two previous days.

Pulled from UP yard track to south yard. 8:05 a. m. lite
engine moved from UP yard to scales track at 8:15 a. m.,
account no track room in south yard to bring down loads
from UP.

8:30 a. m. Switched and pulled out from Track 5 south yard
to scales track to weigh 8:35 a. m.

(UP 62043) gon Ld ore, weighed 9:10 a. m. left on East
Track Old Thaw shed 9:15 a. m.

UP 62762 gon Ld ore, weighed 9:09 a. m. left on East
Track Old Thaw shed 9:15 a. m.

63930

UP ~~62920~~ gon Ld ore, weighed 9:08 a. m., left on East
Track Old Thaw shed 9:15 a. m.

UP 62800 gon Ld ore, weighed 9:07 a.m. left on East Track Old Thaw shed 9:15 a.m.

UP 63810 gon Ld ore, weighed 9:06 a.m. left on East Track Old Thaw shed 9:15 a.m.

8:40 a.m. switched and pulled out from track 6 south yard to scales track to weigh at 8:45 a.m.

DRGW 41982 gon Ld ore, weighed 9:13 a.m., left on West track Old Thaw shed 9:20 a.m.

UCR 21910 gon Ld ore, weighed 9:12 a.m., left on West Track Old Thaw shed 9:20 a.m.

DRGW 41781 gon Ld ore, weighed 9:11 a.m., left on West Track Old Thaw shed 9:20 a.m.

8:50 a.m. Switched and pulled out from Track 7 South Yard to scales to weigh 8:35 a.m.

(D&RGW 40500) gon Ld ore, weighed 9:10 a.m. left on West Track Old Thaw Shed 9:20 a.m.

9:00 a.m. Switched and pulled out from Track 4 South yard to scales to weigh 9:05 a.m.

UCR 21079 gon Load ore, not weighed left on West Track Old Thaw Shed 9:20 a.m.

9:25 a.m. to 9:45 a.m. Delayed by crew engine 58 switching in south yard.

Switched and ~~picked up~~ and lined up for Belt Setting the following car for Belt Track New Mill loading.

9:45 a.m. Pulled from Belt Track to scales track.

UP 62077 mty gon, not weighed, left on Middle Track New Mill 10:00 a.m.

9:50 a.m. pulled from Middle Track to scales track.

SP 94935 mty gon, weighed 9:56 a.m. Left on Middle track New Mill 10:00 a.m.

UP 63540 mty gon, not weighed Left on Middle track New Mill 10:00 a.m.

(UP 63401) mty gon, not weighed left on Middle track New Mill 10:00 h.m.

1036 Assignment No. 2 Page 10

UCR 20751 mty gon, weighed 9:53 a.m. left on Middle track New Mill 10:00 a.m.

UCR 20293 mty gon, not weighed, left on Middle Track New Mill 10:00 a.m.

(USS CO 202) mty gon, weighed 9:52 a.m., left on Middle track New Mill 10:00 a.m.

USS CO 200 mty gon, weighed 9:51 a.m., left on Middle track New Mill 10:00 a.m.

(USS CO 207) mty gon, weighed 9:55 a.m., left on Middle Track New Mill 10:00 a.m.

(USS CO 210) mty gon, weighed 9:54 a. m. left on Middle track New Mill 10:00 a. m.

10:05 a. m., lite engine went to track 7 south yard and switched and pulled out 2 cars having to handle 26 cars to get them out. Setting the other 24 cars back on Track 7 South yard. The 2 cars pulled from track 7 south yard are as follows:

UP 86018 mty gon, left on track 2 south yard 10:15 a. m.

UP 86476 mty gon, left on track 2 south yard 10:15 a. m.

10:18 a. m. Lite engine then went to track 4 south yard switched and pulled out 1 car, having to handle 8 cars to get it out setting the other 7 cars back on track 4 south yard. The car pulled from Track 4 south yard was

UP 86877 mty gon, left on track 2 south yard 10:22 a. m.

10:25 a. m. pulled from Belt Track to Scales and weighed 10:35 a. m.

UCR 21138 gon Load ore, weighed 10:51 a. m. delivered to UP Later.

UCR 21254 gon Load ore, weighed 10:50 a. m. delivered to Up.

(UCR 21957) gon Load ore, weighed 10:49 a. m. reset to Belt track New mill lite load.

DRGW 42078 gon Load ore, weighed 10:48 a. m. Set to track 5 south yard at 11:00 a. m.

87584

UP 87548 gon Load ore, weighed 10:47 a. m. delivered to UP Later.

UP 62259 gon Load ore, weighed 10:46 a. m. delivered to UP.

USS CO 205 gon Load ore, weighed 10:45 a. m. set to track 5 south yard 11:00 a. m.

USS CO 208 gon Load ore, weighed 10:44 a. m. set to track 5 south yard 11:00 a. m.

UP 87592 gon Load ore, weighed 10:43 a. m. delivered to UP Later.

UP 63295 gon Load ore, weighed 10:42 a. m. delivered to UP Later.

UCR 21054 gon Load ore, weighed 10:41 a. m. reset to Belt track New Mill lite load. Left on Middle Trk New Mill.

D&RGW 41822 gon Load ore, weighed 10:40 a. m. set to track 5 south yard 11:00 a. m.

UP 63649 gon Load ore, weighed 10:39 a. m. delivered to UP Later.

USS CO 201 gon Load ore, weighed 10:38 a. m. set to track 5 south yard 11:00 a. m.

USS CO 203

gon Load ore, weighed 10:37 a. m. set to track 5 south yard 11:00 a. m.

(UP 87927)

gon Load ore, weighed 10:36 a. m. reset to Belt track New Mill lite load. Left on Middle Trk New Mill.

1037 Assignment No. 2 Midvale, Utah

Page 11

11:05 a. m. Pulled from scales to belt track to finish loading of lite load (UCR 21957,) lite load ore, completed loading and returned same to scales track, for weighing 11:10 a. m. Reweighed 1:17 p. m. Delivered to UP. Later.

11:05 a. m. Pulled from track 2 south yard to Belt track New Mill for loading.

UP 86018, mty gon, not weighed, set on Belt track New Mill 11:08 a. m.

UP 86476 mty gon, not weighed, set on Belt track New Mill 11:08 a. m.

UP 86877 mty gon, not weighed, set on Belt track New Mill 11:08 a. m.

*11:15 a. m. Lite engine then went to High line New Mill and pulled the following empty gons to scales track for weighing at 11:45 a. m. weighed at

DRGW 42161 mty gon, 1:24 p. m., set to DRGW delivery transfer 1:30 p. m.

DRGW 40643 mty gon, 1:23 p. m., set to DRGW Delivery transfer 1:30 p. m.

(UCR 20612) mty gon, not weighed, delivered to UP. Later.

DRGW 71363 mty gon, weighed at 1:22 p. m. Set to DRGW Delivery Transfer at 1:30 p. m.

DRGW 71175 mty gon, weighed at 1:21 p. m. set to DRGW Delivery transfer at 1:30 p. m.

DRGW 40776 mty gon, weighed at 1:20 p. m. set to DRGW Delivery transfer at 1:30 p. m.

UCR 21795 mty gon, weighed at 1:19 p. m. delivered to UP. Later.

UCR 21310 mty gon, weighed at 1:18 p. m. delivered to UP.

11:50 a. m. pulled from west track Old Thaw Shed and set to High line New Mill for unloading.

DRGW 41781 gon Load ore, set to High line New Mill for unloading 12:00 noon.

UCR 21910 gon Load ore, set to High line New Mill for unloading 12:00 noon.

DRGW 41982 gon Load ore, set to High Line New Mill for unloading 12:00 noon.

Mill waiting for a car to be finished unloading
11:30 AM to 11:40 AM Crew & Engine delayed on High Line Trk New

(DRGW 40500) gon Load ore, set to High Line New Mill for unloading 12:00 noon.
 UCR 21079 gon Load ore, set to High line new Mill for unloading 12:00 noon.

12:05 p.m. pulled from middle Track New Mill to Belt Track New Mill for loading the following

UCR 21054 lite load ore, reset for heavier loading 12:10 p.m.
 USSC 200 mty gon, set to Belt track New Mill for loading 12:10 p.m.
 (USSC 202) mty gon, set to Belt track New Mill for loading 12:10 p.m.
 UCR 20293 mty gon, set to Belt track New Mill for loading 12:10 p.m.
 UCR 20751 mty gon, set to Belt track New Mill for loading 12:10 p.m.
 (UP 63401) mty gon, set to Belt track New Mill for loading 12:10 p.m.
 (USSCO 210) mty gon, set to Belt track New Mill for loading 12:10 p.m.
 (USSCO 207) mty gon, set to Belt track New Mill for loading 12:10 p.m.
 UP 63540 mty gon, set to Belt track New Mill for loading 12:10 p.m.
 SP 94935 mty gon, set to Belt track New Mill for loading 12:10 p.m.
 (UP 87927) lite load ore. Reset for heavier loading 12:10 p.m.
 UP 62077 mty gon, set to belt track New Mill for loading 12:10 p.m.

1038 Assignment No. 2 Midvale, Utah Page 12
 12:15 p.m. tied up for lunch to 12:45 p.m.

12:50 p.m. lite engine went to High Line New Mill and pulled empties.

UCR 21079 mty gon, set to track 3 12:55 p.m. for delivery to DRGW.
 (DRGW 40500) mty gon, set to track 3 12:55 p.m. for delivery to DRGW.

1:00 p.m. lite engine went to east track Old Thaw Shed and pulled following cars to high line New Mill.

(UP 62043) gon Load ore, set to High line New Mill for unloading 1:05 p.m.
 UP 62762 gon Load ore, set to High line New Mill for unloading 1:05 p.m.

- UP 63930 gon Load ore, set to High line New Mill for unloading 1:05 p. m.
- UP 62800 gon Load ore, set to High line New Mill for unloading 1:05 p. m.
- UP 63810 gon Load ore, set to High line New Mill for unloading 1:05 p. m.

1:15 p. m. lite engine returned to scales and weighed empty gons and 1 reset load that was completed.

1:27 p. m. picked up from scales track the following cars and left south yard.

Delivered to DRGW Transfer track the following cars

- DRGW 42161 mty gon, delivered to DRGW Transfer track 1:30 p. m. (see Page 11).
- " 40643 mty gon, delivered to DRGW Transfer track 1:30 p. m. (see Page 11).
- " 71363 mty gon, delivered to DRGW Transfer track 1:30 p. m. (see Page 11).
- " 71175 mty gon, delivered to DRGW Transfer track 1:30 p. m. (see Page 11).
- " 40776 mty gon, delivered to DRGW Transfer track 1:30 p. m. (see Page 11).

1:40 p. m. delivered to UP delivery interchange track the following cars.

- UCR 21795 mty. This car returned to South Yard and left on Belt Track 2:05 p. m., account no place on track to deliver car to Up.
- UCR 21310 mty. delivered to UP 1:40 p. m.
- (UCR 20612) mty. delivered to UP 1:40 p. m.
- (UCR 21957) ld ore, delivered to UP 1:40 p. m.
- UCR 21138 ld ore, delivered to UP 1:40 p. m.
- UCR 21254 ld ore, delivered to UP 1:40 p. m.
- UP 87584 ld ore, delivered to UP 1:40 p. m.
- UP 62259 ld ore, delivered to UP 1:40 p. m.
- UP 87592 ld ore, delivered to UP 1:40 p. m.
- UP 63295 ld ore, delivered to UP 1:40 p. m.
- UP 63649 ld ore, delivered to UP 1:40 p. m.

1:45 p. m. pulled from UP yard receiving track 5 to south yard the following cars:

- (UP 64118) gon Ld ore, set on track 3 south yard 2:00 p. m.
- USSCO 34 gon Ld ore, set on track 3 south yard 2:00 p. m.

UP 86527 empty set on track 3 south yard 2:00 p. m.
 UP 86703 empty set on track 3 south yard 2:00 p. m.
 UP 86002 empty set on track 3 south yard 2:00 p. m.
 UP 87144 empty set on track 3 south yard 2:00 p. m.
 UP 87575 empty set on track 3 south yard 2:00 p. m.
 UP 87296 empty set on track 3 south yard 2:00 p. m.
 UP 87768 empty set on track 3 south yard 2:00 p. m.

1039 Assignment No. 2 Midvale, Utah Page 13

UP 87344 empty, set on track 3 south yard 2:00 p. m.
 UP 21933 gon load scrap iron, set on track 3 south yard
 2:00 p. m.

1:50 p. m. Pulled from Track 3 UP receiving yard to south yard the following cars:

DRGW 41579 gon Ld ore, set on track 3 south yard 2:00
 p. m.
 " 40229 gon Ld ore, set on track 3 south yard 2:00
 p. m.
 UCR 21186 gon Ld ore, set on track 3 south yard 2:00
 p. m.
 UP 64951 gon Ld ore, set on track 3 south yard 2:00
 p. m.
 UCR 20100 gon Ld ore, set on track 3 south yard 2:00
 p. m.
 UCR 21795 empty gon, returned to yard and placed on
 Belt track New Mill 2:05 p. m.

2:10 p. m. Lite engine returned from south yard to switch office.

Crew tied up 2:20 p. m

1040 Assignment No. 2 Midvale, Utah Page 14

Report of Observer Coleman Richardson at the plant of the United States Smelting, Refining and Mining Company.

Midvale plant, Midvale, Utah. March 31, 1944. 8:00 a. m. started to work. At 8:10 a. m. pulled from Arsenic Track to scales south yard and weighed 8:45 a. m.

(UP 92003) covered gon load arsenic, weighed 8:53 a. m.
 set to scales Track South Yard 8:55 a. m.

Low Bridge over Arsenic Track has to be raised before pulling arsenic track.

8:20 a. m. respoated at Arsenic Loading Spot for Arsenic Track 2 cars that were already on arsenic track. Car No.s as follows:

UP 92073 empty, covered gon for arsenic loading
 UP 92004 " " " " " " " "

8:30 a. m. Pulled from Track 4 UB Interchange yard to scales south yard and weighed the following 8:45 a. m.
(UP 63142) gon Ld ore, not weighed, set to track 7 south yard 9:00 a. m.

UP 63854 gon Ld ore, weighed 8:48 a. m. set to Belt Track south yard 8:56 a. m.

UP 62854 gon Ld ore, weighed 8:49 a. m. set to Belt track south yard 8:56 a. m.

UP 62067 gon Ld ore, weighed 8:50 a. m. set to Belt track south yard 8:56 a. m.

UP 62252 gon Ld ore weighed 8:51 a. m. set to Belt track south yard 8:56 a. m.

(PE 20193) gon Ld ore not weighed set to track 7 south yard 9:00 a. m.

UCR 20273 gon Ld ore not weighed set to track 7 south yard 9:00 a. m.

UCR 20270 gon Ld ore not weighed set to track 7 south yard 9:00 a. m.

9:10 a. m. Switched and pulled from track 7 south yard 3 cars handling 15 cars to get same. Returned the other 12 cars to Track 7 south yard. The 3 cars pulled are as follows to scales track.

UP 64241 gon Ld ore, not weighed, set to East Track Old Thaw Shed 9:45 a. m.

DRGW 40098 gon Ld ore, weighed 9:32 a. m., set to East Track Old Thaw Shed 9:45 a. m.

UCR 20195 gon Ld ore, weighed 9:33 a. m. set to East Track Old Thaw Shed 9:45 a. m.

9:15 a. m. Pulled from track 5 south yard to scales.

(UP 62255) gon Ld ore, not weighed, reset to track 5 south yard 9:50 a. m.

9:20 a. m. Pulled from East Track Old Thaw Shed and switched as follows, some to track 7 south yard and rest to scales track.

UCR 20984 gon Ld ore, set to track 7 south yard 9:25 a. m.

UP (LASL) 201070 gon Ld ore, set to track 7 south yard 9:25 a. m.

UP 64485 gon Ld ore, set to track 7 south yard 9:25 a. m.

UCR 20477 gon Ld ore, weighed 9:38 a. m. set to track 5 south yard 9:50 a. m.

UCR 21836 gon Ld ore, weighed 9:37 a. m. set to track 5 south yard 9:50 a. m.

UCR 21118 gon Ld ore, weighed 9:36 a. m. set to track 5 south yard 9:50 a. m.

1041 Assignment No. 2 Midvale, Utah Page 15
DGR 43124 gon Ld ore, weighed 9:35 a. m., set to
track 5 south yard 9:50 a. m.

UCR 20526 gon Ld ore, weighed 9:34 a. m. set to East
track Old Thaw Shed 9:45 a. m.

UP 64336 gon ore, Set to Track 7 south yard 9:25 a. m.

Picked up from Belt track south yard and set to East Shed
Old Thaw Shed:

UP 63854 Gon Ld ore, set to East Shed Old Thaw Shed
9:45 a. m.

UP 62854 Gon Ld ore, set to East Shed Old Thaw Shed
9:45 a. m.

UP 62067 Gon Ld ore, set to East Shed Old Thaw Shed
9:45 a. m.

UP 62252 Gon Ld ore, set to East Shed Old Thaw Shed
9:45 a. m.

9:55 a. m. to 10:15 a. m. tied up by crew engine 58 switch-
ing in south yard.

10:18 a. m. Lite engine went to High-Line New Mill and
pulled empties to scales weighed same, delivered them all to
DRGW Transfer Track weighed

DRGW 40040 empty gon, 10:35 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

UCR 20439 empty gon, 10:34 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

UCR 21358 empty gon, 10:33 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

UCR 21423 empty gon, 10:32 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

DSL 34138 empty gon, 10:31 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

DRG 42493 empty gon, 10:30 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

DRGW 43169 empty gon, 10:29 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

UCR 20239 empty gon, 10:28 a. m. delivered to DRGW
New Transfer de-
livery track 10:45
a. m.

10:36 picked up from scales and delivered to UP

(UP 92003) load arsenic, delivered to UP 10:42 a. m. Lite
Engine returned to Track 5 South Yard and picked up 5
cars and set to High Line New Mill.

UP 62255 gon Ld ore, set to High Line New Mill for
unloading 10:55 a. m.

UCR 20477 gon Ld ore, set to High Line New Mill for
unloading 10:55 a. m.

UCR 21836 gon Ld ore, set to High Line New Mill for
unloading 10:55 a. m.

UCR 21118 gon Ld ore, set to High Line New Mill for
unloading 10:55 a. m.

DRGW 43124 gon Ld ore, set to High Line New Mill for
unloading 10:55 a. m.

11:00 a. m. Lite engine returned to Belt track New Mill and
picked up and switched to scales, weighed same, and re-
turned them to Middle track New Mill for later Belt
Setting for loading.

USS CO 205 mty gon, weighed 11:11 a. m. set all cars to
Middle track New Mill 11:20 a. m.

USS CO 208 mty gon, weighed 11:10 a. m. set all cars to
Middle track New Mill 11:20 a. m.

USS CO 201 mty gon, weighed 11:14 a. m. set all cars to
Middle track New Mill 11:20 a. m.

1042 Assignment No. 2 ~~Gorfield~~, Utah Page 16
Midvale

USS CO 203 mty gon, weighed 11:13 a. m. set to Middle
track New Mill 11:20 a. m.

11:05 a. m. Picked up from Middle Track New Mill and
Switched to scales and weighed same, returned all to Mid-
dle track New Mill for later belt setting for later loading

(UP 62043) mty gon, weighed 11:15 a. m., set to Middle
Track New Mill 11:20 a. m.

UP 62762 mty gon, not weighed, set to Middle track
New Mill 11:20 a. m.

UP 63930 mty gon, not weighed, set to Middle track
New Mill 11:20 a. m.

UP 62800 mty gon, weighed 11:12 a. m., set to Middle track New Mill 11:20 a. m.
 UP 63810 mty gon, not weighed, set to Middle track New Mill 11:20 a. m.
 UCR 21910 mty gon, set to Belt Track 11:06 a. m.

11:25 a. m. Pulled from Belt track the following cars to scales and weighed.

UCR 21910 mty, not weighed set to Middle track New Mill 11:42 a. m.
 UCR 21054 load ore, weighed 11:40 a. m. set to scales for delivery to UP 11:45 a. m. Later
 UP 62077 load ore, weighed 11:39 a. m. set to scales for delivery to UP 11:45 a. m. Later
 (UP 87927) load ore, weighed 11:38 a. m. set to scales for delivery to UP 11:45 a. m. Later
 SP 94935 load ore, weighed 11:37 a. m. set to track 7 south yard 11:50 a. m.
 UP 63540 mty, not weighed, set to Middle track New Mill 11:42 a. m.
 (USS CO 207) load ore, weighed 11:36 a. m. Set to track 7 south yard 11:50 a. m.
 (" " 210) load ore, weighed 11:35 a. m. set to track 7 south yard 11:50 a. m.
 UP 86877 load ore, weighed 11:34 a. m. reset to Belt track New Mill lite load to complete loading 12:00 noon
 (UP 63401) load ore, weighed 11:33 a. m. reset to Belt track New Mill lite load to complete loading 12:00
 UCR 20751 load ore, weighed 11:32 a. m. set to track 7 south yard 11:50 a. m.
 UCR 20293 load ore, weighed 11:31 a. m. set to scales track for delivery to UP 11:45 a. m. Later
 (USS CO 202) load ore, weighed 11:30 a. m. set to track 7 south yard 11:50 a. m.
 " " 200 load ore, weighed 11:29 a. m. set to track 7 south yard 11:50 a. m.
 UP 86476 load ore, weighed 11:28 a. m. Reset to Middle track New Mill 11:42 a. m.

11:52 a. m. Pulled from track 2 south yard

DRGW 40112 load ore, left on track 3 south yard 11:55 a. m.

UP 62625 load ore, left on track 3 south yard 11:55 a. m.

11:55 a. m. Pulled from track 3 south yard

(UP 64118) load ore, returned to track 3 south yard 11:58 a. m.

USS CO 34 load ore, returned to track 3 south yard
 11:58 a. m.
 UP 86527 mty gon, set to Belt track New Mill for
 loading 12:00 noon
 UP 86703 mty gon, set to Belt track New Mill for
 loading 12:00 noon
 12:10 p. m. to 12:50 p. m. tied up for lunch
 1043 Assignment No. 2 Midvale " " Page 17
 Garfield, Utah
 12:55 p. m. pulled from belt track New Mill to scales at
 1:02 p. m. & reweighed:
 at 1:02 p. m. & reweighed:
 (UP 86877 gon Ld ore, weighed 1:13 p. m. for delivery to
 UP Later
 (UP 63401) gon Ld ore, weighed 1:12 p. m. for delivery to
 UP Later
 1:05 p. m. Lite engine went to High Line New Mill and
 pulled 5 empties 11:12 p. m. to scales and weighed.
 (UP 62255) mty gon, not weighed, delivered to UP
 Later
 UCR 20477 mty gon, weighed 1:17 p. m., delivered to
 UP Later
 UCR 21836 mty gon, weighed 1:16 p. m., delivered to
 UP Later
 UCR 21118 mty gon, weighed 1:15 p. m., delivered to
 UP Later
 DRGW 43124 mty gon, weighed 1:14 p. m., delivered to
 track 4 south yard for DRGW Delivery
 1:20 p. m.
 1:25 p. m. lite engine went to east track Old Thaw Shed and
 pulled the following cars.
 UP 62252 gon Ld ore, set to High Line New Mill for
 unloading 1:30 p. m.
 UP 662067 gon Ld ore, set to High Line New Mill for
 unloading 1:30 p. m.
 UP 62854 gon Ld ore, set to High Line New Mill for
 unloading 1:30 p. m.
 UP 63854 gon Ld ore, set to High Line New Mill for
 unloading 1:30 p. m.
 UCR 20526 gon Ld ore, set to High Line New Mill for
 unloading 1:30 p. m.
 UCR 20195 gon Ld ore, set to High Line New Mill for
 unloading 1:35 p. m.
 DRGW 40098 gon Ld ore, set to High Line New Mill for
 unloading 1:35 p. m.
 UP 64241 gon Ld ore, set to High Line New Mill for
 unloading 1:35 p. m.

1:45 p. m. lite engine went to Middle track New Mill and pulled the following empties, set them on Belt track New Mill for loading.

UCR	21910	mty gon, set on Belt track New Mill for loading 1:50 p. m.
UP	63540	mty gon, reset not loaded to Belt track New Mill for loading 1:50 p. m.
UP	86476	mty gon, lite load ore reset to Belt track New Mill to complete loading 1:50 p. m.
(UP	62043)	mty gon, set on belt track New Mill for loading 1:50 p. m.
UP	62762	mty gon, set on belt track New Mill for loading 1:50 p. m.
USS CO	201	mty gon, set on belt track New Mill for loading 1:50 p. m.
" "	203	mty gon, set on belt track New Mill for loading 1:50 p. m.
UP	63930	mty gon, set on belt track New Mill for loading 1:50 p. m.
UP	62800	mty gon, set on belt track New Mill for loading 1:50 p. m.
UP	63810	mty gon, set on belt track New Mill for loading 1:50 p. m.
USS CO	205	mty gon, set on belt track New Mill for loading 1:50 p. m.
USS CO	208	mty gon, set on belt track New Mill for loading 1:50 p. m.

1:53 p. m. Lite engine returned to scales track and picked up the following cars for delivery to UP interchange track 2:05 p. m.

UCR	20293	load ore, delivered to UP 2:05 p. m.
(UP	87927)	load ore, delivered to UP 2:05 p. m.
UP	62077	load ore, delivered to UP 2:05 p. m.
UCR	21054	load ore, delivered to UP 2:05 p. m.
(UP	63401)	load ore, delivered to UP 2:05 p. m.
UP	86877	load one, delivered to UP 2:05 p. m.
UCR	21118	mty gon, delivered to UP 2:05 p. m.
UCR	21836	mty gon, delivered to UP 2:05 p. m.
UCR	20477	mty gon, delivered to UP 2:05 p. m.
(UP	62255)	mty gon, delivered to UP 2:05 p. m.

Crew tied up at 2:15 p. m.

This completed assignment.

1044

Exhibit No. 6

Assignment No. 3 Midvale, Utah

Page 1

Report of Inspector McCormick observing switching performance of D&RGW Engine 58, with a Union Pacific Crew, at the Plant of the USSM&R Company, Midvale, Utah. March 28, 1944.

Engine 58 departed from the D&RGW Coal Chute track at 3:00 p. m. Picked up on Track No. 3 UP Yard at 3:38 p. m., the following cars.

UP (63682) gon load, set to Belt track Smelter yard at 3:53 p. m.
 UP (62255) gon load, set to East Thaw Track yard at 3:54 p. m.
 UP 92025 mty hopper, set to East Thaw Track yard at 3:54 p. m.
 UP 92065 mty hopper, set to East Thaw Track yard at 3:54 p. m.
 UP 92073 mty hopper, set to East Thaw Track yard at 3:54 p. m.
 UP 92004 mty hopper, set to East Thaw Track yard at 3:54 p. m.
 UP 32682 hopper load, set to East Thaw Track yard at 3:54 p. m.

Doubled to Track No. 5 UP yard, picked up at 3:41 p. m. the following cars and set out as shown below.

(ATSF 175069) gon load, set to track No. 5 Smelter yard at 3:52 p. m.
 B&A (50294) mty box, set to track No. 5 Smelter yard at 3:52 p. m.
 P&LE 35370 mty box, set to track No. 5 Smelter yard at 3:52 p. m.
 NYC 107347 mty box, set to track No. 5 Smelter yard at 3:52 p. m.
 B&O 465043 mty box, set to track No. 5 Smelter yard at 3:52 p. m.
 NYC 97890 mty box, set to track No. 5 Smelter yard at 3:52 p. m.
 UCR 21729 gon load, set to Track 5 Smelter yard at 3:52 p. m.
 UCR 20061 gon load, set to Track 5 Smelter yard at 3:52 p. m.
 UCR (20612) gon load, set to Track 6 Smelter yard at 3:50 p. m.

Picked up on track No. 4 at Smelter yard at 3:58 p. m., and switched out three cars from behind 7 cars as follows:

DRGW 41579 gon load, set to Track No. 2 Smelter yard at 4:01 p. m.

UCR 20258 gon load, set to Scale track smelter yard at 4:00 p. m.

UP ~~62586~~ 63856 gon load, set to Scale track smelter yard at 4:00 p. m.

Picked up on track # 6 Smelter yard at 4:05 p. m.

UCR (20612) loaded gon, set to track No. 7 at 4:09 p. m.

UCR 20515 loaded gon, set to Belt track at 4:08 p. m.

UCR 20178 loaded gon, set to Belt track at 4:08 p. m.

UP 63035 loaded gon, set to Belt track at 4:08 p. m.

DRGW 43325 loaded gon, set to Track No. 7 at 4:07 p. m.

UCR 20025 loaded gon, set to Track No. 7 at 4:07 p. m.

UP (63013) loaded gon, set to Belt track at 4:06 p. m.

Picked up on track No. 7 Smelter yard at 4:10 p. m.

UCR (20612) gon load, set to Scale track at 4:13 p. m.

UCR 20025 gon load, set back to No. 7 track at 4:12 p. m.

DRGW 43325 gon load, set back to No. 7 track at 4:12 p. m.

DRGW (40500) gon load, set back to No. 7 track at 4:12 p. m.

WP 5605 gon load, set back to No. 7 track at 4:12 p. m.

UCR 20273 gon load, set to scale track at 4:11 p. m.

DRGW 45417 gon load, set to scale track at 4:11 p. m.

9

1045 Assignment No. 3 Midvale, Utah

Page 2

W. O. McCORMICK

Picked up on belt track at 4:14 p. m., and set to scale track at 4:15 p. m. the following loaded gons.

UP 63035

UCR 20515

UCR 20178

UP (63013)

UP (63682)

All cars marked (*) weighed between 4:15 and 4:23 p. m., and all cars listed below picked up at 4:23 p. m., and set to track, in UP yard known as East Side at 4:27 p. m. All loaded gons.

3

UP 63085

UCR 20515

UCR 20178 *

UP (63013)

UP (63682) *

UCR (20612)

UCR 20273 •

DRGW 45419 •

UCR 20258 •

UP 63856 •

Picked up on track No. 5 Trestle at 4:28 p. m., mty cars listed below, and weighed cars marked between 4:30 and 4:35 p. m. (*)

*PRR 93534 mty box

USSR 8 mty gon

USSR 12 mty gon

*UP 64951 mty gon

*DRGW 70333 mty gon

*UP 63794 mty gon

*UCR (21125) mty gon

Picked up on scale track at 4:35 p. m., and set to sand Hole track at 4:37 p. m. the following mty gons.

UCR (21125)

UP 63794

DRGW 70333

UP 64951

Picked up on scale track at 4:35 p. m., and set to house track at 4:38 p. m. the following cars.

USSR 12 mty gon

USSR 8 mty gon

PRR 93534 mty box

Picked up on East Side track at 4:40 p. m., and set behind 5 cars on No. 5 trestle at 5:08 p. m. the following loaded gons.

UP 63035

UCR 20515

UCR 20178

UP (63013)

Picked up on East side track at 4:40 p. m., and set to track No. 4 trestle at 5:06 p. m.

UP 63856 loaded gon

1046 Assignment No. 3 Midvale, Utah

Page 3

Picked up on track No. 5 trestle at 4:50 p. m.

UCR 20100 mty gon, set to track No. 2 UP yard at 5:20 p. m.

UP 62220 mty gon, set to track No. 2 UP yard at 5:20 p. m.

UCR 21654 mty gon, set to track No. 2 UP yard at 5:20 p. m.

UP 64582 mty gon, set to track No. 2 UP yard at 5:20 p. m.
 USSR 16 mty gon, set to track No. 3 UP yard at 5:21 p. m.
 USSR 3 mty gon, set to track No. 3 UP yard at 5:21 p. m.

Picked up on House Track at 5:16 p. m. set to Track No. 2 UP yard at 5:20 p. m.
 PRR 93534 mty box

Picked up on track known as Roast Hole at 5:22 p. m., and set to track No. 3 UP yard at 5:23 p. m.
 USSR 66 loaded gon
 USSR 59 loaded gon

Lite to Roast Hole track, spotted for loading at 5:25 p. m.
 USSR (68) mty gon
 USSR 56 mty gon
 USSR (69) mty gon

Lite to track No. 3 UP yard picked up at 5:28 p. m.
 USSR 66 loaded gon
 USSR 59 loaded gon
 Weighed above 2 cars at 5:35 p. m.
 Set on track No. 3 trestle at 5:51 p. m.

Picked up on track No. 3 trestle at 5:45 p. m.
 USSR 201 mty gon, set to No. 5 trestle at 5:46 p. m.
 USSR 203 mty gon, set to No. 5 trestle at 5:46 p. m.
 USSR 205 mty gon, set to No. 5 trestle at 5:46 p. m.
 USSR 208 mty gon, set to No. 5 trestle at 5:46 p. m.
 USSR (51) mty gon, set to No. 5 trestle at 5:46 p. m.
 UCR 21978 mty gon, set to No. 5 trestle at 5:46 p. m.

Picked up on Sand Hole track at 5:47 p. m., and spotted behind 3 cars on track No. 2 trestle at 5:57 p. m.

UP 64951 mty gon
 UP 63794 mty gon
 DRGW 70333 mty gon

Picked up on track No. 1 trestle at 6:04 p. m.

USSR (2) set to sand Hole track at 6:15 p. m.
 WP 4478 set to sand Hole track at 6:15 p. m.
 DRGW 40229 set to sand Hole track at 6:15 p. m.
 SP 95050 set to track No. 5 trestle at 6:14 p. m.
 DRGW 71391 set to D&RGW Transfer at 6:13 p. m.
 *UCR 21566 set to D&RGW Transfer at 6:13 p. m.
 *DRGW 42492 set to D&RGW Transfer at 6:13 p. m.
 Cars marked (*) weighed at 6:10 p. m.

Lite to track No. 4 Smelter yard picked up at 6:33 p. m. set to Midvale track in Slag dump yard at 6:44 p. m.

UP 63851 loaded gon

UP 63360 loaded gon

DRGW 40426 loaded gon

UCR 20555 loaded gon

1047 Assignment No. 3 Midvale, Utah

Page 4

W. O. McCORMICK

Picked up on Mat Track at 6:45 p. m.

D&RGW 40423 set to bullion track at 6:55 p. m.

D&RGW 45148 set to D&RGW Transfer at 7:07 p. m.

Picked up on Bullion track at 6:52 p. m., set to UP transfer at 7:05 p. m.

9

PM 83970 loaded box

C&O 7522 loaded box

MP 30568 loaded box

Dead time waiting for cars to be loaded at Roaster Mill 7:30 p. m. to 12:30 a. m.

a. m.

Picked up on Roast Hole track at 12:35 p. m.

USSR 50 loaded gon, weighed 12:40 a. m., set to track No. 3 trestle at 12:55 a. m.

USSR 57 loaded gon, weighed at 12:40 a. m., set to track No. 3 trestle at 12:55 a. m.

USSR 56 loaded gon, weighed at 12:40 a. m., set to track No. 3 trestle at 12:55 a. m.

Departed for D&RGW coal chute track at 1:10 a. m.

1048 Assignment No. 3 Midvale, Utah

Page 5

Report of Inspector McCormick, observing switching performance of DRGW Engine No. 58, with Union Pacific Crew, at the Plant of the United States Smelting & Refining Company, Midvale, Utah, March 29, 1944.

Departed from the D&RGW Coal Chute Track at 3:00 p. m., picked up on track No. 4 Union Pacific Yard at 3:25 p. m. Handled from track No. 4 to clear track No. 5 trestle, and left at 3:26 p. m. Picked up again at 3:48 p. m., and set to Track No. 5 in Smelter Yard at 3:52 p. m.

2

UP 32832 hopper load

" 63438 gon load

" (62043) gon load.

" 62762 gon load

UP 63939 gon load
 " 62800 gon load
 " 63810 gon load

Lite to U. S. Shears Track, picked up at 3:28 p. m.
 DRGW 45188 loaded gon, set to Belt track smelter yard at
 3:55 p. m.

Engine and 1 car (45188) moved from U. S. Shears Track,
 to track No. 5 trestle and at 3:33 p. m. picked up.
 UP 63687 loaded gon, set to track 2 smelter yard at 4:00
 p. m.

Picked up on No. 4 spur track, at 3:35 p. m.
 UP 63035 gon load, set to Belt Track Smelter yard 3:57
 p. m.
 UCR 20583 gon load set to Belt Track smelter yard 3:57
 p. m.

Picked up on track No. 4 trestle at 3:38 p. m.
 UP (63682) loaded gon, set to scales at 3:56 p. m.
 LV 61593 mty box, set to track No. 5 trestle at 3:44 p. m.

Engine and 5 cars from track No. 5 trestle, moved to run-
 ning lead track, and picked up cars shown in first item.
 Engine and 12 cars moved to smelter yard, and set cars
 out as shown above.

Picked up on track No. 2 smelter yard at 3:58 p. m.
 DRGW 41579 gon load, set to scale track at 4:15 p. m.
 DRGW 70286 gon load, set to scale track at 3:59 p. m.
 UCR 21613 gon load, set to scale track at 3:59 p. m.

Picked on on track No. 7 smelter yard at 4:02 p. m.
 UP 64887 gon load, set to scales at 4:11 p. m.
 UCR 20025 gon load set to Belt track at 4:05 p. m.
 DRGW 43325 gon load, set to Belt track at 4:08 p. m.
 DRGW (40500) gon load, set to track No. 7 at 4:04 p. m.
 WP 5605 gon load, set to track No. 7 at 4:04 p. m.
 WP 5511 gon load, set to scales at 4:03 p. m.
 UCR 20352 gon load, set to scales at 4:03 p. m.

1049 Assignment No. 3 Midvale, Utah Page 6
 Picked up on track No. 5 smelter yard at 4:06 p. m.
 UCR 21650 gon load, set to Belt track at 4:07 p. m.
 UP 62649 gon load set to Belt track at 4:08 p. m.

Picked up on East Thaw House at 4:13 p. m., and set to
 scale track at 4:14 p. m.
 UP (62255) gon load,

Picked up on Belt track at 4:16 p. m., and set to scale track at 4:17 p. m.

UP 62649 loaded gon
 DRGW 43345 loaded gon
 UCR 21659 loaded gon
 UCR 20025 loaded gon
 UP 63035 loaded gon
 UCR 20583 loaded gon
 DRGW 45188 loaded gon

Following cars weighed between 4:18 and 4:30 p. m.

UP 62649 gon load, set to No. 5 trestle at 4:43 p. m.
 DRGW 43325 gon load, set to No. 5 trestle at 4:43 p. m.
 UCR 21659 gon load, set to No. 5 trestle at 4:43 p. m.
 UCR 20583 gon load, set to No. 5 trestle at 4:43 p. m.
 UP 63035 gon load, set to No. 5 trestle, at 4:43 p. m.
 DRGW 45188 gon load, set to No. 4 trestle at 4:37 p. m.

Following cars left to clear track No. 5 trestle at 4:33 p. m. and at 4:58 p. m. were again picked up and set in on No. 5 trestle to clear running lead track.

DRGW 41579 loaded gon

5

UP (62225) loaded gon
 WP 5511 loaded gon
 UCR 20352 loaded gon
 UCR 21613 loaded gon
 DRGW 70286 loaded gon
 UP (63682) loaded gon

Picked up on No. 5 trestle at 4:40 p. m.

LV 61953 mty box, left on No. 5 trestle at 4:58 p. m.
 UCR 20515 mty box, set to sand hole track 4:57 p. m.
 UCR 20178 mty box set to sand hole track 4:57 p. m.
 UP (63013) mty box gon set to sand hole track 4:57 p. m.

PICKED UP ON Sand Hole Track at 4:47 p. m.

DRGW 40229 mty gon, set to DRGW Transfer at 4:51 p. m.
 UP 64826 gon load, set to track No. 5 Trestle at 4:55 p. m.

Moved lite to Mat Track, and picked up at 5:03 p. m., and set to refining track at 5:24 p. m.

UP 63851 mty gon,
 UP 62218 mty gon

Engine and 2 cars, moved to bullion track and picked up at 5:04 p. m.

NYC (135827) box load, set to UP transfer at 5:18 p. m.
 DRGW 40423 gon load, weighed at 8:35 p. m., and set to track No. 3 Trestle at 8:55 p. m.

1050 Assignment No. 3 Midvale, Utah Page 7

Lite to Track No. 5 trestle, picked up at 5:35 p. m.
 LV 61593 mty box, weighed 6:41 p. m., set to UP
 Transfer 7:03 p. m.

DRGW 41579 gon load, set to No. 2 trestle at 9:08 p. m.

Held on to the above 2 cars, and picked up on track No. 1
 trestle at 6:20 p. m., Delayed from 5:38 p. m. to 6:20 p. m.
 waiting for cars to be unloaded.

UP 62077 mty gon, set to sand hole at 6:49 p. m.

DRGW 43349 mty gon, weighed at 6:40 p. m. to sand
 hole 6:49 p. m.

UP (64118) mty gon, weighed 6:39 p. m., set to UP
 Track No. 1 6:48 p. m.

UP (62459) mty gon, weighed 6:38 p. m., set to UP
 Track No. 1 6:48 p. m.

DRGW (71530) mty gon, set* to UP track No. 1 at 6:48
 p. m.

(ATSF 175069) mty gon, weighed 6:37 p. m., set to UP
 transfer 6:47 p. m.

Picked up on No. 5 trestle at 6:53 p. m., and set to No. 1
 trestle at 7:00 p. m.

UP 62255 gon load

WP 5511 gon load

UCR 20532 gon load

UCR 21613 gon load

DRGW 70286 gon load

Picked up on No. 5 trestle at 7:08 p. m., and set to No. 3
 trestle at 8:55 p. m.

UP (63682) gon load

Picked up on Wedge Hole track at 8:10 p. m., and set to UP
 track No. 5 at 8:12 p. m.

USSR 34 loaded gon

Picked up on Roast Hole track at 8:20 p. m., weighed at
 8:35 p. m., and set to No. 3 trestle at 8:55 p. m.

USSR 65 loaded gon

USSR 59 loaded gon

" (51) loaded gon

Picked up on Sand Hole track at 8:43 p. m., set to No. 2
 trestle track at 9:08 p. m.

UP 62077 empty gon

DRGW 43349 empty gon

UCR 20515 empty gon

Picked up on DRGW Transfer at 8:52 p.m., set to No. 2 Trestle track at 9:08 p.m.

DRGW 40229 mty gon

Picked up on No. 3 trestle at 8:54 p.m., and set to No. 5 trestle at 8:57 p.m.

USSR 52 mty gon

USSR 58 mty gon

Picked up on No. 2 trestle track at 8:55 p.m., and set to No. 5 trestle track at 8:57 p.m.

DRGW 40854 loaded gon

WP 4482 loaded gon

Departed from Plant Yard at 9:20 p.m.

1051 Assignment No. 3 Midvale, Utah Page 8

Report of Inspector McCormick, observing switching performances of DRGW Engine No. 58, with Union Pacific Crew, at the plant of the United States Smelting & Refining Company, Midvale, Utah, March 30, 1944.

Departed from DRGW Coal Chute track at 3:00 p.m., picked up on Roast Hole track at 3:10 p.m., (UP 63682) set to track No. 2 in smelter yard at 3:26 p.m.

Picked up on UP No. 1 at 3:11 p.m.,

UP 62549 loaded gon, set to No. 2 smelter yard 3:26 p.m.

DRGW (71530) mty gon, set to DRGW Transfer at 3:19 p.m.

Picked up on track No. 5 smelter yard at 3:20 p.m., set to scale track at 5:28 p.m.

UCR 20061 gon load

Picked up on track No. 7 at smelter yard at 3:34 p.m.

USSR 67 gon load, set to scales at 3:36 p.m., and USSR 62 set to scales at 3:36 p.m.

USSR 54 gon load, set to scales at 3:36 p.m., and USSR 62 set to scales at 3:36 p.m.

NYC 109414 mty box, set to No. 5 at 3:38 p.m.

PRR 78821 mty box, set to No. 5 at 3:38 p.m.

L&N 96546 mty box, set to No. 5 at 3:38 p.m.

SLSF 148795 mty box, set to No. 5 at 3:38 p.m.

Set 7 cars back to track No. 7 at 3:39 p.m.

WP 5654 gon load, set to smelter track No. 5 3:40 p.m.

Set 10 cars back to track No. 7 at 3:41 p.m.

Picked up from Track No. 2 smelter yard, at 3:45 p.m.

UP (63682) gon load, set to Belt track at 3:51 p.m.

Set 3 cars back to No. 2 at 3:50 p. m.

DRGW 70076 gon load, set to scales at 3:49 p. m.

DRGW 70278 gon load, set to Belt at 3:48 p. m.

DRGW (40320) gon load, set to Track No. 2 at 3:47 p. m.

SL&U (1102) gon load, set to Scales at 3:46 p. m.

WP 5855 gon load, set to Scales at 3:46 p. m.

Picked up on Track No. 3 smelter yard at 3:52 p. m. Set this CAR to scales at 3:53 p. m.

UP 21933 gon load

Picked up on track No. 5 smelter yard at 3:55 p. m., and set to scales at 4:00 p. m.

WP 5654 gon load

NYC 109414 mty box

PRR 78821 mty box

L&N 96546 mty box

SL&SF 148795 mty box

USSR 29 mty gon

DRGW 42078 loaded gon

DRGW 41822 loaded gon

Picked up on track No. 4 smelter yard at 3:57 p. m., and set to scales at 4:00 p. m.

DRGW 40802 gon load

1052 Assignment No. 2 Midvale, Utah Page 9

Weighed the following cars, between 4:13 p. m., and 4:22 p. m., then set to clear on UP transfer track.

UCR 20061 gon load,

USSR 62 gon load,

" 54 gon load,

" 67 gon load,

WP 5855 gon load,

SL&U (1102) gon load,

DRGW 70076 gon load,

DRGW 40802 gon load,

" 70278 gon load,

Picked up on scales, and set to UP transfer at 4:22 p. m.

UP (63682) gon load

DRGW 41822 gon load

" 42078 gon load

Picked up on scales, and set Lead plant at 4:57 p. m. 1 car USSR 29 mty gon

Picked up on scales, and set to ballion track at 5:03 p. m. SL&SF 148795 mty box car

L&N 96546 mty box car
 PRR 78821 mty box car
 NYC 109414 mty box car

Picked up on scales, and set to Middle track, slag dump,
 behind 1 car at 4:46 p. m.
 WP 5654 gon loaded

Picked up on scales, and set on U. S. SHEAR'S Track behind
 1 car at 4:34 p. m.

UP 21933 gon load, weighed at 4:22 p. m.

Lite from Middle track, slag dump yard, to lead plant track
 4:51 p. m. Picked up at 4:55 p. m.

D&RGW 42000 mty gon, weighed at 5:16 p. m., set to
 DRGW Transfer 5:18 p. m.

D&RGW 42458 gon load, weighed at 5:16 p. m., set to
 DRGW Transfer 5:18 p. m.

Lite to bullion track, picked up at 5:02 p. m., and set to UP
 Transfer at 5:12 p. m.

NYC (110333) box load

C&O 8389 box load

1053 Assignment No. 3 Midvale, Utah Page 10

Picked up on UP transfer at 5:19 p. m.

DRGW 42078 gon load, set to track 5 trestle 5:27 p. m.

DRGW 41872 gon load, set to track No. 5 trestle 5:27
 p. m.

UP (63682) gon load, set to track No. 5 trestle 5:27
 p. m.

DRGW 70728 gon load, set to track No. 4 trestle 5:25
 p. m.

Picked up on No. 5 trestle at 5:26 p. m.

UP 62649 mty gon, set to UP transfer at 5:45 p. m.

UCR 21659 mty gon, set to UP transfer at 5:45 p. m.

UCR 20025 mty gon, set to UP transfer at 5:45 p. m.

DRGW 43325 mty gon, set back to No. 5 trestle at 6:03
 p. m.

Picked up on No. 4 trestle at 5:33 p. m., weighed at 5:55
 p. m. set to DRGW Transfer at 6:01 p. m.

DRGW 66938 mty box car

Picked up on No. 1 trestle at 5:51 p. m.

WP (5933) mty gon, set to DRGW Transfer at 6:01
 p. m.

DRGW 70286 mty gon, wghd 5:54 p. m., set DRGW Tfr.
 at 6:01 p. m.

UCR (21125) mty gon, wghd 5:54 p. m., set to UP Tfr.
at 5:58 p. m.
UCR 20258 mty gon, wghd 5:54 p. m., set to UP Tfr.
at 5:58 p. m.

Picked up on UP Transfer at 6:10 p. m., set to No. 1
Trestle track at 6:19 p. m.

UCR 20061 loaded gon
USSR 62 loaded gon
" 54 loaded gon
" 67 loaded gon
WP 5855 loaded gon
SI&U (1102) loaded gon
DRGW 70076 loaded gon
DRGW 40802 loaded gon

Picked up on No. 2 trestle track at 6:23 p. m.

USSR (68) mty gon, set to Rip track at 6:27 p. m.
" (69) mty gon, set to Roast Hole track 6:33 p. m.
" 203 mty gon, set to No. 5 trestle track 6:39 a. m.
" 201 mty gon, set to No. 5 trestle track 6:39 a. m.
" 208 mty gon, set to No. 5 trestle track 6:39 a. m.
" 205 mty gon, set to No. 5 trestle track 6:39 a. m.

Picked up on Roast Hole track at 6:35 p. m., weighed at
6:45 p. m., and set to No. 3 trestle track at 6:55 p. m.

USSR (53) gon load
USSR 66 gon load

Delayed 7:30 p. m. to 10:46 p. m., waiting for cars to be
loaded on Roast Hole track

Picked up on Roast Hole track at 10:46 p. m., weighed at
10:37 p. m., and set to No. 3 trestle at 10:46 p. m.

USSR 52 loaded gon
" 58 loaded gon

Picked up on No. 1 trestle at 11:05 p. m., set to sand Hole
track at 11:08 p. m. DRGW 70056 mty gon.,

Departed for Plant Yard at 11:20 p. m.

1054 Assignment No. 3 Midvale, Utah Page 11

Report of Inspector McCormick, observing switching
performance of DRGW Engine No. 58, with Union
Pacific Crew, at the plant of the United States Smelting and
Refining Company, Midvale, Utah, March 31, 1944.

Departed from DRGW Coal Chute track at 3:00 p. m., pick-
ed up on No. 5 track UP yard 3:20 p. m., left to clear No. 5

trestle track at 3:22 p. m., picked up again at 3:46 p. m., and set to East Thaw House track at 3:51 p. m.

UP 63728 gon load

" 63759 gon load

" 62351 gon load

" 62603 gon load

" 63417 gon load

" 63562 gon load

Picked up on U.S. SHEARS Track at 3:37 p. m., set to Belt track in smelter yard at 3:52 p. m.

DRGW 45188 gon load

Picked up on No. 3 trestle at 3:41 p. m.

USSR (207) mty gon, set to Middle Belt Track 3:55 p. m.

" (210) mty gon, set to Middle Belt Track 3:55 p. m.

" (202) mty gon, set to Middle Belt Track 3:55 p. m.

UCR 21613 gon load, set to Belt Track 3:54 p. m.

WP 5351 gon load, set to East Thaw House at 3:53 p. m.

Picked up on Belt Track in Smelter Yard at 3:57 p. m. set to scales at 3:58 p. m.

UCR 21910 gon load

Picked up on track No. 2 in smelter yard at 4:04 p. m.

CB&Q 25150 mty box, set to scales at 4:05 p. m.

BVO 27608 mty box, set to scales at 4:05 p. m.

PRR 66038 mty box, set to scales at 4:05 p. m.

WP (5965) loaded gon, set to East Thaw House 4:06 p. m.

DRGW 40992 loaded gon, set to No. 3 track 4:07 p. m.

WP 5358 loaded gon, set to No. 3 track 4:07 p. m.

UCR 20352 loaded gon, set to East Thaw House 4:08 p. m.

From East Thaw House track at 4:10 p. m.

WP (5965) gon load, set to No. 5 track at 4:12 p. m.

UCR 20352 gon load, set to No. 7 track at 4:11 p. m.

Picked up on No. 5 track, from behind 4 cars, and set to scale track at 4:15 p. m.

B&A (50294) mty box,

Four cars set back to No. 5 at 4:15 p. m.

Picked up on No. 7 track at 4:22 p. m.

UC 28391 mty box, set to scales at 4:23 p. m.

5 cars set back to No. 7 at 4:24 p. m.

SP 95050 load, set to No. 3 4:25 p. m.
 DRGW 41306 loaded gon, set to No. 3 4:25 p. m.
 3 cars set back to No. 7 at 4:26 p. m.

(PE 20193) loaded gon, set to Belt Track at 4:27 p. m.
 5 cars set back to No. 7 at 4:28 p. m.

1055 Assignment No. 3 —Midvale, Utah Page 12

SP 94935 loaded gon, set to No. 5 at 4:29 p. m.

UCR 20751 loaded gon, set to No. 5 at 4:29 p. m.

Picked up on No. 3 at 4:30 p. m.

UCR 20100 gon load, set to scales at 4:35 p. m.

UCR 21186 gon load, set to Belt track 4:36 p. m.

UP 64951 gon load, set to Belt track 4:36 p. m.

WP (5965) gon load, set to Scales at 4:32 p. m.

WP 5358 gon load, set to Scales at 4:32 p. m.

DRGW 40992 gon load, set to Scales at 4:32 p. m.

" 40112 gon load, set to Scales at 4:32 p. m.

UP 62625 gon load, set to Scales at 4:32 p. m.

DRGW 41306 gon load, set to Belt track at 4:34 p. m.

SP 95050 gon load, set to Scales at 4:38 p. m.

Picked up on track No. 5 at 4:43 p. m., and set to scales at 4:46 p. m.

SP 94935 loaded gon

UCR 20751 loaded gon

Picked up on Belt track at 4:46 p. m., and set to scale track at 4:47 p. m.

UCR 21186 gon load

UP 64951 gon load

DRGW 41306 gon load

PE (20193) gon load

UCR 21613 gon load

DRGW 45188 gon load

Picked up on scale track at 5:06 p. m.

SP 94935 gon load, set to No. 5 trestle at 5:26 p. m.

UCR 20751 gon load, set to No. 5 trestle at 5:26 p. m.

UCR 21910 gon load, set to No. 5 trestle at 5:26 p. m.

UCR 21186 gon load, set to No. 5 trestle at 5:26 p. m.

UP 64951 gon load, set to No. 5 trestle at 5:26 p. m.

DRGW 41306 gon load, set to No. 5 trestle at 5:26 p. m.

PE (20193) gon load, set to No. 4 trestle at 5:10 p. m.

UCR 21613 gon load, set to No. 4 trestle at 5:10 p. m.

DRGW 45188 gon load, set to No. 4 trestle at 5:10 p. m.
 SP 95050 gon load, set to No. 2 trestle at 5:33 p. m.
 UCR 20100 gon load, set to No. 1 trestle at 6:15 p. m.
 WPR (5965) gon load, set to No. 1 trestle at 6:15 p. m.
 WP 5358 gon load, set to No. 1 trestle at 6:15 p. m.
 DRGW 40992 gon load, set to No. 1 trestle at 6:15 p. m.
 UP 62625 gon load, set to No. 1 trestle at 6:15 p. m.
 DRGW 40112 gon load, set to No. 1 trestle at 6:15 p. m.
 IC 28391 mty box, set to Bullion track at 6:35 p. m.
 B&A (50294) mty box, set to Bullion track at 6:35 p. m.
 PRR 66038 mty box, set to Bullion track at 6:35 p. m.
 B&O 276087 mty box, set to Bullion track at 6:35 p. m.
 CB&Q 25150 mty box, set to Bullion track at 6:35 p. m.
 All loaded cars were weighed between 4:47 and 5:06 p. m.

1056. Assignment No. 2 Midvale, Utah Page 13

Picked up on No. 4 spur at 5:15, and set to No. 2 trestle at 5:33 p. m.

CP 375051 gon load
 DRGW 472078 gon load

Picked up on No. 5 trestle at 5:16 p. m.

UP (63682) mty gon, set to UP transfer at 5:28 p. m.
 UP 63035 mty gon, set to UP transfer at 5:28 p. m.
 UCR 20583 mty gon, set to UP transfer at 5:28 p. m.
 DRGW 70278 mty gon, set back on No. 5 trestle at 5:29
 " 41822 mty gon, set back on No. 5 trestle at 5:29 p. m.

Picked up on No. 1 trestle at 5:55 p. m.

DRGW (40320) mty gon, wghd 6:01 p. m., set to DRGW
 Tfr. at 6:07 p. m.
 " 42322 mty gon, wghd 6:02 p. m., set to DRGW
 Tfr. at 6:07 p. m.
 " 40116 mty gon, wghd 6:03 p. m., set to DRGW
 Tfr. at 6:07 p. m.
 UP 64826 mty gon, wghd 6:04 p. m., set to UP Tfr.
 at 6:10 p. m.
 UP (63142) mty gon, wghd 6:05 p. m., set to UP Tfr.
 at 6:10 p. m.
 UP 64485 mty gon, wghd 6:06 p. m., set to UP Tfr.
 at 6:10 p. m.

Lite to Bullion Track, picked up at 6:33 p. m.

P&LE 35370 loaded box, set to DRGW Tfr. 7:01 p. m.
 SL&SF 148795 loaded box, set to DRGW Tfr. 7:01 p. m.
 I&N 96546 loaded box, set to UP Tfr. 7:02 p. m.

Lite to Mat Track, picked up at 6:44 p. m.

UP 86025 hopper load, wghd 6:59, set to UP Tfr. at 7:02 p. m.

USSR 22 gon load, set to No. 5 trestle at 7:03 p. m.

Picked up on Roast Hole track at 7:25 p. m., weighed at 7:35 p. m., and set to No. 3 trestle at 7:45 p. m.

USSR (51) gon load

" 58 gon load

" 52 gon load

Picked up on No. 2 Trestle at 7:30 p. m., set to No. 5 trestle 7:32 p. m.

DRGW 42078 mty gon

CP 375051 mty gon

USSR 200 mty gon

UP 32682 mty hopper

UP 63856 loaded gon

DRGW 40802 loaded gon

DRGW 70076 loaded gon

SI&U (1102) loaded gon

1057 Assignment No. 3 Midvale, Utah Page 14

Picked up on Track No. 2 UP Yard at 9:05 p. m., and set to No. 2 trestle at 9:08 p. m.

UP 64211 mty gon

" 64336 mty gon

" ~~64241~~ 62241 mty gon

" 62252 mty gon

" 62067 mty gon

" 62854 mty gon

" 63854 mty gon

UCR 20526 mty gon

UCR 20195 mty gon

Picked up on Calcine track at 9:12 p. m., weighed at 9:15 p. m., set to No. 6 trestle at 9:17 p. m.

UP 62218 loaded gon

UP 64027 loaded gon

Picked up on Roast Hole track at 9:45 p. m., weighed at 9:48 p. m., set to No. 3 Trestle at 9:53 p. m.

USSR (53) loaded gon

Departed from Plant Yard at 10:01 p. m.

.....
Inspector

Assignment No. 4

Page 1

Report of Observer J. J. Mallaney at the Plant of the United States Smelting and Refining Company at Midvale, Utah.

Tuesday, March 28, 1944.

D&RGW engine 62 and the following Crew were assigned to this yard work.

Engine Foreman	William Davies
Engineer	Steve Shingleton
Fireman	Abe Black
Helper	J. C. Goodrich
"	A. Baker

The work at this plant is done with D&RGW engines, but all of the crews employed are Union Pacific Railroad men. The engine track is located approximately 1 mile from the yard office at Midvale at which point the above crew begins work as of 4:00 p. m., daily, and on March 28, 1944, they received work instructions and left this point at 4:27 p. m., and moved lite to the South Yards arriving there at 4:32 p. m., and went into Rio Grande Transfer Track and picked up UCR 21613, and D&RGW 70286 each loaded with ore, and put them into No. 2 track of the south yard.

Engine then moved lite to the east end of Track 2, and switched:

UP 87584 empty, UCR 21138 Ore, to scales
 DRGW 41579, ore, to track No. 3, and D&RGW 70286, and UCR 21613, ore, back to track 2. Engine then went lite to track 3 and switched out loads UCR 21111, and 21938 UCR to No. 4 track, returning 5 other cars to No. 2 track. Engine then went to No. 4 track, and picked up D&RGW 40350 throwing it to scale track, and 2 cars back on 4, and USR 21111 UCR 21938 to scale track.

Engine then moved lite to the Middle Shear track, and picked up 2 cars of ore:

DRGW 71404

41560, ore, and went to scales, and weighed those

4 cars at 5:15 p. m., and then moved them back to track 2 in south yard.

Engine then went to Middle track, picked up C&NW, empty box, 146788, and took it to track scales and weighed lite,

leaving it at that point at 5:28 p. m. Engine then moved lite to Flotation High Line track, and picked up following 8 empties being delayed 10 minutes to complete dumping of last car in the ore crushing house:

UP 63180 UCR 21280

UP 63649 " 20537

UP 62259 " (21957)

UP 62322 UP 64318, and weighed these cars at 6:05 p. m., and moved them as follows:

C&NW 146788 set into track 2

UP 63180 to the Belt Track for later loading

and other 7 empties to the Middle track to be held for loading of concentrates.

1059 Assignment No. 4

Page 2

Engine 62 then went lite to the Mill Track and got 7 cars and picked up UP 63180, empty, from Belt track, and shoved all cars back on Mill track to spot the UP 63180 for immediate loading.

Engine then went to scale track for supper hour for the crew.

Crew returned to duty at 7:10 p. m., and went to Old Scale Track and picked up 14 cars of ore from the DRGW, Lark Mine, as follows:

UCR 21897—

UCR 21886—

UCR 21036—

" 20131—

DRGW 43170—

" 20779—

" 43068—

" 21287—

" 40546—

DRGW 41822—

" 43349—

" 42078—

" 43293—

" 41048—

These cars were taken to scales and weighed with the exception of DRGW 43349, which was set into track 4. The rest of the cars were switched to Belt track, and No. 4 track. Into position for later spotting on the High Line trestle track known as the Concentration Ore Crushing House. It is now 7:40 p. m. Engine then went lite to the High Line Track and picked up 3 empties.

DRGW 41560

" 71404

UCR 21138, and kicked them to the scale track. Then picked up the following 5 loads: from the Belt Track and shoved them on the High Line track to Ore Crushing House spotting them at 7:50 p. m.

UCR 21287 UCR 21886
 UCR 20979 " 21897
 " 20131

Crew then went lite to the scale track and weighed 3 empties.

D&RGW 41560

" 71404

UCR 21138, setting the first 2 to No. 3 track for D&RGW Railway delivery, and UCR 21138 to Middle track to be used later for loading.

At 10:00 p. m. engine 62 pulled the Belt Track of 7 loads, concentrates, to clear the High Line Lead, then went to High Line and picked up empties.

UCR 21287

" 20979

" 20131

" 21886

" 21897

DRGW 40350, and shoved these cars to scale track, and weighed them, and shoved them into track 3 for D&RGW Railway delivery at 10:33 p. m.

Engine then went lite to track 4 and picked up 5 loads.

1060 Assignment No. 4

Page 3

UCR 21036

DRGW 43170

" 43068

" 40546

" 43293, and shoved them to High Line Ore House, and waited there from 10:40 p. m., to 10:55 p. m. for first 2 cars to be dumped.

Crew then came to track scales, and weighed lite these 2 empties,

UCR 21036

DRGW 43170, at 11:05 p. m., and set them into No. 3 track for DRGW delivery.

Engine then got 3 loads

DRGW 41822

" 42078

" 41048, from track 4 and spotted them at 11:15 p. m. into ore house.

This completes the day's work, and leaves the cut of 7 loads for 8:00 a. m. crew to spot in Ore House. Engine 62

left Smelter Yard Scale House at 11:25 p. m., and went to DRGW engine house track lite where crew tied up at 12:00 midnight.

1061 Assignment No. 4 USSM&R COMPANY Page 1
J. J. MALLANEY

USSM&R COMPANY, Midvale, Utah March 29, 1944.
DRGW Railway engine No. 62.

Same engine and crew as was used yesterday, assembled at yard office, Midvale yard; at 4:20, and departed for south yard scale house after receiving work instructions at 4:40 p. m. with following loads:

UP 64211

DRGW 71363

" 71175

" 40776

UCR " 20195, being delayed account of main lead blocked by DRGW engine 58. Stop was made at Smelter Trestle Track 3 at east side, and 2 loads UCR (20612),

UP 64241, and 4 empty gons,

USS CO (202)

" " 200

" " (207)

" " (210), were picked up at 5:05 p. m. and arrived at scale house in south yard at 5:10 p. m.

The latter 4 empties were set into the Flotation Middle track,

UCR 20195 was switched to No. 3 track,

DRGW 40776

" 71175

" 71363, to scale track, and, UP 64211

UP 64241

UCR (20612), to No. 3 track.

Crew then went lite to Belt track at 5:18 p. m., and picked up 7 loads,

WP 5360

DRGW 70278

WP (5965)

" (40320)

WP 5855

SL&U " (1102)

DRGW 70076

and set them into No. 2 track.

Engine then returned lite to Belt track, and picked up the following Lark Mine Ore,

DRGW 41864	UCR (21403)
" 41688	DRGW 43348
" 41442	" 40514
" 42361	" 42272
" 40802	" 43277
" 41250	" 42161
" 43123	" 40643

at 5:30 p. m., and switched DRGW 40802 to No. 4 track. DRGW 43123 - 41250 - 42361 - 41442 - 41688 - 41864 on scale track and weighed the latter 6 loads between 5:34 and 5:42 p. m. leaving the other 7 loads back on the Belt Lead. The six loads on scale track were then set in on No. 3 track. Engine then moved lite to High Line track at 5:48 p. m., and picked up 8 empties as follows:

1062 Assignment No. 4 Midvale Utah Page 2

DRGW 71751 SP 94935
DRGW 42425

UP 63540
UP (63401)
UP 63295
UCR 20293
UCR 20751

and set these cars on scale track. Of these 8 empty cars the following 5 were weighed lite:

DRGW 71751
UP 63540
UP (63401)
UCR 20751
UCR 20293

These were not weighed lite:

UP 63295
DRGW 42425
SP 94935

These cars were shoved to the west end of the scale track and left there at this time.

Engine 62 then moved lite to track 3, and picked up 6 loads.

DRGW 41864
" 41688
" 41442
" 42361
" 41250
" 43123

and took them to the High Line track and spotted them in the Ore Crusher House at 6:05 p. m.

Engine then returned lite to No. 7 track, and picked up load (UCR 20612), and went to track 6, and switched out NYC, mty box, 117676, and

PRR 565212, mty box,

UCR 21795

UCR 21310 mty box, Load put the latter 2 cars into the scale track and the other 2 back on track 6.

4

Engine then moved lite to Belt Track, picked up 7 loads of Lark Mine Ore, at 6:20 p. m., and moved to scale track, and weighed them, with cars previously set on scale track, as follows:

UCR 20293 mty gon

UCR 20751 " "

DRG 40514 load

UP (63401) " "

" 43348 "

UP 63540 " "

UCR (21403) "

DRG 271751 " "

UCR 21310 load

UCR 71795 "

DRG 40643 "

" 42161 "

" 43277 "

" 42272 "

Cars not weighed at this time with above cut were

UP mty gon, 63295

SP " " 94935

DRG " " 42425

After weighing was completed at 6:32 p. m. this cut of cars was pulled to the east end of yard, and switched as follows.

UP 63295 mty, to Belt track

1063 Assignment No. 4

Midvale, Utah

Page 3

UCR mty gon, 20293

UCR " " 20751

UP " " (63401)

UP " " 63540

SP " " 94935, were set on Middle track to be held for loading.

DRG 42425

DRG 71751, to No. 2 track, for DRGW railway delivery.

UCR 21310 load

DRG 40514 load

UCR 21795 "

DRG 43348, "

UCR (21403) "

DRG 43277 "

DRG 42272 "

WERE SET into East Ore Shed Track, and, DRG 40643, and, DRG 42161 was set into No. 6 track.

Engine then went lite to the scale house to wait for the unloading of 6 cars on the High Line Track which was completed at 7:22 p. m.

Engine moved lite to High Line Track Ore House and picked up empty gons:

DRGW 41864	DRGW 42361
" 41688	" 41250
" 41442	" 43123

and set them into the scale track to be weighed later.

Engine then went to Ore Shed, got the following loads, and put them in High Line Ore Crusher House for unloading at 7:35 p. m.

UCR (21403)	DRGW 43348
" 21795	" 40514
" 20310	" 42272
	43277

Engine then returned lite to No. 2 track, and picked up DRG empties

DRG 42425

DRG 71751, went to No. 3 track, and pulled 7 loads, and set them into track No. 5, the 2 DRG empties shown were then left in track 3 at 7:45 p. m.

Engine then went lite to the scale track, and weighed lite the 6 empties just shown as brought down from High Line Track, and set them into track 3 for delivery to D&RGW Railway.

Engine then moved lite to Belt Track, picked up UP 63295 my gon, and moved it to clear the Mill track to be spotted for loading later.

At 9:00 p. m. engine 62 picked up 6 cars first out on Mill track, came to Belt track and got UP, empty, 63295, and shoved back and spotted it on Mill track, for immediate loading.

Engine then moved lite to scale track, and weighed following empties, which had been brought from High Line track.

1064	Assignment No. 4	Midvale, Utah	Page 4
	DRG 43277		
DRG	42272		
DRG	40514		
"	43348		

UCR (21403); and put them into track 3.

Engine then went to track 6, and picked up loads

DRG	42161
"	40643

UCR (20612), and came to East Ore Shed track, and picked up

DRG 71363

" 71175

" 40776, and moved them all to High Line Track, and spotted them in Ore Shed at 9:35 p. m.

Upon returning to Scale House track this completed the work for the day, and engine left lite for Midvale yard office at 9:45 p. m., and later from there to the D&RGW Railway engine house track at Midvale, and tied up at 12:00 midnight.

1065 Assignment No. 4 MSSM&R CO., Midvale, Utah

J. J. MALLANEY

Page 1

USSM&R Company, Midvale, Utah, March 30, 1944, DRGW Railway Engine 62

DRGW Engine 62 with same crew as previously reported left Midvale Yard Office lite at 4:25 p. m., and arrived at South Yard scale House at 4:32 p. m. Upon receipt of work instructions engine moved lite to Belt Track, picked up loads

DRGW 71197 coke, weighed, and set to track 2 at 4:40 p. m.

" (71058) coke, weighed, and set to track 2 at 4:40 p. m.

UP 62625 ore, weighed, and set to track 2 at 4:40 p. m.

DRGW 4012 ore, weighed, and set to track 2 at 4:40 p. m.

WP 5358 ore, weighed, and set to track 2 at 4:40 p. m.

UP 5906 ore, weighed, and set to track 2 at 4:40 p. m.

DRGW 40992 ore, weighed, and set to track 2 at 4:40 p. m.

UCR 21795 empty, was moved with engine to Track 7, from which track empty gons,

UP 92073

UP 92004, were thrown out to scale track, and UCR 21795 was set to Middle track.

Engine then moved lite to scale track and weighed lite

UP 92073

UP 92004 at 4:58 p. m. These 2 cars were then moved to Midvale yard, proper, and set into Arsenic Hole track at 5:00 p. m. for later loading.

Engine 62 then moved lite to Track 2, Midvale yard, and picked up 16 ore as follows at 5:10 p. m.

UP 64336 ore, set into east side thaw shed at 5:25 p. m.

UCR 20526 ore, set into east side thaw shed at 5:25 p. m.

DRG 43124 ore, set into east side thaw shed at 5:25 p. m.

UCR 21118 ore, set into east side thaw shed at 5:25 p. m.
 UCR 21836 ore, set into east side thaw shed at 5:25 p. m.
 UCR 20477 ore, set into east side thaw shed at 5:25 p. m.
 UP 64485 ore, set into east side thaw shed at 5:25 p. m.
 UP 201070 ore, set into east side thaw shed at 5:25 p. m.
 UCR 20984 ore, set into east side thaw shed at 5:25 p. m.
 UCR 20838 ore, set into west side ore shed at 5:35 p. m.
 " 20231 ore, set into west side ore shed at 5:35 p. m.
 " 20559 ore, set into west side ore shed at 5:35 p. m.
 " 20085 ore, set into west side ore shed at 5:35 p. m.
 UP 64513 ore, set into west side ore shed at 5:35 p. m.
 UP 64652 ore, set into west side ore shed at 5:35 p. m.
 DRG 71033 ore, set into west side ore shed at 5:35 p. m.

It is now 5:40 p. m. Engine 62 went lile to High Line and picked up empty gons.

UP (62043) weighed, set to track (Middle) at 5:50 p. m.
 UP 62762 weighed, set to Middle track at 5:50 p. m.
 UP 63930 weighed, set to Middle track at 5:50 p. m.
 UP 62800 weighed, set to Middle track at 5:50 p. m.
 UP 63810 weighed, set to Middle track at 5:50 p. m.
 NCR 21910 weighed, set to Middle track at 5:50 p. m.
 DRG 41982 weighed, set to Track 4 at 5:55 p. m.
 DRG 41781 weighed, set to Track 4 at 5:55 p. m.

1066 Assignment No. 4 Midvale, Utah Page 2

It is now 6:00 p. m. Crew being delayed for arrival of DRGW train with Lark Mine Ore, as follows:

UCR 20439 ore, weighed, set to track 7 7:35 p. m.
 UCR 21358 ore, weighed, set to track 7 7:35 p. m.
 UCR 26239 ore, weighed, set to track 7 7:35 p. m.
 UCR 21423 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.
 D&SL 34138 ore, weighed, set to track 7 7:35 p. m.
 DRG 42493 ore, weighed, set to track 7 7:35 p. m.
 DRG 43169 ore, weighed, set to track 7 7:35 p. m.
 DRG 42322 ore, weighed, set to track 7 7:35 p. m.
 DRG 40094 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.
 DRG 42049 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.
 DRG 43079 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.
 DRG 40049 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.
 DRG 42412 ore, weighed, set on High Line in Ore Shed.
 7:42 p. m.

DRG 43309 ore, weighed, set on High Line in Ore Shed.
7:42 p. m.

" 40116 ore, weighed, set into track 3 at 7:32 p. m.

" 40040 ore, weighed, set into track 3 at 7:32 p. m.

" 40144 ore, weighed, set into track 3 at 7:32 p. m.

Engine returned lite to track 7, and shoved those cars in the clear. Came to track 5, and switched out DRG 40040, to scale track, and weighed it, a load, returned with it to track 7. Engine then went lite to scale house for Supper hour.

At 8:50 p. m. engine 62 went lite to High Line, and got empties.

DRG 43309, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

" 42412, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

" 40049, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

" 43079, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

" 42049, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

" 40094, weighed, and put in track 4, DRG Ry. Delvy
9:10 p. m.

Engine then moved lite to track 7, got 7 loads as follows:
and set on High Line Track into Ore Crushing shed at
9:18 p. m.

DRG 42493

" 43169

" 40040

UCR 20439

" 21358

" 20239

DSL 34138

Engine returned lite to Scale House, which completed the day's work, and left lite for Midvale Yard Office. Completed report work there, and engine moved to D&RGW Engine house track at Midvale and tied up at 12:00 midnight.

1067 Assignment, No. 4 USSM&R Midvale, Utah Page 1
Report of J. J. MALLANEY at the plant of the
USSM&R Company at Midvale, Utah, March 31, 1944.
D&RGW Railway-Engine 62 Work hours 4:00 p. m. to
11:55 p. m.

Engine 62 with same crew as previously reported, arrived at Midvale Yard Office at 4:20 p. m. Received work instructions, but were blocked in getting to the South Yard until 4:55 p. m. by D&RGW Engine 58 and crew, which had main line blocked between the 2 yards. Engine 62 arrived at the South Yard at 5:00 p. m., and went through No. 3 track to the High Line and picked up following 7 empty gons:

UCR 20195, weighed, and left on west end of scale track
5:15 p. m.
DRG 40098 not weighed, and left on west end of scale track
5:15 p. m.
UP 64241 not weighed, and left on west end of scale track
5:15 p. m.
UP 62252 weighed, and left on west end of scale track
5:15 p. m.
UP 62067 weighed, and left on west end of scale track
5:15 p. m.
UP 62854 weighed, and left on west end of scale track
5:15 p. m.
UP 63854 weighed, and left on west end of scale track
5:15 p. m.

Then engine 62 moved to track 7, picked up

UP 64336

UP 64211, loads, took them to scale track, and weighed, and took to High Line, and set into Ore House at 5:40 p. m.

Engine then moved lite to Belt track, and picked up following empties, which had been previously weighed by forenoon crew:

UCR 21423 E

DRG 40040 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

CCR 20439 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

UCR 21358 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

UCR 20239 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

DSL 34138 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

DRG 42493 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

DRG 43169 Delivered into track 4 for D&RGW Ry.
5:50 p. m.

Engine 62 then went to track 5, with UCR, mty, 21423, switched out DRGW 40144, to scale track, and WP 55114, back to No. 5 track, and empty UCR 21423 back to No. 4 track.

Engine then moved lite to Belt Track, and picked up Lark Mine Ore as follows:

UCR 21297 weighed, set to track 3 Sth yd at 6:30 p. m.
 " 21930 weighed, set to track 3 Sth yd at 6:30 p. m.
 DRG 42492 weighed, set to track 3 Sth yd at 6:30 p. m.
 DRG 43293 weighed, set to track 3 Sth yd at 6:30 p. m.
 DRG 40546 weighed, set to track 3 Sth yd at 6:30 p. m.
 " 43068 not weighed, set to track 7 Sth yd at 6:20 p. m.
 UCR 20918 not weighed, set to track 7 Sth yd at 6:20 p. m.
 DRG 41048 not weighed, set to track 7 Sth yd at 6:20 p. m.
 DRG 43170 not weighed, set to track 7 Sth yd at 6:20 p. m.
 UCR 20994 weighed, set into track 3 Sth yd at 6:15 p. m.
 UCR 20796 weighed, set into track 3 Sth yd at 6:15 p. m.
 DRG 40144 weighed, and set to track 3 Sth yd at 6:30 p. m.
 UCR 20862 not weighed, set into track 7 Sth yd at 6:20 p. m.
 DRG 43019 not weighed, set into track 7 Sth yd at 6:20 p. m.

1068 Assignment No. 4 Midvale, Utah Page 2

Engine then went lite to Belt track, and picked up loads

DRG 40214 set to track 7 Sth yd at 6:35 p. m.
 UCR 20344 set them to track 7 Sth yd at 6:35 p. m.
 PRR 858197, ore, set into track 4 Sth yd 6:35 p. m.
 RI 188461 ore, set into track 4 Sth yd 6:35 p. m.
 DRG 70513 scrap set into track 4 Sth yd 6:35 p. m.
 WP 5973 rock set into track 4 Sth yd 6:35 p. m.
 WP 5851 rock set into track 4 Sth yd 6:35 p. m.
 WP 5557 rock set into track 4 Sth yd 6:35 p. m.
 DRG 70349 coke set into track 4 Sth yd 6:35 p. m.
 " 70192 coke set into track 4 Sth yd 6:35 p. m.

Engine then went lite to scale track, waiting for 3 cars to be unloaded in Ore Crushing Shed on High Line track.

These empty cars

UP 64211 weighed, set into Middle Track at 7:20 p. m.
 UP 64336 weighed, set into Middle Track at 7:20 p. m.
 UCR 20526 weighed, set into Middle Track at 7:20 p. m.

At 7:25 p. m. engine went lite to No. 7 (Sth yd) track, and put up 8 loads on High Line Track into the Ore Crushing Shed as follows:

DRG 43293 shoved on High Line track at 7:28 p. m.
 " 42492 shoved on High Line track at 7:28 p. m.
 UCR 21930 shoved on High Line track at 7:28 p. m.
 " 21297 shoved on High Line track at 7:28 p. m.

Engine 62 again returned to track 7, (Sth yd) got the following 4 loads:

DRG 40144 shoved into Crushed Ore House at 7:40 p. m.
 UCR 20796 shoved into Crushed Ore House at 7:40 p. m.
 UCR 20994 shoved into Crushed Ore House at 7:40 p. m.
 DRG 40546 shoved into Crushed Ore House at 7:40 p. m.

Engine 62, then picked up UP empties

UP 64387 from north end track 6, to Slag Dump Midvale, yard
 UP 64825 from north end track 6, to Slag Dump Midvale, yard
 SP 95050 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 64211 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 64336 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UCR 20526 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UCR 20195 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 64241 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 62252 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 62067 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 62854 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.
 UP 63854 from west end scale track into track 2 Midvale (UP yd) 8:05 p. m.

After closing work at Midvale Yard Office, Crew went to D&RGW Engine Track at Midvale at 8:35 p. m.

1069

Exhibit No. 8

**SWITCHING OPERATIONS OBSERVED BY
REPRESENTATIVES OF THE INTERSTATE COMMERCE COMMISSION
ON MARCH 28, 29, 30 AND 31, 1944,
AT THE PLANT OF
UNITED STATES SMELTING, REFINING & MINING CO.,
MIDVALE, UTAH.**

1070

Car Initial & Number
D. R. G. W. 40500

Date Contents Via
Car In: 3/27/44 Load DRGW (Car in Plant prior to 3/28/44)
Car Out: 3/30/44 Mty DRGW
Commodity: Zinc Ore Concentrates

Origin: Sargent, Colo.
Destination: Midvale, Utah

Switching Performed:

<i>Date</i>	<i>Time</i>	<i>Contents</i>	<i>Assign- ment No.</i>	<i>From</i>	<i>To</i>
3/30/44	8:50 AM	Ore	2	Trk 7 Sth. Yd.	Scales & Weighed
3/30/44	9:20 AM	Ore	2	Scales	West Trk.
3/30/44	11:50 AM	Ore	2	West Trk Old Thaw Shed	Old Thaw Shed High line
3/30/44	12:50 PM	Mty	2	High Line N. Mill	N. Mill Del'd. to DRGW on Trk 3 South Yard

Switching Charges:

Intra-Plant: None
Empty Weigh ⓧ None

1071

Car Initial & Number
U. P. 63401

Date Contents Via
Car In: Received Prior to 3/28/44 (Date Investigation Began)
Car Out: 3/31/44 Load UP
Commodity: Zinc Ore Concentrates
Origin: Midvale, Utah
Destination: Anaconda, Mont.
Switching Performed:

<i>Date</i>	<i>Time</i>	<i>Contents</i>	<i>Assign- ment No.</i>	<i>From</i>	<i>To</i>
3/30/44	12:05 PM	Mty	2	Middle Trk. N.M.	Belt Trk N. Mill
3/31/44	11:25 AM	Ore	2	Belt Trk. N. M.	Scales
3/31/44	11:33 AM	Ore	2	Weighted (Lite Load)	
3/31/44	12:00 N	Ore	2	Scales Reset to Belt Trk for Heavier Loading)	
3/31/44	12:55 PM	Ore	2	Belt Trk. N. Mill	Scales
3/31/44	1:12 PM	Ore	2	Reweighed	
3/31/44	1:53 PM	Ore	2	Scales	UP Interchange, Dly Trk

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1072

3
Car Initial & Number
U. S. S. Co. 2

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
	About				
3/28/44	9:20 AM	Load	1	Wedge Roast	Scales & Weighed
	About				
3/28/44	9:30 AM	Load	1	Scales	Trestle No. 1
3/28/44	6:04 PM	Mty	3	Trestle No. 1	Sand Hole Trk.

Switching Charges:

Intra-Plant: \$2.70 3/28/44
Empty Weigh: None

1073

4
Car Initial & Number
S. L. U. 1102

Date Contents Via

Car In: 3/29/44 Load DRGW

Car Out: Car still in Plant on 3/31/44 last day of Investigation

Commodity: Crude Arsenic Ore

Origin: Wendover, Utah

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	5:18 PM	Load	4	DRGW on Belt	Trk. 2 Sth. Yd.
				Trk	
3/30/44	3:45 PM	Load	3	Trk 2 Sth. Yd.	Scales & Weighed
3/30/44	4:22 PM	Load	3	Scales	Trestle 1
3/31/44	10:42 AM	Mty	1	Trestle 1	Scales & Weighed
3/31/44	11:25 AM	Mty	1	Scales	Trestle 2
3/31/44	7:30 PM	Load	3	Trestle 2	Trestle 5

Switching Charges:

Intra-Plant: None during dates of Investigation
Empty Weigh: 50¢ 3/31/44

1074

5

Car Initial & Number
U. S. S. Co. 202

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/30/44	9:50 AM	Mty	2	Middle Trk. N.M.	Scales & Weighed
3/30/44	10:00 AM	Mty	2	Scales	Middle Trk. N.M.
3/30/44	12:05 PM	Mty	2	Middle Trk N. M.	Belt Trk. N. Mill
3/31/44	11:25 AM	Ore	2	Belt Trk. N. M.	Scales & Weighed
3/31/44	11:50 AM	Ore	2	Scales	Trk. 7 South Yd.
3/31/44	1:05 PM	Ore	1	Trk 7 Sth. Yd.	Trestle 3
3/31/44	3:41 PM	Mty	3	Trestle 3	Middle Trk. N. Mill

Switching Charges:

Intra-Plant: \$1.00 3/31/44
Empty Weigh: .50¢ 3/30/44

1075

6

Car Initial & Number
U. P. 92003

Date	Contents	Via
Car In: 3/25/44	Empty	UP (Arrived in Plant Prior to 3/28/44 Date
Car Out: 3/31/44	Load	UP Investigation Began)
Commodity: Crude Arsenic		
Origin: Midvale, Utah		
Destination: Bound Brook, N. J.		

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	10:05 AM	Mty	1	Arsenic Hole	(Pulled back 3 car lengths
3/31/44	8:10 AM	Arsenic	2	Arsenic Trk.	Scales & Weighed
3/31/44	10:42 AM	Arsenic	2	Scales	UP Delivery Trk

Switching Charges:

Inter-plant: None
Empty Weigh: None (During Dates of Investigation)

1076

7
Car Initial & Number
U. C. R. 21403

Date Contents Via
Car In: 3/29/44 Load DRGW
Car Out: 3/30/44 Empty DRGW
Commodity: Lead Ore
Origin: Lark, Utah
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	6:20 PM	Ore	4	DRGW on Belt Trk	Scales & Weighed
3/29/44	6:32 PM	Ore	4	Scales	East Trk. Old Thaw Shed
3/29/44	7:35 PM	Ore	4	East Trk. Old Thaw Shed	High Line N. Mill
3/29/44	9:00 PM	Mty	4	High Line N. Mill	Scales & Weighed
3/29/44	9:10 PM	Mty	4	Scales	Del'd to DRGW on Trk 3 S. Yd.

Switching Charges:

Intra-Plant: None
Empty Weigh: 50¢ 3/29/44

1077

8
Car Initial & Number
U. P. 88706

Date Contents Via
Car In: 3/28/44 Load U. P.
Car Out: — — —
Commodity: Ore
Origin: Dillon, Mont.
Destination: Midvale, Utah
Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	11:15 AM	Ore	1	UP Dely. Yd.	Scales & Weighed
3/29/44	11:20 AM	Ore	1	Scales	Trestle 1
3/30/44	10:12 AM	Mty	1	Trestle 1	Scales & Weighed
3/30/44	10:30 AM	Mty	1	Scales	UP Interchange Trk

Switching Charges:

Intra-Plant: None
Empty Weigh: 50¢ 3/30/44

1078

9

Car Initial & Number
U. S. S. Co. 207

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	5:05 PM	Mty	4	Trestle 3	Middle Trk. N. Mill
3/30/44	9:50 AM	Mty	2	Middle Trk. N. M.	Scales & Weighed
3/30/44	10:00 AM	Mty	2	Scales	Middle Trk. N. Mill
3/30/44	12:05 PM	Mty	2	Middle Trk. N. M.	Belt Trk. N. Mill
3/31/44	11:25 AM	Ore	2	Belt Trk. N. M.	Scales & Weighed
3/31/44	11:50 AM	Ore	2	Scales	Trk. 7 South Yd.
3/31/44	1:05 PM	Ore	1	Trk. 7 South Yd.	Trestle 3
3/31/44	3:41 PM	Mty	3	Trestle 3	Middle Trk. N. Mill

Switching Charges:

Intra-Plant: \$1.00 3/31/44
Empty Weigh: \$.50 3/30/44

1079

10

Car Initial & Number
U. S. S. Co. 210

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	5:05 PM	Mty	4	Trestle 3	Middle Trk/ N. Mill
3/30/44	9:50 AM	Mty	2	Middle Trk. N. M.	Scales & Weighed
3/30/44	10:00 AM	Mty	2	Scales	Middle Trk. N. Mill
3/30/44	12:05 PM	Mty	2	Middle Trk. N. M.	Belt Trk. N. Mill
3/31/44	11:25 AM	Ore	2	Belt Trk. N. M.	Scales & Weighed
3/31/44	11:50 AM	Ore	2	Scales	Trk 7 South Yd.
3/31/44	1:05 PM	Ore	1	Trk 7 South Yd.	Trestle 3
3/31/44	3:41 PM	Mty	3	Trestle 3	Middle Trk. N. Mill

Switching Charges:

Intra-Plant: \$1.00 3/31/44
Empty Weigh: .50 3/30/44

1080

11

Car Initial & Number
U. C. R. 20812

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/30/44	10:12 AM	Mty	1	Trestle 1	Sand Hold Trk.
3/31/44	9:15 AM	Sand	1	Sand Hole Trk.	Scales & Weighed
3/31/44	11:10 AM	Sand	1	Scales	Sand Stock Trk.

Switching Charges:

Intra-Plant: \$2.70 3/31/44
Empty Weight: None

1081

12

Car Initial & Number
U. P. 63013

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/28/44	8:00 AM	Ore	1	Trestle 2	Trk 6 South Yd.
3/28/44	4:05 PM	Ore	3	Trk 6 Sth. Yd.	Trestle 5
3/29/44	4:40 PM	Mty	3	Trestle 5	Sand Hole Trk.
3/31/44	9:15 AM	Sand	1	Sand Hole Trk.	Scales & Weighed
3/31/44	11:10 AM	Sand	1	Scales	Sand Stock Trk.

Switching Charges:

Intra-Plant: \$1.00 3/28/44
\$2.70 3/31/44
Empty Weight: None

1082

13

Car Initial & Number
U. C. R. 21915

Date Contents Via
Car In: 3/27/44 Load U. P.
Car Out: 3/29/44 Empty U. P.
Commodity: Ore
Origin: Bingham, Utah
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/29/44	8:15 AM	Ore	2	UP Dely. Yd.	Scales & Weighed
3/29/44	8:45 AM	Ore	2	Scales	Belt Trk. N. Mill
3/29/44	10:05 AM	Ore	2	Belt Trk.	High Line
				N. M.	N. Mill
3/29/44	12:05 PM	Mty	2	High Line N. M.	Scales & Weighed
3/29/44	1:35 PM	Mty	2	Scales	U. P. Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weight: 500 3/29/44

1083

14

Car Initial & Number
U. P. 64118

Date Contents Via
Car In: 3/27/44 Load U. P.
Car Out: — — —
Commodity: Ore
Origin: Arco, Idaho
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/29/44	11:15 AM	Ore	1	U. P. Dely Trk	Scales & Weighed
3/29/44	11:20 AM	Ore	1	Scales	Trestle 1
3/29/44	6:20 PM	Mty	3	Trestle 1	Scales & Weighed
3/29/44	6:48 PM	Mty	3	Scales	U. P. Trk. 1

Switching Charges:

Intra-Plant: None
Empty Weigh: .50¢ 3/29/44

1084

15

Car Initial & Number
DRGW 40320

Date Contents Via
Car In: 3/29/44 Load DRGW
Car Out: 4/1/44 Empty DRGW
Commodity: Crude Lead & Zinc Ore
Origin: Leadville, Colo.
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/29/44	5:18 PM	Ore	4	DRGW on Belt	Trk. 2 Sth. Yd.
				Trk.	
3/31/44	10:42 AM	Ore	1	Trk. 2 Sth. Yd.	Scales & Weighed
3/31/44	10:45 AM	Ore	1	Scales	Trestle 1
3/31/44	5:55 PM	Mty	1	Trestle 1	Scales & Weighed
3/31/44	6:07 PM	Mty	1	Scales	Del'd to DRGW
					Transfer

Switching Charges:

Intra-Plant: None
Empty Weigh: .50¢ 3/31/44

1085

16

Car Initial & Number
U. P. 92021

Date Contents Via
Car In: 3/25/44 Empty U. P.
Car Out: 4/ 1/44 Load U. P.
Commodity: Crude Arsenic
Origin: Midvale, Utah
Destination: Tacoma, Wash.

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	10:05 AM	Mty	1	Arsenic Hole	Spotted only
3/30/44	1:03 PM	Arsenic	1	Arsenic Hole	Scales & Weighed
3/30/44	1:10 PM	Arsenic	1	Scales	U. P. Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weigh: .50¢ 3/27/44 (Prior to date
Investigation
Began)

1086

17

Car Initial & Number
U. C. R. 21522

Date Contents Via
Car In: 3/28/44 Load U. P.
Car Out: 3/30/44 Empty U. P.
Commodity: Ore
Origin: Stockton, Utah
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	11:15 AM	Ore	1	U. P. Dely. Yd.	Scales & Weighed
3/29/44	11:20 AM	Ore	1	Scales	Trestle 1
3/30/44	10:12 AM	Mty	1	Trestle 1	Scales & Weighed
3/30/44	10:30 AM	Mty	1	Scales	U. P. Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weigh: .50¢ 3/30/44

1087

18

Car Initial & Number
U. C. R. 21125

• INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	4:35 PM	Mty	3	Trestle 5	Sand Hole Trk.
3/30/44	10:12 AM	Sand	1	Sand Hole Trk.	Scales & Weighed
3/30/44	10:18 AM	Sand	1	Scales	Trestle 1
3/30/44	5:51 PM	Mty	3	Trestle 1	Deld to U. P. Transfer

Switching Charges:

Intra-Plant: \$2.70 3/30/44
Empty Weigh: None

1088

19

Car Initial & Number
U. C. R. 20426

Date Contents Via

Car In: Car Received Prior to 3/28/44 (Date Investigation Began)
Car Out: 3/28/44 Load U. P.
Commodity: Zinc Ore Concentrates
Origin: Midvale, Utah
Destination: Anaconda, Mont.

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	11:50 AM	Ore	2	Belt Trk N. M.	Scales
3/28/44	12:07 PM	Ore	2	Weighed (Lite Load)	
3/28/44	12:35 PM	Ore	2	Scales reset to Belt Trk. for heavier loading.	
3/28/44	1:40 PM	Ore	2	Belt Trk. N. M.	Scales
3/28/44	2:16 PM	Ore	2	Reweighed	
3/28/44	2:20 PM	Ore	2	Scales	U. P. Interchange Trk.

Switching Charges:

Intra-Plant: / None
Empty Weigh: None

1089

20

Car Initial & Number
N. Y. C. 135827

Date Contents Via
Car in: 3/16/44 Empty U P (Prior to 3/28/44 Date Investigation Began)

Car out: 3/30/44 Load U P

Commodity: Anodes Lead Bullion

Origin: Midvale, Utah

Destination: Grasselli, Ind.

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/29/44	5.04 PM	Load	3	Bullion Trk	U P Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1090

21

Car Initial & Number
U P. 87927

Date Contents Via
Car In: 3/22/44 Empty U P. (Prior to 3/28/44 Date Investigation Started)

Car Out: 3/31/44 Load U P.

Commodity: Zinc Ore Concentrates

Origin: Midvale, Utah

Destination: Anaconda, Mont.

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/30/44	10.25 AM	Ore	2	Belt Trk. N. Mill	Scales
3/30/44	10.36 AM	Ore	2	Weighed (Lite Load to be Reset)	
3/30/44	10.37 AM	Ore	2	Scales	Middle Trk. N. Mill
3/30/44	12.05 PM	Ore (Lite Ld)	2	Middle Trk	Reset to Belt Trk N. Mill For Heavier Loading
3/31/44	11.25 AM	Ore	2	Belt Trk. N. Mill	Scales
3/31/44	11.38 AM	Ore	2	Reweighed	
3/31/44	1.53 PM	Ore	2	Scales	U P. Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1090A

22

Car Initial & Number
DRGW 71530

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	1:15 PM	Mty	1	3	Sand Hole Trk.
3/29/44	11:15 AM	Sand	1	Sand Hole Trk.	Scales & Weighed
3/29/44	11:20 AM	Sand	1	Scales	Trestle 1
3/29/44	6:20 PM	Mty	3	Trestle 1	UP Trk 1
3/30/44	3:11 PM	Mty	3	UP Trk.1	DRGW Transfer

Movement from Trestle 1 to WL Trk.
via UP track 1 for carrier conv.

Switching Charges:

Intra-Plant: \$2.70 3/29/44
Empty Weigh: None

1091

23

Car Initial & Number
N. Y. C. 110333

Date	Contents	Via
Car In: 3/23/44	Empty	U.P. (Prior to 3/28/44 Date Investigation began)

Car Out. 3/31/44 Load U.P.

Commodity: Anodes Lead Bullion

Origin: Midvale, Utah

Destination: Grasselli, Ind.

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/30/44	5:02 PM	Load	3	Bullion Trk.	UP Interchange Trk.

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1092

24

Car Initial & Number
W. P. 5933

Date Contents Via

Car In: Car Received Prior to 3/28/44 Date Investigation Started.

Car Out: 3/31/44 Empty DRGW

Commodity: Lime Rock

Origin: Dolomite, Utah

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/30/44	10:12 AM	Lime Rock	1	Trk. 3 Sth. Yd.	Scales & Weighed
3/30/44	10:20 AM	Lime Rock	1	Scales	Trestle 1
3/30/44	5:51 PM	Mty	3	Trestle 1	DRGW Transfer

Switching Charges:

Intra-Plant: None

Empty Weigh: None

1093

25

Car Initial & Number
U. P. 63142

Date Contents Via

Car In: 3/30/44 Load U.P. —

Car Out: 3/31/44 Empty U.P.

Commodity: Ore

Origin: Arco, Idaho

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/31/44	8:30 AM	Ore	2	UP Interchange	Trk 7 Sth. Yd.
				Trk	
3/31/44	10:42 AM	Ore	1	Trk 7 Sth. Yd.	Scales & Weighed
3/31/44	10:45 AM	Ore	1	Scales	Trestle 1
3/31/44	5:55 PM	Mty	3	Trestle 1	Scales & Weighed
3/31/44	6:10 PM	Mty	3	Scales	UP Interchange
					Trk

Switching Charges:

Intra-Plant: None

Empty Weigh: 50c 3/31/44

1094

26

Car Initial & Number
U. P. 62043

Date Contents Via
Car In: 3/28/44 Load N.P.

Car Out: — — —

Commodity: Ore

Origin: Cranmer, Utah

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	3:25 PM	Ore	3	UP Dely. Yd.	Trk 5 Sth. Yd.
3/30/44	8:30 AM	Ore	2	Trk 5 Sth. Yd.	Scales & Weighed
3/30/44	9:15 AM	Ore	2	Scales	East Trk Old Thaw Shed
3/30/44	1:00 PM	Ore	2	East Trk Old Thaw Shed	High Line N. Mill
3/30/44	5:40 PM	Mty	4	High Line N. Mill	Scales & Weighed
3/30/44	5:50 PM	Mty	4	Scales	Middle Trk New Mill

Switching Charges:

Intra-Plant: None

Empty Weigh: 50¢ 3/30/44

1095

27

Car Initial & Number
U. C. R. 21544

Date Contents Via
Car In: Car Arrived Prior to 3/28/44 Date Investigation Started

Car Out: 3/29/44 Load U.P.

Commodity: Zinc Ore Concentrates

Origin: Midvale, Utah

Destination: Anaconda, Mont.

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	2:05 PM	Mty	2	Middle Trk. N. Mill	Belt Trk. N. Mill
3/29/44	10:45 AM	Ore	2	Belt Trk. N. Mill	Scales & Weighed
3/29/44	1:35 PM	Ore	2	Scales	U.P. Interchange Trk.

Switching Charges:

Intra-Plant: None

Empty Weigh: None

1096

28

Car Initial & Number
U. S. S. Co. 51

INTRA PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	7:25 AM	Mty	1	Trestle No. 5	Roast Trk.
3/29/44	8:20 PM	Load	3	Roast Trk	Scales
3/29/44	8:35 PM	Load	3	Weighed	
3/29/44	8:55 PM	Load	3	Scales	Trestle No. 3
3/30/44	8:30 AM	Mty	1	Trestle No. 3	Roast Trk.

Switching Charges:

Intra-Plant: \$2.70 3/29/44

Empty Weigh: None

1097

29

Car Initial & Number
U. S. S. Co. 53

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	8:10 AM	Mty	1	Trestle 3	Roast Trk.
3/29/44	8:35 AM	Roast	1	Roast Trk	Scales & Weighed
3/29/44	8:55 AM	Roast	1	Scales	Trestle 3
3/29/44	10:18 AM	Mty	1	Trestle 3	Roast Trk
3/30/44	6:35 PM	Load	3	Roast Trk	Scales & Weighed
3/30/44	6:55 PM	Load	3	Scales	Trestle 3
3/31/44	8:46 AM	Mty	1	Trestle 3	Roast Trk

Switching Charges:

Intra-Plant: \$2.70 3/29/44

\$2.70 3/30/44

Empty Weigh: None

1098

30

Car Initial & Number
U. P. 62255

Date Contents Via
Car In: 3/27/44 Load U.P.
Car Out: 3/31/44 Empty U.P.
Commodity: Ore
Origin: Basin, Mont.
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	3:38 PM	Ore	3	UP Dely Trk.	East Trk Old Thaw Shed
3/29/44	4:13 PM	Ore	3	East Trk Old Thaw Shed	Scales & Weighed
3/29/44	4:58 PM	Ore	3	Scales	Trestle 5
3/29/44	6:53 PM	Ore	3	Trestle 5	Trestle 1
3/30/44	10:12 AM	Mty	1	Trestle 1	Scales & Weighed
3/30/44	10:45 AM	Mty	1	Scales	Trestle 2
3/31/44	7:00 AM	Ore	1	Trestle 2	Trk. 5 Sth. Yds.
3/31/44	9:15 AM	Ore	2	Trk. 5 Sth. Yd.	Scales Not Weighed
3/31/44	9:50 AM	Ore	2	Scales	Reset to Trk 5 Sth Yd.
3/31/44	10:48 AM	Ore	2	Trk 5 Sth Yd	High Line N. Mill
3/31/44	1:05 PM	Mty	2	High Line N.M.	Scales Not Weighed
3/31/44	1:53 PM	Mty	2	Scales	U.P. Interchange Trk.

Switching Charges:

Intra-Plant: \$1.00 3/31/44
Empty Weigh: .50¢ 3/30/44

1099

31

Car Initial & Number
U. C. R. 21957

Date Contents Via
Car In: Car Received Prior to 3/28/44 Date Investigation Started
Car Out: 3/30/44 Load U. P.
Commodity: Iron Middlings Concentrates
Origin: Midvale, Utah
Destination: Garfield, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	1:20 PM	Mty	2	Middle Trk	Belt Trk N. Mill
3/30/44	10:25 AM	Ore	2	Belt Trk. N. M.	Scales
3/30/44	10:49 AM	Ore	2	Weighed (Lite Load to be Reset)	
3/30/44	11:05 AM	Ore	2	Scales Reset to Belt Trk. N. M. For Heavier Loading	
3/30/44	11:10 AM	Ore	2	Belt Trk. N. M.	Scales
3/30/44	1:38 PM	Ore	2	Reweighed	
3/30/44	1:40 PM	Ore	2	Scales	UP Interchange

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1100

32

Car Initial & Number
DRGW 71058

Date Contents Via
Car In: 3/30/44 Load DRGW

Car Out: Car still in Plant on 3/31/44 Last date of Investigation

Commodity: Furnace Coke

Origin: Ironton, Utah

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/30/44	4:32 PM	Furnace Coke	4	DRGW on Belt Trk.	Scales & Weighed
3/30/44	4:40 PM	Furnace Coke	4	Scales	Trk 2 South Yd.
3/31/44	1:05 PM	Furnace Coke	4	Trk 2 Sth. Yd.	Trestle 3

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1101

33

Car Initial & Number
U. P. 62459

Date Contents Via
Car In: 3/27/44 Load U.P.

Car Out: 3/29/44 Empty U.P.

Commodity: Ore

Origin: Arco, Idaho

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	11:15 AM	Ore	1	UP Dely Trk	Scales & Weighed
3/29/44	11:20 AM	Ore	1	Scales	Trestle 1
3/29/44	6:20 PM	Mty	3	Trestle 1	Scales & Weighed
3/29/44	6:43 PM	Mty	3	Scales	UP Interchange Trk

Switching Charges:

Intra-Plant: None
Empty Weigh: .50¢ 3/29/44

1102

34

Car Initial & Number
W. P. 5965

Date Contents Via

Car In: 3/29/44 Lime Rock DRGW

Car Out: Car still in Plant on 3/31/44 last date of Investigation

Commodity: Lime Rock

Origin: Dolomite, Utah

Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/29/44	5:18 PM	Lime Rock	4	DRGW on Belt Trk.	Trk 2 South Yd.
3/31/44	4:04 PM	Lime Rock	3	Trk 2 Sth. Yd.	Scales & Weighed
3/31/44	5:06 PM	Lime Rock	3	Scales	Trestle 1

Switching Charges:

Intra-Plant: None

Empty Weigh: None during dates of Investigation

1103

35

Car Initial & Number
U. S. S. Co. 68

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/30/44	6:23 PM	Mty	3	Trestle 3	Rip Track

Switching Charges:

Intra-Plant: \$2.70 3/30/44

Empty Weigh: None

1104

36

Car Initial & Number
U. S. S. Co. 69

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	7:50 AM	Roast	1	Roast Hole	Scales & Weighed
3/28/44	7:55 AM	Roast	1	Scales	Trestle 3
3/28/44	2:00 PM	Mty	1	Trestle 3	Roast Hole
3/28/44	5:25 PM	Mty	3	Roast Hole	spotted for loading
3/30/44	1:00 PM	Roast	1	Roast Hole	Scales & Weighed
3/30/44	1:05 PM	Roast	1	Scales	Trestle 3
3/30/44	6:23 PM	Mty	3	Trestle #2 or 3	Roast Hole

Switching Charges:

Intra-Plant: \$2.70 3/28/44

\$2.70 3/30/44

Empty Weigh: None

1105

37
Car Initial & Number
A. T. S. F. 175069

Date Contents Via
Car In: 3/27/44 Load U.P.
Car Out: 3/29/44 Empty U.P.
Commodity: Ore
Origin: Kingman, Ariz.
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	3:41 PM	Ore	3	UP Dely Yd.	Trk. 5 Sth. Yd.
3/29/44	11:15 AM	Ore	1	Trk 5 Sth. Yd.	Scales & Weighed
3/29/44	11:20 AM	Ore	1	Scales	Trestle 1
3/29/44	6:20 PM	Mty	3	Trestle 1	Scales & Weighed
3/29/44	6:47 PM	Mty	3	Scales	UP Interchange Trk

Switching Charges:

Inter-Plant: None
Empty Weigh: .50¢ 3/29/44

1106

38
Car Initial & Number
U. P. 87178

Date Contents Via
Car In: Car Arrived Prior to 3/28/44 Date Investigation Started
Car Out: 3/29/44 Load U.P.
Commodity: Zinc Ore Concentrates
Origin: Midvale, Utah
Destination: Anaconda, Mont.

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/28/44	11:50 AM	Ore	2	Belt Tr. N. Mill	Scales
3/28/44	11:58 AM	Ore	2	Weighed (Lite Load to be Reset)	
3/28/44	12:30 PM	Ore	2	Scales	(Lite Load) Middle Trk
3/28/44	2:05 PM	Ore	2	Middle Trk.	Reset to Belt Trk for Heavier Load- ing.
3/29/44	10:45 AM	Ore	2	Belt Trk. N. Mill	Scales
3/29/44	11:21 AM	Ore	2	Reweighed	
3/29/44	1:35 PM	Ore	2	Scales	U.P. Interchange Trk

Switching Charges:

Intra-Plant: None
Empty Weigh: None

1107

Car Initial & Number
P. E. 20193

Date Contents Via
Car In: 3/30/44 Load U.P.
Car Out: — — —
Commodity: Ore
Origin: Olancha, Calif.
Destination: Midvale, Utah

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/31/44	8:20 AM	Ore	2	UP Dely. Yd.	Trk 7 Sth. Yd.
3/31/44	4:22 PM	Ore	3	Trk 7 Sth. Yd.	Scales & Weighed
3/31/44	5:06 PM	Ore	3	Scales Trk.	Trestle 4

Switching Charges:

Intra-Plant: None

Empty Weigh: None during period of investigation.

1108

Car Initial & Number
B&A 50294

Date Contents Via
Car In: 3/27/44 Empty U.P.
Car Out: — — —
Commodity: Empty (For Bullion Loading)
Origin: —

Destination: Car in Plant Empty on last date of Investigation 3/31/44

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/28/44	3:41 PM	Mty	3	UP Dely Yd.	Trk 5 Sth Ya.
3/31/44	4:15 PM	Mty	3	Trk 5 Sth. Yd.	Bullion Trk.

Switching Charges:

Intra-Plant: None

Empty Weigh: None

Exhibit No. 9
Witness: VICTOR

STATEMENT SHOWING TYPICAL CARS OF ORE, BOTH INTRA-STATE AND INTERSTATE, SAMPLED IN TRANSIT AT MIDVALE, UTAH AND SUBSEQUENTLY REFORWARDED TO DESTINATIONS SHOWN, DURING PERIOD JANUARY 1, 1944 TO MARCH 31, 1944.

Origin	Bill of Lading Date	Origin Car Int.	Car No.	Received Midvale, Utah	Diverted to
Stockton, Utah	1- 2-44	UCR	20514	1- 4-44	International, Utah
U. S. Ore Bins, Utah	1- 6-44	UCR	21632	1- 8-44	Garfield, Utah
" " "	1- 7-44	UCR	21739	1- 9-44	" "
" " "	1-11-44	UP	64120	1-13-44	" "
" " "	1-12-44	UCR	21414	1-14-44	" "
Stockton, Utah	1-14-44	UP	62377	1-18-44	International, Utah
Hobson, Mont.	1-11-44	KCS	20853	1-18-44	" "
U. S. Ore Bins, Utah	1-27-44	UCR	21694	1-29-44	Garfield, Utah
Silver City, Utah	1-18-44	UP	64238	1-28-44	International, Utah
U. S. Ore Bins, Utah	1-28-44	UP	64681	1-30-44	Garfield, Utah
" " "	1-31-44	UCR	21572	2- 1-44	" "
" " "	2- 2-44	DRGW	40935	2- 3-44	" "
" " "	2- 1-44	DRGW	41178	2- 2-44	" "
" " "	2- 4-44	DRGW	45001	2- 5-44	" "
Yucca, Ariz.	1-17-44	ATSF	173216	2- 4-44	International, Utah
" " "	1-23-44	ATSF	173618	2- 7-44	" "
" " "	1-28-44	ATSF	82757	2- 4-44	" "
" " "	1-29-44	ATSF	70322	2- 8-44	" "
U. S. Ore Bins, Utah	2-10-44	UCR	20652	2-11-44	Garfield, Utah
Yucca, Ariz.	2- 5-44	ATSF	173562	2-16-44	" "
U. S. Ore Bins, Utah	2-16-44	DRGW	45465	2-17-44	" "
Yucca, Ariz.	2- 4-44	ATSF	83539	2-19-44	" "
U. S. Ore Bins, Utah	2-17-44	UCR	21412	2-18-44	" "
" " "	2-18-44	DRGW	40881	2-19-44	" "
Yucca, Ariz.	2-15-44	ATSF	172036	2-22-44	" "
U. S. Ore Bins, Utah	2-19-44	UCR	20160	2-21-44	" "
" " "	2-24-44	UCR	20637	2-25-44	" "
" " "	2-25-44	DRGW	42161	2-26-44	" "
" " "	2-26-44	DRGW	40793	2-28-44	" "
" " "	2-29-44	UCR	20499	3- 2-44	" "
" " "	3- 1-44	UCR	21764	3- 3-44	" "
" " "	3- 2-44	UCR	20477	3- 4-44	" "
Stockton, Utah	3- 3-44	UP	62302	3- 5-44	International, Utah
Kingman, Ariz.	3- 9-44	ATSF	173127	3-17-44	" "

1110

Exhibit No. 10

Exhibit No. 10

Witness: VICTOR

COPY

POSTAL NIGHT LETTERGRAM
Salt Lake City, February 7, 1919.

J. A. Munroe,
Traffic Manager,
Union Pacific System,
Omaha, Nebraska

Reeves interpreting Johnson rate advice six five seven and nine naught one to require publication minimum switching charge two dollar fifty cents car at plants where by definite understanding with carriers and for considerations in matters of yard track construction no charge has been made for past ten years or more stop Switching tariffs now provide for free switch at smelters from track to track within smelter yards by oral agreement that ore rates yield ample revenue to cover switching stop We constructed at our own expense a complete assembling yard on above understanding and have added tracks from time to time to facilitate necessary switches saving carriers the expense of providing similar yards of their own stop We interpret Administration Circulars as having reference only to switching not in connection with line haul and switching not covered by specific agreement stop The interpretation given by Oregon Short Line would result in discrimination between smelters in this vicinity as in one case smelter switches its own cars and receives compensation by division of through ore and commodity rates while at Midvale the Oregon Short Line uses our yards and switches free in lieu of compensation and as I said before by definite agreement stop No means of collecting additional switching charges from ores are smelting charge all based on time contracts therefore hope you will defer action pending further conference Advise.

G. W. CUSHING.

Chg. U. S. S. R. M.

5-30pm—GWC-g

cc: J. A. REEVES.

1111

*Exhibit No. 11*Exhibit No. 11
Witness: VICTOR

COPY

DAY LETTER

Salt Lake City, Utah, February 10, 1919.

Fred Wild, Jr.,
Freight Traffic Manager,
Denver & Rio Grande R. R.,
Denver, Colorado.

Following telegram sent Mr. Munroe quote Reeves interpreting Johnson rate advice six five seven and nine naught one to require publication minimum switching charge two dollar fifty cents car at plants where by definite understanding with carriers and for considerations in matters of yard track construction no charge has been made for past ten years or more stop Switching tariffs now provide for free switch at smelters from track to track within smelter yards by oral agreement that ore rates yield ample revenue to cover switching stop We constructed at our own expense a complete assembling yard on above understanding and have added tracks from time to time to facilitate necessary switches saving carriers the expense of providing similar yards of their own stop We interpret Administration Circulars as having reference only to switching not in connection with line haul and switching not covered by specific agreement stop The interpretation given by Oregon Short Line would result in discrimination between smelters in this vicinity as in one case smelter switches its own cars and receives compensation by division of through ore and commodity rates while at Midvale the Oregon Short Line uses our yards and switches free in lieu of compensation and as I said before by definite agreement stop No means of collecting additional switching charges from ores as smelting charge all based on time contracts therefore hope you will defer action pending further conference advise end quote Any change in present switching tariffs would give the International Smelter decided advantage whose plant is switched by the Tooele Valley Railroad and the latter receives remuneration therefore through division of ore bullion and other freight rates.

G. W. CUSHING

Chg; U. S. S. R. M.
11:45am GWC-g

1112

Exhibit No. 12

Exhibit No. 12

Witness: VICTOR

COPY
TELEGRAM
Copy

Omaha, March 13, 1919.

J. A. Reeves, Salt Lake.

A-494. This confirms my view and understanding as stated in previous wire in reply to your A-485 of yesterday. At same time see no objection to conclusions reached in your conference to effect that line haul charges will include additional movement within smelter plant to designated unloading point in order to complete line haul service but this involves a distinct rate proposition in itself and will require a freight rate authority. If you concur in this view suggest you proceed accordingly acting in unison with Salt Lake Route and Rio Grande keeping Mr. Barnwell fully advised of progress you are making. I take this view on the ground that it is function of carrier to complete service to the unloading place of the commodity not denying any transit privilege such as weighing, sampling in transit, etc., to that part of haul lying within the plant that is accorded same shipments at any other intermediate point on direct line of haul. Do not understand you permit concentrating in transit at any point so do not understand your reference to concentrator. It is essential of course that all lines involved act in unison and simultaneously in matter. The definition quoted in your message reads "Will include one movement". Is this correct? If car moves from assembling track to the sampler and thence to unloading dock is this not two movements and do you not mean to include them both? C-575. Original JAR copy Fred Wild, T. M. Sloan.

(sgd) J. A. MUNROE.

1114

Exhibit No. 12

Witness:

Copy
TELEGRAM

Salt Lake City, March 14, 1919.

W. G. Barnwell, San Francisco.

C-8-13. Had conference here yesterday with Mr. Richards of AS&R., Mr. Cushing of United States Smelter, representatives of Legal, Operating and Auditing Departments were present and Mr. Robbins of D&RG. Following definition of initial or delivery switching was agreed to:

"QUOTE—Delivery of a line haul carload shipment destined to smelters at (Blank) will include one movement of commodity within smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator) to a designated unloading point indicated by the Smelting Company. END QUOTE.

This definition strictly in accordance with that used in arriving at bills against Smelting Companies in suit argued before the Federal Court here last week, except that basis of payment was actual cost of service of internal switching instead of \$2.50 per move per car as now ordered. You understand we maintain no tracks scales at Murray or Midvale—they belong to smelters and are on their ground. We must weigh the ore same as all carload freight in order to obtain basis for freight charges, and free switching to and from smelter sampler or combination sampler and concentrator is provided for in our tariff under heading of Free Sampling in Transit and samples and assays must be obtained in order to secure value of ore on which to assess freight charges.

1115 All switching other than that designated above as initial or delivery switching to be classed as intra-plant or internal switching, of which there is considerable, and which smelters must pay for on basis of \$2.50 per move per car—said charge to include movement of load and empty. Does this meet with your approval?

Unnecessary to say, perhaps, that effective date for this charge on D&RG., Salt Lake Route and Short Line should be same. A-496.

J. A. REEVES
OSL RR

Copy to
Mr. C. E. Richards, AS&R
Mr. G. W. Cushing, USS&R Co.

1116

Exhibit No. 12

Witness:

COPY

UNITED STATES RAILROAD ADMINISTRATION
W. G. McAdoo, Director General of Railroads

CENTRAL WESTERN REGION
Denver and Rio Grande Railroad
Rio Grande Southern Railroad
TRAFFIC DEPARTMENT

April 3, 1919
23-511

TERMINALS: Inter-plant Switching.

Mr. G. W. Cushing,

Traffic Manager, United States S. R. & M. Company,
Salt Lake City, Utah

Dear Sir:

I am in receipt of your favor of the 27th ultimo, File 620-151-C, in which you quote your telegraphic correspondence with Mr. Edward Chambers, Director of Traffic, United States Railroad Administration.

On March 25, I received a telegram from Mr. Chambers reading:

"Mr. Raiff complains that under our General Freight Rate Authorities governing industrial switching, the Colorado and Utah Lines are making effective minimum charge of \$2.50 on switching formerly handled free within the plants. Am sure you understand that our authorities ran only to industrial switching not in connection with line haul. A hasty examination of D&RG switching tariff 4486-D shows that most of the free switching service is in connection with line haul. What are the facts?"

To which I replied:

"Your H File 3-25-1696 date. All lines interested understand FRA applies only to intraplant switching. On line haul traffic we would weigh car, set on track selected by smelter which would constitute first placement. Thereafter for each move to some other location within smelter yards charge \$2.50 would be made. I think we fully understand what is desired and tariffs are being prepared accordingly."

It is our understanding that the delivery of a line haul carload shipment destined to your smelter at Midvale would include one movement of the commodity contained in 1117 the car within the smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator) to a designated unloading point indicated by some one authorized by your company. After this has been accomplished, then if you desire the car switched to some one, or to several other places in your yards, a charge of \$2.50 per car will be made for each setting.

This I understand is the agreement reached between the various smelting companies and the Oregon Short Line, and I see no reason why it should not be effective via the Denver & Rio Grande. We are publishing a similar rule in Colorado. May I inquire what objections, if any, you find to it? I understand of course that it is desirable from your standpoint that the old arrangement for free switching will be continued, but I think you can hardly hope that it will be.

As you sent a copy of your letter to Messrs. Richards and Reeves, I am permitting a copy of my reply to you to go to these gentlemen.

Yours truly,

(sgd.) FRED WILD, JR.

Wd

cc Mr. C. E. Richards

Mr. J. A. Reeves

Exhibit No. 13
Witness: VICTOR

STATEMENT OF TYPICAL CARS OF ORES AND CONCENTRATES ON WHICH FREIGHT CHARGES WERE PAID AT MIDVALE, UTAH DURING MARCH 1944,
BOTH INTRASTATE AND INTERSTATE, SHOWING CARRIER'S CAR MILE AND TON MILE EARNINGS

Freight Bill Date No.	Car Int. No.	Origin	Value	Weight	Rate	Freight Charges	Routing	Distance	Car Mile Earnings	Ton Mile Earnings	Rate	Tariff Reference	Distance
INTRA STATE													
3-1 9	UP 62981	Stockton, Utah	17.13	117640	.60	35.29	UP	52.0	\$.67865	\$.01154		F. W. McManus ICC 3	UP ICC 634
3-1 24	UP 62458	Cranmer, Utah	10.68	114020	1.00	57.01	UP	118.8	.47988	.00842		UP ICC 4956 UP ICC 4967	UP ICC 2615 UP ICC 3976
3-15 194	UP 64739	Cranmer, Utah	16.86	113480	1.15	65.25	UP	118.8	.54924	.00968		UP ICC 4956 UP ICC 4967	UP ICC 2615 UP ICC 3976
3-15 195	UCR 21427	U. S. Ore Bins, Utah	17.14	118500	1.00	59.25	B&G-UP	48.5	1.22165	.02062		F. W. McManus ICC 3 B&GPSCU 43-UP	B&G ICC 37 UP ICC 634
3-17 212	UCR 21761	U. S. Ore Bins, Utah	36.86	122740	1.30	79.78	B&G-UP	48.5	1.64495	.02680		" "	" "
3-17 214	UCR 20113	U. S. Ore Bins, Utah	Under 15.00	119100	.60	35.73	B&G-UP	48.5	736.70	.01237		" "	" "
3-6 72627	RG 42052	Lark, Utah	15.50	112720	.55	31.00	D&RGW	12.6	2.46032	.04365		DRG ICC 641	DRG ICC 623
3-7 72661	RG 40593	Lark, Utah	Under 15.00	113680	.30	17.05	D&RGW	12.6	1.3532	.02381		" "	" "
3-29 74093	RG 71627	Wendover, Utah	Under 9.00	136580	1.40	95.61	WP-D&RGW	132.3	.72268	.01058		J. P. Haynes ICC 1386	WP ICC 418
INTER STATE													
3-1 1	UP 307904	Cascade, Idaho	46.22	109180	4.50	245.66	UP	523.4	.46935	.00860		UP ICC 4956	UP ICC 2615
3-1 2	UP 63182	Arco, Idaho	Under 5.00	125900	2.00	125.90	UP	264.8	.47545	.00735		UP ICC 4956	UP ICC 2615
3-1 14	RG 40861	Pioche, Nevada	3.36	130400	1.87	121.92	UP	366.0	.33311	.00511		UP ICC 606	UP ICC 634
3-1 15	CP 375237	Silverton, B. C., Canada	97.77	111700	11.00	614.35	CP-SI-UP	1260 (Approx.)	.48758	.00873		CP ICC W975 NP ICC 9640	UP ICC 970 UP ICC 2615 NP ICC 9095
3-1 16	UP 64276	Elliston, Montana	14.14	65000	4.73	153.73	NP-UP	503.8	.30524	.00939		J. P. Haynes ICC 1386	UP ICC 2615 SP ICC 4687
3-1 17	SP 93347	Keeler, California	11.04	117500	5.00	293.75	SP-UP	1237.9	.23730	.00404		UP ICC 4956	UP ICC 2615
3-1 22	UP 64800	Mackay, Idaho	24.88	115560	3.03	175.07	UP	291.0	.60162	.01041		J. P. Haynes ICC 1386	SP ICC 4687 UP ICC 2615
3-8 122	SP 97385	Lone Pine, California	53.58	119920	8.25	494.67	SP-UP	1217.0	.40647	.00678		J. P. Haynes ICC 1386	SP ICC 4687 UP ICC 2615
3-9 77	SP 92294	Tonopah, Nevada	20.89	98080	5.83	285.90	T&G-SP-UP	739.5	.38661	.00788		" "	SP ICC 2615 UP ICC 2615
3-10 162	UP 62429	Melrose, Montana	19.57	100340	3.30	165.56	UP	406.5	.40728	.00812		UP ICC 4956	UP ICC 2615
3-10 166	CBQ 196231	Santa Ana, California	27.56	104160	5.78	301.02	AT&SF-UP	774.0	.38891	.00747		J. P. Haynes ICC 1386	ATSF ICC 12714 UP ICC 684

Page 2
 Exhibit No.
 Witness:

Freight Bill		Car		Origin	Value	Weight	Freight		Routing	Distance	Car Mile		Ton Mile		Tariff Reference	
Date	No.	Int.	No.				Rate	Charges			Earnings	Earnings	Rate	Distance		
1944																
3-15	188	UP	63509	Roberts, Idaho	6.48	115080	2.25	129.47	UP	249.6	.51871	.00901	UP ICC 4956		UP ICC 2615	
3-6	72629	RG	45327	Leadville, Colorado	8.57	120720	3.35	202.21	D&RGW	464.3	.43552	.00722	DRG ICC 641		DRG ICC 623	
3-6	72631	RG	71274	Villa Grove, Colorado	8.43	96320	4.85	233.58	D&RGW	549.6	.42500	.00882	" " "		" " "	
3-6	72639	RG	71512	Sargent, Colorado	13.09	95340	6.05	288.40	D&RGW	451.9	.63819	.01339	" " "		" " "	
3-6	72643	Penn	56010	Ouray, Colorado	10.36	105380	6.05	318.77	D&RGW	393.5	.81009	.01537	" " "		" " "	
3-6	72645	Penn	358602	Steamboat Springs, Colo.	7.04	122640	4.95	303.53	D&SL	492.5	.61630	.01005	DRG ICC 757		" " "	
3-6	72648	RG	70102	Steamboat, Nevada	1.25	132660	4.51	229.46	V&T-WP-RG	641.1	.35792	.00703	J. P. Haynes ICC 1386		DRG ICC 623 WP ICC 418	
3-8	72822	WP	16339	Rollinsville, Colorado	29.45	72580	5.45	197.78	D&SL-D&RGW	517.5	.38218	.01053	DRG ICC 757		DRG ICC 623	
3-15	73148	B&O	380735	Lotus, Colorado	44.91	89980	6.26	281.54	D&RGW	391.5	.71939	.01599	DRG ICC 641		" " "	
3-15	73153	SSW	33602	Kremmling, Colorado	10.50	65460	4.95	162.01	D&SL-D&RGW	456.5	.35490	.01084	DRG ICC 757		" " "	

EXCERPTS FROM F. W. McMANUS, AGENT TARIFF 6-F, I. C. C.
 No. 3, SHOWING TYPICAL TARIFF PROVISIONS GOV-
 ERNING APPLICATION OF WEIGHTS AND RATES ON
 ORES AND CONCENTRATES AT UTAH
 SMELTERS, INCLUDING MIDVALE.

Item No.	
40	<p style="text-align: center;">MANNER OF WAYBILLING SHIPMENTS</p> <p>Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value.</p> <p style="text-align: center;">Rule for Determining Rate Upon Which Freight Charges Shall Be Assessed</p> <p>After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.</p>
115	<p style="text-align: center;">WEIGHTS APPLICABLE</p> <p>The provisions of T. C. F. B. Tariff No. 58-D, Agent L. E. Kipp's I. C. C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)</p> <p>Shipments of Ore and/or Ore Concentrates originating at points on the Union Pacific Railroad may be weighed at point of origin without extra charge.</p> <p>Exception.—Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges.</p>

1121

*Exhibit No 15.*Exhibit No. 15
Witness: VICTOR**STATEMENT SHOWING TOTAL NUMBER OF CARS HANDLED IN
AND OUT OF MIDVALE, UTAH PLANT OF UNITED STATES
SMELTING REFINING AND MINING COMPANY DUR-
ING PERIOD JANUARY 1 TO MARCH 31, 1944**

	Number of Cars			Percent of Total	
	Intrastate	Interstate	Total	Intrastate	Interstate
Inbound	2889	330	3219	89.7	10.3
Outbound	296	579	875	33.8	66.2
	<hr/> 3185	<hr/> 909	<hr/> 4094	<hr/> 77.8	<hr/> 22.2

1122

*Exhibit No. 16.*Exhibit No. 16
Witness: VICTOR**STATEMENT SHOWING NUMBER OF TONS OF ORE MOVING IN
INTRASTATE AND INTERSTATE TRAFFIC ON WHICH
FREIGHT CHARGES WERE PAID AT MIDVALE,
UTAH DURING MARCH, 1944**

Interstate	Number of Tons		Percent of Total	
	Intrastate	Total	Interstate	Intrastate
7,225	66,589	73,814	9.8%	90.2%

1123

Exhibit No. 17.

Contract Dept. No. C-720-A

CONTRACT

A. C. E. No. 6568 Audit No. 13787

Between**OREGON SHORT LINE RAILROAD COMPANY****And****DENVER & RIO GRANDE WESTERN RAILROAD COMPANY****Joint switching service****at****Midvale and Murray, Utah**

1124 **THIS AGREEMENT, made and entered into this First day of October, 1926, by and between the OREGON SHORT LINE RAILROAD COMPANY, a corporation organized and existing under the laws of the State of Utah, party of the first part (herein sometimes called the "Short Line Company"), and THE DENVER & RIO GRANDE WESTERN RAIL-**

ROAD COMPANY, a corporation organized and existing under the laws of the State of Delaware, party of the second part (herein sometimes called the "Denver Company"),

WITNESSETH:

THAT WHEREAS, under agreement bearing date August 11, 1903, by and between the Short Line Company and the RIO GRANDE WESTERN RAILWAY COMPANY (predecessor in interest of the Denver Company), certain provisions are made for the acquisition, construction, maintenance and operation of trackage, in the vicinity of Murray, County of Salt Lake, State of Utah, also in the vicinity of Midvale, in said County and State, for the purpose of affording access to the plants of certain Smelting Companies, and

WHEREAS, said agreement made provision for joint switching service to be performed by one of the parties thereto in the event that it was found impracticable for engines of both companies to do switching at said plants, and

WHEREAS, it has been found impracticable for engines of both parties to do switching, not only at the plants named in the said agreement, but at other plants in the vicinity of said Murray and Midvale, and

WHEREAS, the Short Line Company is and for sometime past has been performing the joint switching service at the plants of:

American Smelting & Refining Co., situate near Murray
Utah Ore Sampling Co., situate near Murray,

United States Smelting, Refining & Mining Co., situate near Midvale; and

WHEREAS, the parties hereto desire to enter into an agreement supplemental to the aforesaid agreement of August 11, 1903;

NOW THEREFORE, in consideration of the premises, it is mutually covenanted and agreed by and between the parties hereto, as follows:

ARTICLE I.

1. All necessary switching of cars to and from any of the said plants and such other switching in the vicinity of Midvale and Murray, Utah, as may from time to time be agreed upon by the parties hereto for account of both parties hereto, shall be exclusively directed and performed by the Short Line Company, said switching to be done with motive power equipment as hereinafter set forth.

2. The Denver Company agrees to deliver all cars to be switched to said plants for its account at the point or points most convenient for said switching as designated from time to time by the Short Line Company through its proper agents or representatives.

3. The Short Line Company agrees to receive all cars of the Denver Company for said switching at said point or points and to switch same to proper places for unloading or loading at either or any of said plants or other points and to return or deliver same to the designated point or points, when unloaded or loaded for return or delivery to said point or points, with reasonable dispatch and diligence, for delivery to the Denver Company; said Denver Company agrees to receive and remove said switched cars, with reasonable dispatch and diligence.

4. The rules and regulations under and subject to which the joint switching service shall be conducted shall be made by the Short Line Company with a view to giving equal rights and privileges to each of the parties hereto; they shall be just and reasonable, and shall not favor or discriminate against either of said parties.

ARTICLE II

1. The monthly expenses of conducting and performing the joint switching service shall be divided between and borne by the parties hereto on the basis of revenue carloads handled in the joint switching service; each party's proportion shall be the percentage which the number of revenue car loads handled in the joint switching service for account of such party bears to the total number of revenue carloads handled in the joint switching service during the month; Provided, however, no account will be taken of intraplant switching of cars in so far as arriving at the total number of revenue car loads handled is concerned.

2. The monthly expenses of conducting and performing joint switching service shall include the following elements of cost and expense:

(a) Rental for switching locomotives;

(b) Wages of yard conductors and brakemen, yard enginemen and proportion of wages of crossing watchman properly chargeable to the cost of joint switching service;

(c) Cost of fuel, water, sand, lubricants and other supplies for switching locomotives, including cost of handling such material and supplies and transportation of same to point of supply;

(d) Engine house expense;

(e) Cost of general, division and yard supervision computed on the basis of ten percent (10%) of the amounts represented by Item (b) of this section;

(f) Any amount borne or paid by either party hereto on account of loss, damage and/or injury and charged, under the terms herein, to expenses of joint switching service to be divided between the parties hereto on said basis of revenue car loads handled.

3. Suitable locomotives for joint switching service by crews assigned at Midvale shall be furnished by the Denver Company. Said locomotives shall be maintained in satisfactory condition and supplied with fuel, water, sand, lubricants and other supplies and given necessary engine house attention by the Denver Company. Such locomotives shall be delivered by the Denver Company to the crews of the Short Line Company at the beginning of each shift and returned to the Denver Company by such crews at the end of each shift at the cinder pit of the Denver Company at Midvale.

4. Locomotives for joint switching service herein provided for, other than for crews assigned at Midvale per Section 3 of this Article II, shall be furnished, maintained and cared for, and supplied with fuel, water, sand, lubricants and other supplies by the Short Line Company.

5. Rental for locomotives used in Joint switching service shall be charged at the rate of One and 85/100 Dollars (\$1.85) per hour from the beginning to the end of the shift including time consumed in going to and from work except when individual service for the owning Company is performed while going to or from work in which case the rental time in joint service shall be computed from or to the time such individual service ends or begins as the case may be. The time of crews of the Denver Company handling locomotives of the Denver Company to and from the Salt Lake Shops for the Denver Company for necessary repairs and/or such other transportation expense as is incurred in such movement shall be included in the expense of joint switching service and paid by the parties hereto as herein provided, except when individual service is performed by such locomotives during such movement, in which case such time shall not be charged to the joint switching service.

6. Engine house expense shall be allowed for all locomotives in joint switching service at the rate of sixty-five cents

(\$0.65) per hour to run concurrently with locomotive rental and shall include the cost of all engine house labor, material, supplies, rental and maintenance of engine house facilities, taxes and insurance on such facilities, supervision and accounting.

7. The rates hereinbefore specified for locomotive rental and engine house expense shall be held to include all costs and expenses growing out of liability account of injuries to or death of persons whomsoever, or loss of or damage to property whatsoever, arising in connection with the repair of said locomotives or in connection with engine house service performed in caring for same, excepting such liability when arising in connection with the repair of said locomotives when such repair is necessitated by accidents occurring while they are engaged in joint switching service.

8. Locomotive fuel for joint switching service shall be charged at cost at nine plus freight charges at tariff rates over foreign and home lines, if any, plus cost of delivering to locomotive.

9. Water for locomotives in joint switching service shall be charged at fifty cents (\$0.50) per tank.

10. Locomotive sand for joint switching shall be charged at purchase price plus freight charges at tariff rates over foreign and home lines, if any, plus the material cost of drying.

11. Lubricants and other supplies for locomotives in joint switching service shall be charged at purchase price plus freight at tariff rates over foreign lines plus 15% to cover freight over home line, supervision, handling and accounting.

ARTICLE III

For the purposes of the liability provisions of this agreement, all employees of the parties hereto in any wise engaged in the joint switching service shall be deemed to be the joint employees of both the parties hereto.

Except as herein otherwise provided, liability for injury to or death of persons whomsoever and for loss of or damage to property whatsoever in connection with the joint switching service shall be fixed as between the parties hereto as follows:

When due to

(a) the acts or omissions of either party hereto or of its officers, agents or employees; or to

(b) the concurring acts or omissions of a joint employe or joint employes and of either party hereto or of its officers, agents or employes; or to

(c) defects of any kind in the separate equipment or facilities of either party hereto (except the switch engines in joint switching service)

shall be borne solely by such party, when due to

(d) any other cause whatsoever, shall be borne

1128 1. Solely by each party hereto as to its own property (other than locomotives in joint switching service) or property in its custody or control and as to its own employes, passengers and patrons and all others on its engines, trains or cars or in or about the property and tracks used in connection with the joint switching service in the transaction of business with it; and

2. in the same proportion as the expense of the joint switching service is borne during the month when such liability shall arise as to third persons and their property, joint employes and their property and the locomotives in joint switching service, except that in cases of accidents in which the engines, trains, cars or sole employes of only one party hereto are concerned, then the liability for the resulting injury, death, loss or damage shall, as to such persons and property, be borne solely by the party whose engines, trains, cars or sole employes are concerned.

If it shall be impossible to determine whether any person is an exclusive passenger, patron or employe of either party hereto then the liability for injury to or death of such person or loss of or damage to the property of such person shall, except as herein otherwise provided, be apportioned as in the case of third persons.

Anything herein to the contrary notwithstanding, neither party hereto shall have any claim against the other party for any loss or damage which may occur to its rolling stock equipment or to that in its possession, or to the contents thereof while on the tracks used in connection with the joint switching service arising by reason of fire nor for loss or damage caused by or resulting from any interruption of or delay to its business whether such loss or damage be due to the negligence of the other party or otherwise.

Each party hereto against which a claim is made involving joint liability shall give prompt notice thereof to

the other party and unless so notified prior to the settlement thereof, such party shall not be bound for a proportionate share of any settlement of such claim or the expense incident thereto, but such party's share shall be borne by the party so failing to give the required notice.

If a claim is made against either party which under this agreement is not chargeable in whole or in part with the liability involved in such claim, such party shall promptly notify in writing the responsible party.

All releases taken pursuant to the settlement of any and all claims involving joint liability shall include both parties hereto and copies thereof shall be furnished each of them.

1128A If a judgment should be recovered against and satisfied by one party hereto involving a liability which should under this agreement be borne entirely or participated in by the other party hereto, then all expenses of whatsoever nature, including costs and fees, connected with such judgment and with the prosecution of the suit upon which it was based, shall be settled between the parties hereto in strict accordance with the provisions of this agreement and the party against which such judgment shall have been recovered shall be promptly reimbursed by such other party to the extent to which the latter is indebted.

Neither party hereto shall, however, be concluded by any judgment or decree at law or in equity against the other party unless it has had reasonable notice from such other party requiring to appear in the action or suit and make defense thereto for its own account or jointly with the other party. If such notice shall have been given by one party hereto to the other party and the party receiving the same shall have failed to appear and make defense, it shall be concluded by the judgment or decree in such suit.

Each party hereto shall fully indemnify and save harmless the other party, its successors and assigns, from and against all claims, liability, judgments, costs and expenses of whatsoever nature resulting from or by reason of any injury to or death of persons or loss of or damage to property properly chargeable to such party under the provisions of this agreement.

ARTICLE IV.

1. It is mutually agreed and understood that cars destined to, originating at, or held at either or any of said plants, but not interchanged, for any reason or cause what-

soever, shall be considered in the possession of the company over whose lines the car moved to, or will move from, as the circumstances may be, the said plant, and all per diem, demurrage, or other expenses or earnings thereon, shall accrue to the company in whose possession said cars stand.

2. All earnings, if any, received from either or any of said plants for the switching of cars in intra-plant service shall be credited to and divided between the parties hereto on the same basis as provided herein for division of the expense of joint switching service.

ARTICLE V.

1. Each party hereto agrees that it will promptly pay proper bills of the other party hereunder within fifteen (15) days from the receipt thereof, it being expressly understood that payment shall not be withheld due to errors or exceptions; all such errors, or exceptions to be adjusted promptly in a succeeding month.

2. All books, accounts and records of either party hereto relating to the subject matter of this agreement, 1129 shall, at all reasonable times, be open to the inspection of the proper officers and agents of the other party.

3. All notices to be given hereunder may be given by serving the same upon any executive or general officer of the party upon which notice is to be served.

ARTICLE VI.

If at any time any controversy shall arise between the parties hereto, with respect to the rights, duties or obligations of either party under the terms hereof, and such controversy cannot be mutually settled otherwise, it shall be submitted to arbitrament and shall be adjusted and settled in accordance with Section 1, Article III of said agreement between the parties hereto bearing date of August 11, 1903.

ARTICLE VII.

THIS AGREEMENT shall take effect as of the 1st day of January, 1927, and shall be and remain in full force and effect for the period of five (5) years from and including said date, and thereafter, subject to termination by either party at any time upon ninety (90) days written notice to the other.

THIS AGREEMENT shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their Officers thereunto duly authorized.

OREGON SHORT LINE RAILROAD COMPANY

(SEAL) By C. R. GRAY
Its President

Witness:

H. B. BLANCHARD

Attest:

NORMAN PRICE
Secretary

DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY

(SEAL) By J. S. PYEATT
Its President

Witness:

F. O. RIE

Attest:

R. W. WATKINS
Secretary

Form Approved:

GEO. H. SMITH

General Solicitor

JOHN A. BENNEWITZ

Contract Attorney

Execution Approved:

GEO. H. SMITH

General Solicitor

Approved:

H. V. PLATT, *General Manager*

B. H. PRATER, *Asst. Chief Engr.*

Approved as to form

E. N. CLARK, *General Attorney*

1130 UNION PACIFIC RAILROAD COMPANY

CD-720-B

OREGON SHORT LINE RAILROAD COMPANY

W. M. Jeffers,
Executive Vice President

1416 Dodge Street
Omaha, Nebraska
April 17, 1937

Contract
Audit No. 13787-1

Wilson McCarthy and Henry Swan, Trustees,
The Denver and Rio Grande Western RR Co.,
Denver, Colorado.

Referring to the correspondence and discussions had between Mr. Hugh Wilson, Superintendent of the Denver and Rio Grande Western Railroad, and Mr. H. J. Plumbhof, General Manager of the Union Pacific Railroad Company, relating to the switching of slag cars for the Denver and Rio Grande Western Railroad between the certain designated transfer track in the Pallas Yard (hereinafter referred to as "Transfer Track") and the trackage serving the slag pit located on the property of the American Smelting & Refining Company (hereinafter referred to as "AS&RCo.") at Murray, Utah:

Under the provisions of that certain contract (identified in the records of the Union Pacific Railroad Company as Audit No. 13787 and hereinafter referred to as the "Joint Switching Contract") dated October 1, 1926, between Oregon Short Line Railroad Company and The Denver & Rio Grande Western Railroad Company, the Union Pacific Railroad Company, lessee of said Oregon Short Line Railroad Company, performs all of the switching service for both the parties at the plants of the AS&RCo. and Utah Ore Sampling Company near Murray, Utah. It is contemplated that the desired switching of slag cars will be handled in connection with the switching done under that contract.

It is our understanding that you have made, or will make, all necessary arrangements with the AS&RCo. for the construction, maintenance and use of necessary trackage to reach and serve said slag pit and for the use of other trackage owned by the AS&RCo. upon which to move cars to and from said slag pit trackage, all such trackage arrangements and everything in connection with such trackage to be without expense to the Union Pacific Railroad Company. Upon the basis of this understanding and the

further condition that the arrangements so made are acceptable in all respects to the Union Pacific Railroad Company, the Union Pacific Railroad Company is willing to switch the slag cars for the Denver and Rio Grande Western Railroad between the Transfer Track and said slag pit trackage under and subject to the following terms and conditions (for convenience said Union Pacific Railroad Company is hereinafter referred to as the "Union Pacific" and the Trustees of The Denver and Rio Grande

1131

CD-720B

Western Railroad Company are hereinafter referred to collectively as the "Rio Grande"):

1. All empty slag cars shall be placed upon, and all loaded slag cars shall be removed from, the Transfer Track by and at the expense of the Rio Grande, and the Union Pacific shall switch such empty slag cars from the Transfer Track to and place them upon the slag pit trackage for loading and shall switch such loaded slag cars from said slag pit trackage to and place them upon the Transfer Track.

2. All said slag cars shall be switched by the Union Pacific in the same manner as empty and loaded cars are now being switched for both the railroads to and from and on the trackage of said AS&R Co., as provided for by the Joint Switching Contract, and such slag cars shall, except as herein otherwise specifically provided, be regarded as cars switched for the Rio Grande under the provisions of the Joint Switching Contract.

3. The joint switching service is, under the provisions of the Joint Switching Contract, apportioned on the basis of the number of revenue cars handled for each of the railroads. The slag cars to be switched for the Rio Grande, as herein contemplated, are not revenue cars and therefore will not be counted as such. Therefore, to prevent participation by the Union Pacific in the expense of switching said slag cars the Rio Grande shall pay to the Union Pacific, in addition to all other payments payable by the Rio Grande under the provisions of the Joint Switching Contract, amounts computed at the rate of One Dollar and Seventy-five Cents (\$1.75) for each loaded slag car switched by the Union Pacific for the Rio Grande as herein provided; payable monthly. Such amounts so paid by the Rio Grande to the Union Pacific are not and shall not be regarded as earnings for the switching of cars in intraplant service, referred to in Section 2 of Article IV of the Joint Switching Contract, nor shall the same be credited to the expense of joint switching but shall be retained by the Union Pacific.

4. The switching of said slag cars by the Union Pacific, as herein set out, shall continue only so long as in the judgment of the Union Pacific the same can be performed by the switch engines and crews regularly assigned, and during the hours of their assignment, to the joint switching service at the AS&R Co.'s and the Utah Ore Sampling Company's plants at Murray and without interference to said joint switching service, and whenever the switching of said slag cars cannot be so performed the Union Pacific may, at its election, discontinue the switching of said slag cars upon forty-eight (48) hours' notice to the Rio Grande.

5. The arrangement herein outlined shall take effect as of April 1, 1937, and, unless terminated as provided in paragraph 4, shall continue in effect so long as the Rio Grande desires to secure slag from said slag pit;

1132 CD-720B

subject to the condition, however, that the Union Pacific may, at any time, terminate this arrangement by written notice given to the Rio Grande on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given.

6. Nothing herein contained shall be construed as modifying or amending the Joint Switching Contract except as herein specifically set out.

This letter agreement is made in duplicate and if acceptable to you please have same executed in the space provided below and thereafter return to the Union Pacific at Omaha, Nebraska, the copy marked "Union Pacific's Copy".

UNION PACIFIC RAILROAD COMPANY
By W. M. JEFFERS
Executive Vice President

ACCEPTED AND APPROVED:

WILSON McCARTHY and HENRY SWAN
*as Trustees of the Property of
The Denver and Rio Grande West-
ern Railroad Company*

By WILSON McCARTHY
By HENRY SWAN

Approved as to execution:

W. R. ROUSE

Assistant General Attorney

Approved as to form:

T. R. WOODROW

General Attorney

Approved as to form:

GEO. H. SMITH
General Solicitor

Approved:

H. J. PLUMHOFF
General Manager

Approved:

H. C. MANN
Vice President-Operation

1133 Interstate Commerce Commission

UNITED STATES SMELTING, REFINING AND MINING COMPANY
TERMINAL SERVICES

Ex Parte No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

Submitted.....

Decided.....

Respondents' line-haul rates found not to include services beyond the assembly yard, as described in the report, and the performance of such services by respondents beyond that yard found to be in violation of section 6 (7) of the Interstate Commerce Act.

Elmer B. Collins, L. T. Wilcox, W. M. Campbell, and W. M. Carey for respondents

Omar O. Victor for the industry

Charles A. Root for Public Service Commission of Utah.

D. H. Williams for Interstate Commerce Commission.

Report proposed by Examiners *Leonard Way* and *S. R. Diamondson*—Filed Nov. 22, 1844

In the original report in this proceeding, *Propriety of Operating Practices—Terminal Services*. 209 I. C. C. 11, certain principles were announced which the Commission indicated would be followed in considering the propriety and lawfulness of switching services performed by respondents at industrial plants. This supplemental report

deals with the practice of respondent carriers in performing switching services within the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah.

Midvale is about 12 miles south of Salt Lake City, Utah, on the Union Pacific¹ and Rio Grande.² The plant is about 100 yards from the Union Pacific station at Midvale and about .5 mile from the Rio Grande station. The plant occupies approximately 25 acres of land and is engaged in the processing of lead ores and concentrates. Fourteen miles of trackage, comprising 48 separate standard-

Ex Parte No. 104—Sheet 2

1134 gauge tracks and serving about 16 locations for the loading and unloading of cars, are located within the plant enclosure. There are also an unspecified number of electrified narrow-gauge tracks in the northern section of the plant yard, operation over which by small electric locomotives owned by the industry does not interfere with operation over the standard-gauge tracks. The industry does not operate a standard-gauge locomotive but does have three locomotive cranes which handle loads and empties on standard-gauge tracks in the northern part of the plant.

The industry is served by the Union Pacific and Rio Grande. At the northeast corner of the plant property there are 5 parallel tracks owned and maintained by the Union Pacific. These tracks, the car capacity of which is not shown of record, but which appear to be 600 to 1,000 feet in length,³ are used by the Union Pacific for the receipt and delivery of empty and loaded cars by its line-haul engines, and is hereinafter referred to as the interchange yard. The two parallel leads, also owned and maintained by that carrier, 800 feet long, extend southwestwardly from this interchange yard and merge into a single lead which extends for 150 feet before connecting with an industry-owned track near the center of the property. The latter track continues in the same general direction for a distance of 600 feet to a connection with the plant track layout in the southern portion of the yard.

From the Union Pacific leads a number of industry-owned stubbed tracks diverge in the reverse direction or to the

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

³ A map of record shows all of the tracks involved in this proceeding drawn to scale. The distances used in describing them in this report are based on the scale and are approximate only.

north and form what will hereinafter be called the north yard. Track 1, 1,800 feet long, takes off from the southern end of the Union Pacific leads and serves the oxide mill sampler in the approximate center of the north yard. Ore is unloaded at this sampler or into adjacent bins. Track 2, directly east of, and parallel to Track 1, is used for loading sampled ore from the sampler for further movement. This track merges with Track 1 south of the sampler and is 1,000 feet long. Track 3 is directly east of Track 2 and connects with the latter at the south entrance to the sampler. This track, 600 feet in length, is used for dumping into bins miscellaneous commodities, such as roast, coke, and lime rock. Tracks 1, 2, and 3 are on trestles. Track 4 takes off the Union Pacific lead just east of Track 1 and serves a storage platform for unloading scrap iron and supplies. It is over 1,900 feet long and, by short diverging tracks, designated Tracks 4-A and 5, serves the high-grade sampling plant and for unloading flotation lead at the wedge roaster, respectively. Track 10 is a short stubbed track just east of Track 4 and serves the plant warehouse. Track 7 diverges from the southern end of the interchange yard referred to above and, together with connecting Tracks 8, 8-A, and 9, serves the sintering and roasting mills adjacent to that yard on the west. Track 11 is a short track just west of, and parallel to Track 1, and is also known as the sand hole track. Connecting with the continuation of the Union Pacific lead near the center of the property is Track 13 which extends in the reverse direction to the north for about 1,900 feet to the lead refinery, and, in conjunction with connecting Tracks Nos. 14, 15, 18, and 19, serves facilities for loading lead bullion and matte. A water

Ex Parte No. 104—Sheet 3

1135 tank, maintained by the industry for respondents' switch engines, is located south of the refinery. Other tracks, designated 20, 21, 22, and 23, in the western portion of this yard, ranging in length from 500 to 800 feet, are used for storage purposes, and for stock piling coke and other commodities. There are a few tracks in addition to those described but they are relatively unimportant. The total number of tracks are about equally divided between the northern and southern sections of the plant yard and there are no excessive curves or grades.

The Rio Grande's Lake-Bingham branch crosses the plant site from east to west, practically bisecting it. From this branch two carrier-owned parallel tracks diverge

towards the southern section of the plant yard in a left curve to connections with industry-owned tracks. One of the Rio Grande tracks is described as a receiving track, is about 800 feet long, and has a capacity of about 13 empty cars. The other is known as the delivery track, where the Rio Grande's line-haul engines cut loose from inbound trains and pick up outbound cars. This track is 1,100 feet long. All tracks except the two Rio Grande tracks and those hereinbefore described as owned by the Union Pacific, are owned and maintained by the industry. The Rio Grande tracks connect with a number of tracks serving thaw houses, scales, and a combination concentrator and sampler in that portion of the plant hereinafter called the south yard. Tracks 26 to 36, inclusive, are parallel tracks used by both respondents as assembly and classification tracks for general switching and passing and storage tracks. These tracks are herein called the assembly yard, and, except Track 26, range in length from 400 to 1,500 feet. Track 26 is 2,700 feet long and from its connection with the Rio Grande's receiving track to its terminus. Tracks 34 and 35, also serve the so-called old thaw house in the assembly yard, used for thawing frozen ore for the smelter in the north yard. The plant scales are adjacent to each other on Tracks 28 and 29. About 600 feet south of the scale on Track 28 there diverges in the reverse direction to the north, Track 42 for a distance of 600 feet, and taking off from this track in the same direction is Track 43, 500 feet long. Just south of the scale on Track 28 diverges in the reverse direction to the north Track 41, 800 feet long. A short stubbed track, designated 40, takes off near the northern end of Track 41. Tracks 40 to 43, inclusive, serve as loading and unloading tracks for the combined concentrator and sampler located east of the assembly yard. Tracks in the assembly yard merge at their southern ends into Tracks 26 which then serves as a lead, and with six connecting tracks, designated 45 to 50, inclusive, reach the so-called new thaw house and stock piles in the extreme southeastern portion of that south yard. These seven tracks are also used for storage and general switching. Frozen ore for the concentrator and sampler is handled through the new thaw house. Track 44 is a trestle track, 1,600 feet long, and is known as the high line. This track is used for unloading ore and concentrates at the concentrator and sampler and is reached in reverse movement to the north from its connection with Track 45 near the new thaw house.

The switching within the plant is performed in accordance with an agreement which provides that the expense incurred and switching charges received shall be divided on the basis of revenue carloads switching for each carrier. The Rio Grande furnishes and maintains two six-wheel 75-ton switch engines and the Union Pacific furnishes four crews to operate these engines, in four shifts from 7 A. M. to midnight. One engine operates generally in the north yard and the other in the south yard. Both engines can operate in the same section of the plant but occasional delays occur by reason of such operation, as well as by reason of engine standing by while cars are loaded or unloaded. For example, some of the delays reported by our inspectors during the four-day inspection period from March 28 to March 31, 1944, inclusive, were as follows: On March 28: From 8:42 A. M. to 8:45 A. M., waiting for engine to clear scale; from 10:30 A. M. to 11:10 A. M. waiting for engine to clear scale and blocked from south yard; from 5:28 P. M. to 5:38 P. M. waiting for completion of unloading at ore crushing mill; from 10:40 P. M. to 10:55 P. M., delayed on high line waiting for cars to be dumped; and from 7:30 P. M. to 12:30 A. M. waiting for cars to be loaded at roasting mill. On March 29: From 10:50 A. M. to 11:05 A. M. blocked from entering south yard; from 5:38 P. M. to 6:20 P. M., delayed awaiting completion of loading on Track 1; from 4:20 P. M. to 4:40 P. M., blocked from entering south yard; several other delays in switching due to interference by industry cranes. On March 30: From 9:25 A. M. to 9:45 A. M. blocked by other engine switching south yard; from 7:30 P. M. to 10:46 P. M., waiting for completion of loading of cars on roast hole track. On March 31: From 4:20 to 4:55 P. M., blocked from entering south yard. Written switching instructions are given to the Union Pacific by the industry and charges for switching are paid to that carrier. In the normal switching operations a switch crew handled on an average of from 4 to 10 cars at a time.

The inbound traffic consists principally of ore, concentrates, scrap iron, lime rock, coal, coke, sand, and miscellaneous supplies. The general practice is to switch all shipments to the assembly yard. All inbound shipments, except coal, coke, and coke breeze are weighed. The preponderance of the inbound shipments is intrastate in character. For example, during the period from January 1 to

March 31, 1944, 2,889 cars were handled into the plant from intrastate origins and 330 cars, or 10.3 percent of the total from interstate origins. Of these 330 cars, 17 contained miscellaneous supplies which are stated to have been spotted directly at unloading points. The remaining 313 cars contained ore and concentrates moving under a sampling-in-transit arrangement and were handled as more particularly described hereinafter. The bulk of the out-bound traffic during that period consisted of lead bullion, Speiss, zinc concentrates, arsenic, and pyrites, all of which, with the exception of lead bullion, move to the assembly yard for weighing. Some ore is shipped to other smelters. Of the outbound movement, 579 carloads, or 66.2 percent of the total of 875 cars moved to interstate destinations. A total of 4,094 loaded cars were handled inbound and out-bound during the first three months of 1944. It appears that the volume of interstate shipments at the present time is heavier, due to war conditions, than in normal times.

The following examples depict the switching performed in connection with representative shipments during March 1944:

Car USSCo 2 was switched loaded from Track 8-A, also called the wedge roast track, in intraplant movement to the scale in the south yard, weighed and placed on the Track 1 where it was unloaded and the empty car switched to the sand hole track.

Car WP 5933, lime rock from Dolomite, Utah, was switched from the Rio Grande delivery track to the assembly yard. This car was received in the plant prior to March 28 and was switched to the scale on March 30. The car then moved to Track 1 for unloading and was switched empty to the Rio Grande receiving track.

1137 *Ex Parte* No. 104—Sheet 5

Car D&RGW 42492, containing ore from Bingham, Utah, was switched from the Union Pacific's interchange yard to the assembly yard on March 28, weighed, and thence to the sampler on Track 1 for unloading. The empty car was returned to the scale for weighing light and moved to the Union Pacific yard. The contents of this car, after sampling, were reloaded on Track 2 into car UCR 21079. The latter car was then switched to the assembly yard to be held awaiting disposition instructions. Those instructions are governed by the assay value disclosed by sampling, more particularly discussed

hereinafter. In this instance, the car was ordered switched on March 30 to the high line, Track 44, and unloaded at the concentrator.

Car UCR 21403, lead ore from Lark, Utah, was switched to the assembly yard from the Rio Grande's delivery track on March 29, weighed, and switched to Track 34 serving the old thaw house. The same day the car was switched to Track 44 where it was unloaded and returned to the scale and delivered to the Rio Grande for outbound movement. This carrier transports all ore to the plant from Lark, averaging 15 or 16 cars daily, except Sunday. These shipments are generally switched to the assembly yard and weighed. The number of cars that can be set for unloading at one time on the high line serving the concentrator is not shown of record but our inspectors' reports indicate that all of the inbound cars of Lark ore can not be spotted for unloading as soon as received, the number of cars switched being limited by the inability of the engine to push more than eight cars at a time up the grade to the trestle. The remaining cars are generally held in the assembly yard until the high line has been cleared of empties. After unloading, the cars are returned to the scale, weighed and then move to the Rio Grande receiving track.

Car D&RGW 40320, crude lead and zinc ore from Leadville, Colo., was switched from the Rio Grande delivery track on March 29 to the assembly yard. On March 31 this car was shifted to the scale and then to Track 1 for unloading. The empty car was returned the same day to the scale and after weighing to the Rio Grande receiving track.

Car UP 88706, ore from Dillon, Mont., arrived at the plant on March 28 and was switched from the Union Pacific yard to the assembly yard. On March 29, the car was switched to the scale, weighed, and moved to the sampler on Track 1 and unloaded. On March 30 the car was returned over the scale to the Union Pacific. On the same day the contents of this car were reloaded, after sampling, into car D&RGW 40419 on Track 2 and switched to the assembly yard. On April 3 the car was switched to Track 1 where the sampled ore was dumped into unloading bins.

Car UP 62255, ore from Basin, Mont., on March 29, was handled the same as car UP 88706, except that the sampled ore, after reloading into car D&RGW 43349 on Track 2, moved to the assembly yard and on April 4 was switched to the concentrator in the south yard.

Car D&RGW. 40500, crude ore from Sargent, Colo., sampled in transit at an independent sampler at Murray, Utah, arrived at Midvale on the Rio Grande prior to March 28, and was switched to the assembly yard. On March 30 the car was switched to the scale, weighed, and moved to Track 35 and thence to the high line, for unloading at the concentrator. On the same day, the empty car, without being weighed, was switched to the assembly yard for delivery to the Rio Grande.

1138

Ex Parte No. 104—Sheet 6

Car UP 375051, concentrates from Silverton, B. C., switched from the Union Pacific yard to assembly yard on March 29. The car was weighed on March 30 and moved to Track 4 in north yard where the concentrates were pipe sampled without being unloaded and then on March 31 switched to the ore bin on Track 3 and dumped. This car then moved light to the scale and returned to the Union Pacific yard.

Car NYC 135827 arrived empty on March 16 and moved from the Union Pacific yard to the assembly yard for storage and thence, on March 29, to bullion track 14. The car was loaded with lead bullion for Grasselli, Ind., and was switched directly to the Union Pacific yard. Cars for loading lead bullion are not weighed either loaded or light, the cast bullion being weighed over small scales.

Prior to February 25, 1920, respondents accorded free switching from track to track within the plant under the line-haul rate. On that date the free switching was limited to one movement of a line-haul shipment within the plant over track scales to and from smelter sampler or to and from combination sampler and concentrator,* to an unloading point designated by the smelter. For each additional movement from track to track within the plant the switching charge was \$2.50 per car.

In purported compliance with the principles announced in the original report in this proceedings, respondents' tariffs were amended effective July 5, 1938, on interstate traffic, to provide, in substance, that the line-haul rate would include the movement of loaded cars from the road-haul point of delivery to the switching line to track scales in subsequent delivery to any designated track within the plant which could be accomplished by one continuous switching movement without interruption resulting from orders from, or requirements of, the smelter. A similar provision also applied on the outbound movement of loaded

*Effective November 27, 1920, a free switch was also accorded on line-haul shipments moving to and from the smelter thaw house.

cars from point of loading to track scales for weighing and subsequent movement to the point of interchange with the road-haul carrier. For each additional movement within the plant, except as hereinafter shown, a charge of \$1 per car was applicable. Ore or concentrates arriving at the smelter in a frozen condition would be switched to and from the thaw house at a charge of 50 cents per car. After thawing, the car could be switched to track scales and thence to the sampler or other designated location within the plant as indicated above. Inbound or outbound empty cars could be switched to track scales for weighing, on demand of the smelter, at a charge of 50 cents per car. When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within the plant) will be charged for at \$2.70 per car for each movement. These tariff provisions and charges are in effect at the present time.

Due to the complex nature of ores produced in the intermountain district and shipped to Utah smelters, there has been in effect for many years a sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters by allowing shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then move to the smelter selected by the shippers. During the period from January 1 to March 17, 1944, a total of 34 cars were sampled in transit at Midvale, and then reforwarded to other destinations, 9 of which were interstate in character. The sampling-in-transit provision published in D. & R.G.W. tariff I.C.C. No. 757, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Midvale without charge for the first stop at sampler or for out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 565. The tariffs governing the transportation of ores and concentrates to the Utah smelters pub-

1139

Ex Parte No. 104—Sheet 7

lish rates dependent on the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry, to which the shipment is consigned will be a reasonable rule to apply in the future. Such ores and concentrates are generally waybilled from point of origin at a rate based on approximate value and after the ore has been sampled the rate is revised in accordance with the value determined and certified to the carrier as the basis for settlement between shipper and consignee.

Under the present operating arrangements, inbound or outbound shipments are switched without charge between respondents' interchange yards and unloading or loading points in the plant, including movement over scales, provided there is no interruption caused by the plant. Cars containing ore or concentrates are switched to the assembly yard and are held in that yard pending instructions from the plant. The cars are then weighed and move to either the combined concentrator and sampler in the south yard or to the sampler in the north yard. These shipments are generally unloaded at the sampler and reloaded into other cars after sampling and switched to storage tracks in the assembly yard awaiting further instructions from the plant. As previously indicated, the final point of delivery of sampled ore or concentrates depends upon the assay after sampling. A small percentage of the shipments are pipe sampled, which does not require unloading the car, or sampled in transit prior to arrival at Midvale. These cars are also switched to the assembly yard in the first instance. It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale. If, however, the final destination of the ore is Midvale, a charge of \$1 is made for switching from the sampler to unloading point, plus 50 cents per car for light weighing on demand of the smelter, and 50 cents per car

for movement to and from thaw house, if such movement is required.

1140

Ex Parte No. 104—Sheet 8

On brief, the respondents differ with respect to the proposed propriety of the switching charges presently in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original report in this proceeding. The Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from thaw house. This contention is based primarily on the ground that certain facilities, such as scales, samplers, and thaw houses are necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carries with it the obligation to stand the expense of switching to and from such facilities. But there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier. Moreover, it is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service and their duty in connection with the delivery of such cars does not extend beyond the point of interruption. Any service performed by them beyond such point without proper charge therefor would be unlawful in violation of section 6 of the Interstate Commerce Act.

The industry asserts that miscellaneous supplies move directly from the points of entrance into the plant to the place of unloading, without any interference or interruption. No facts have been presented which show the actual handling of that traffic and such information as we have in connection with the other traffic indicates that, except possibly at the warehouse, such traffic could not be placed at the convenience of the carrier without encountering interference from other traffic. We have not been advised as to what commodities are embraced within the description

"Miscellaneous supplies" but presumably it is intended to cover commodities other than coal, coke, lime rock, and scrap iron and other materials used in the smelting process. Under the circumstances no finding will be made as to that traffic.

With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant yard without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

The Commission should find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars

1141 *Ex Parte* No. 104—Sheet No. 9

by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining & Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of section 6(7) of the Interstate Commerce Act.

An appropriate order should be entered.

1142 Before the Interstate Commerce Commission

UNITED STATES SMELTING REFINING AND MINING COMPANY

EX PARTE 104, Part II

Exceptions of Public Service Commission of Utah to Proposed Report of Examiners Way and Diamondson
—Filed Jan. 9, 1945

1143

STATEMENT

This is an investigation instituted by the Interstate Commerce Commission under the above-entitled docket

with respect to the terminal services, charges, and practices of respondent railroads in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting Refining Company at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act, if any.

Hearing was held in Denver, Colorado, on May 29, 1944, before Examiner Leonard Way, of the Bureau of Rail Carriers of the Interstate Commerce Commission, who, in conjunction with Mr. S. R. Diamondson, rendered a proposed report on or about November 22, 1944. This proposed report is based largely on an investigation made by employees of the Commission in March, 1944, placed in the record at said hearing.

The record shows that for many years the rail carriers and the smelting company have carried on the operations at this plant with the utmost efficiency, each performing the particular service for which it is best fitted. The results have been eminently satisfactory to the carriers, the smelter company, and the mining interests. The results have also been of tremendous importance to the war effort of the Nation.

Unless some actual violation of the Interstate Commerce Act is discovered, which the Utah Public Service Commission has been unable to discern in this case, we respectfully submit that the present operations and practices should remain unmolested.

However, there does appear to be one feature of the tariff covering these services which is misleading and should, in our opinion, be corrected. That is the tariff provision (shown in Ex. 3 page 5) reading as follows:

"The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see Note) from the road-haul point of delivery to the switching line."

The wording of this provision is obviously incorrect and if literally applied would place both the carrier and the smelter operations at a great disadvantage without benefit to anyone. The carriers have stated clearly in the record that the line-haul rates are sufficiently high to cover fully the performance of the intraplant switching. In fact, The Denver and Rio Grande Western claims that the increases

established in 1938 were unnecessary. If this be the case, it would seem that the only improper element in this

1145 whole matter is the wording of the tariff provisions. These provisions should be re-drafted to specifically cover the switching as *actually performed* by the carriers at the plant, regardless of whether or not the switching is "interrupted" or "uninterrupted." Anything different than that is making the mere form control the actual substance and would put these operations in a strait-jacket, purely for the sake of form.

In the basic case reported in 209 I.C.C. 11, at page 17, the Commission said:

"The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switching limits are definitely defined by boundaries, and at others the industries included within the switching limits are named. There is no dispute that delivery at the various industries is covered by the published rate. *The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution for that problem.* The limitation of place within which delivery is due will vary with varying conditions. All that we can safely say is that there must be such a delivery as is customary and reasonable." (emphasis ours)

Applying this principle to the established facts in this case, it manifestly follows that the general rule that the carrier should perform only one uninterrupted switch movement in the delivery or receipt of this traffic is not applicable here and is not intended by the Commission to be applied in cases similar to this.

The Examiners' proposed report finds that the line-haul rates do not include any services beyond the assembly yard, and the performance of any service by the carrier beyond that yard found to be in violation of Section 6 (7) of the Interstate Commerce Act.

1146 The Public Service Commission of Utah was represented at the hearing as an interested party, but presented no testimony because the great bulk of the traffic at this plant is intrastate, not interstate, and the Public Service Commission of Utah was not a party to the investigation which preceded the hearing.

EXCEPTIONS

EXCEPTION No. 1

We except to the statement made on Sheet 7 as follows:

"In *Arlington Silver Mining Company vs. Great Northern Railroad Company* 83 I.C.C. 255, cited with approval in *Nonferrous Metals*, 204 I.C.C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry to which the shipment is consigned will be a reasonable rule to apply in the future."

ARGUMENT ON EXCEPTION No. 1

In the above-cited case (*Arlington Silver Mining Company vs. Great Northern Railroad Company*) the question in dispute was between the carrier and the shipper mining company as to whether the "gross" or "net" value of the ore shall be used in computing freight charges. The smelter and its operations was not involved. Not a word appears in the report as to the amount of switching the 1147 carrier performed in the ascertainment of the value of the ore, or what amount of switching the line-haul rate covered, and for all the report shows, the line-haul rates may have, *and probably did*, cover the same amount of intraplant switching as in the instant case. This case, in our humble judgment, confirms the practice of basing the freight rates on the value of the ores transported, thus giving the carrier a legal interest and duty in ascertaining said values in order to compute its charges. Any equitable agreement as to the cooperative services of the smelter and the carrier, whose *services are both necessary* in the ascertainment of these values, *which are likewise used by smelter and carrier*, would seem to fulfill all requirements of the Interstate Commerce Act. This exception also applies to any and all other statements or inferences in the proposed report that the carrier has no duty or right to participate in the ascertainment of the values of the shipments which it has transported under rates of this character.

EXCEPTION No. 2

We except to the recommendation of the Examiner reading as follows: (Sheets 8 and 9)

"The Commission should find that the interstate line-haul rates of respondents cover the delivery and

receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of the respondents to perform for the United States Smelting Refining and Mining Company at Midvale, Utah, under the line-haul rates begin and end at the assembly yard, and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of Section 6 (7) of the Interstate Commerce Act."

ARGUMENT ON EXCEPTION NO. 2

We are unable to find any factual evidence upon which such a finding could be grounded. All parties, *i. e.*, the two carriers and the smelting company stated definitely that the line-haul rates are designed to, and do cover compensation to the carriers for the switching done within the plant, up to the point of final delivery. This arrangement has been in effect for many years. To now find, contrary to the undisputed facts, that the line-haul rates *do not* cover compensation for intraplant switching would be placing a construction on the tariff that has never been so interpreted since service was instituted many years ago. Such an interpretation would necessarily require overhauling all the line-haul rates to reduce them to cover transportation to the assembly yards only without a "rate" hearing, then a new tariff covering the intraplant service, in an effort to make the over-all transportation costs from mine to final point in the smelter yard equal to the present over-all costs for the same service. Possibly that *form* would be preferable to the present *form* of the publication of rates and charges. But transportation and industry are vital matters of substance.

This case clearly discloses the wisdom of the Commission in stating at the outset of this part, in 209 I.C.C. page 17, the following:

"The difficult thing is to ascertain when delivery at the plant is made. In the nature of things no inflexible formula can furnish a solution."

The Examiners have failed to appreciate the fact that the mining, transportation, and treatment of ores of the

kinds involved herein form an industry probably different in many aspects than any other industry in the country, and that a formula suitable to other industries is not necessarily suitable to this industry.

CONCLUSION

The Commission should decline the recommended report and find that the existing services, charges and practices meet all requirements of the Interstate Commerce Act, but that the tariffs should be corrected to properly cover the services performed.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF UTAH

DONALD HACKING
Donald Hacking
Chairman

W. R. McENTIRE
W. R. McEntire
Commissioner

OSCAR W. CARLSON
Oscar W. Carlson
Commissioner

CHAS. A. ROOT
Chas A. Root
Registered Practitioner

1150

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in the above entitled proceedings by mailing a copy thereof properly addressed to each such party, first class postage paid.

6th

Dated at Salt Lake City, Utah, this 2nd day of January, 1945.

CHAS. A. ROOT
Chas. A. Root

1151 Before the Interstate Commerce Commission

EX PARTE 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II, TERMINAL SERVICES

Exceptions of Respondent, Union-Pacific Railroad Company, to Proposed Report of Examiners Way and Diamondson Filed Jan. 11, 1945

1152 EXCEPTION

Union Pacific Railroad Company, one of the respondents in the above-entitled proceeding, excepts to the following recommended findings in the proposed report of Examiners Way and Diamondson, to the extent and insofar as they would compel assessment of charges for switch movements required in ascertaining the weight and value of ore, both of which are prerequisites to application of freight rates:

"that the transportation service which it is the duty of respondents to perform for the United States Smelting, Refining & Mining Company at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of section 6(7) of the Interstate Commerce Act."

1153 ARGUMENT

The proposed report correctly states (sheet 8) that the Union Pacific is of the view that the present switching charges assessed at the Midvale, Utah, plant of the United States Smelting, Refining and Mining Company are in conformity with the principles announced by the Commission in the original report in this proceeding. The report also correctly states (sheet 8) that the present tariffs provide that the line haul rate includes movement of loaded cars from the road haul point of delivery to track scales and delivery to any designated track within the plant which could be accomplished by one continuous switching movement without interruption "resulting from order from, or requirements of, the smelter" and that for each additional movement within the plant, with certain exceptions, a charge of \$1.00 per car will be assessed.

The Union Pacific has interpreted and applied these tariff provisions as not including a charge for the switch movements necessary to enable the railroad to obtain information as to weight and value of the ore, without which it would be possible to determine the freight charges. In other words, Union Pacific has, for the reason just indicated, made no charge for switch movements over the scales and to the sampler. It has so interpreted the tariffs because, as shown in the report and in the testimony of record, the line-haul rates are upon a sliding scale based on the value of the ore per ton, which value is not known until the ore is weighed and moved to the point where the sampling is done. The report also correctly shows that the facilities for weighing and sampling at the Midvale plant are owned and maintained by the smelter company, and that the Union Pacific has no available facilities of its own for ascertainment of weight or value of the ore.

The Examiners apparently give no weight whatever to the fact that Union Pacific would not have the necessary information upon which to base its freight charges unless the cars are moved over the scales and to the sampler. They seem to base their conclusion principally upon the fact that the movement of cars is first to the assembly yard within the plant, from which they are then moved to the scales and sampler. From this fact the Examiners conclude that there has been an "interruption" of movement upon orders of or because of requirements of the smelter. They say that cars are held in the assembly yard "pending instructions from the plant" (sheet 7), but they further say that after sampling the cars are switched to storage tracks in the assembly yard awaiting further instructions from the plant. Such final instructions direct the carriers' switching crews as to final disposition of the car for, as shown by the report, it is not known until after the weight and value of the ore is ascertained whether the ore will be processed within the Midvale plant or whether it will be moved out of the plant to some other smelter several miles away from the Midvale smelter.

1155 While the smelter must also have the weight and value of the ore in order to make settlement with the seller, we disagree that because of that fact, or the fact that the cars stop briefly in the assembly yard, the respondents violate Section 6(7) of the Act in failing to assess an extra charge for the switch movements necessitated

by the weighing and sampling, without which the carriers could not possibly calculate their freight charges. These switch movements should be regarded as movements for carrier convenience and as necessary to its ascertainment of the charges made against the shipper. This, in justice and fairness, should be the conclusion regardless of the fact that movement of the cars is briefly interrupted in the assembly yard. The complex nature of ore and the practical and physical features of transporting and assessing freight charges upon it are such as to require relaxation from a rigid or fixed rule that carriers' line-haul duty ends at the point of momentary interruption even though there are additional movements which the carrier must make in order to obtain the information necessary in determining its freight charges. These movements would necessarily and most certainly be regarded as movements for carrier convenience if the shipper did not also require the same information as required by the railroads in assessing their charges.

There may be, as suggested by the Examiners, no requirement in the law that railroads shall determine the value of ore, but likewise there is no requirement 1156 in the law that the smelter company shall determine such values for the carriers. Where, as in this case, the carriers base their rates upon value of commodities, and such value can be determined only by a process such as sampling, they should be charged with a violation of law merely because they do not charge the shipper for such movements of the cars as are necessary to enable the carriers to obtain the required information for assessment of their published rates.

The inconsistency which would result from application of the conclusions reached by the Examiners as to illegality of switch movements made without additional charge for the purpose of ascertaining weights and values for application of the rates is forcibly demonstrated by the facts fully stated in the report concerning the published weighing and sampling in transit privilege without charge in addition to the line haul rates. Under that privilege, cars of ore may be weighed and sampled without additional charge at any point en route designated by the shipper. Such point may be at a public sampler, at the independent sampler at Murray or at any one of the smelter plants, after which the cars will be moved on without additional charge

to their destinations as determined upon the results of the sampling. As shown by the report, cars of ore destined to the Midvale plant will receive the same handling and switch movements necessary for weighing and sampling regard-

less of whether they move without charge in addition to the line-haul rate to some other smelter several miles distant or are unloaded at the Midvale plant. In the instance of the latter cars, the Examiner's proposal would compel a charge for each movement required for weighing and sampling, but they make no suggestion that the law is violated by the carriers in performing exactly the same switch movements through the assembly yard to the scales and sampler, thence back to the assembly yard and further line-haul to another smelter on the cars finally routed out of the Midvale plant to such other smelters. The report does not suggest that this sampling-in-transit arrangement without additional charge is unlawful or improper in any way. Clearly, far greater service is performed in connection with the cars which move through Midvale and after weighing and sampling to some other smelter than on the cars finally unloaded at Midvale.

Inasmuch as the final destination or unloading point of no car is known until after weighing and sampling, a fact which the report clearly states, it is apparent that the weighing and sampling is as much a transit privilege under the line-haul rates on a car finally unloaded at Midvale as on cars weighed and sampled at Midvale and forwarded to some other smelter. In other words, weighing and sampling are transit privileges under the line-haul rate regardless of the final destination and unloading point of the car.

Further inconsistency would result in instances where cars are weighed and sampled under the transit privilege at a public sampler located along the line and away from any smelter. There the carrier would perform without extra charge, substantially the same service and switch movements that it performs in connection with weighing and sampling at the Midvale plant.

There is no apparent justification for such an inconsistent interpretation and application of the tariffs and it is submitted that the Commission should find and hold that the weighing and sampling-in-transit privilege offered by the tariffs and necessary switching incident thereto, is lawful and available, without charge in addition to the line-

haul rates, regardless of whether the weighing and sampling take place within the plant in which the car is unloaded.

UNION PACIFIC RAILROAD COMPANY
By ELMER B. COLLINS

1416 Dodge Street
Omaha, Nebraska
January 12, 1945.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each other party.

Dated at Omaha, Nebraska, this 12th day of January, 1945.

ELMER B. COLLINS
Attorney for Respondent

1159 Before the Interstate Commerce Commission

Exceptions of Respondent, the Denver and Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees, to Report Proposed on Hearing by Examiners Leonard Way and S. R. Diamondson—Filed Jan. 11, 1945

1162 Comes now the respondent, The Denver and Rio Grande Railroad Company, Wilson McCarthy and Henry Swan, Trustees, and excepts to the report proposed by Examiners Leonard Way and S. R. Diamondson as follows:

I.

Exception is taken to the proposed findings as disclosed by the following language of the proposed report:

"The Commission should find that the interstate line-haul rates of respondent cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining & Mining Company at Midvale, Utah,

1163 under the line haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of Section 6 (7) of the Interstate Commerce Act."

II

Exception is taken to the proposed finding which reads:

"With respect to the movement of all commodities not including miscellaneous supplies, referred to above, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant yard without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations."

III.

Exception is taken to the proposed finding, or declaration as to the requirement of the law, as shown by the following language of the report:

"But there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier. Moreover, it is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement respondents are prevented from performing an uninterrupted service and their duty in connection with the delivery of such cars does not extend beyond the point of interruption. Any service performed by them beyond such point without proper charge therefor would be unlawful in violation of Section 6 of the Interstate Commerce Act."

IV

1164 Exception is taken of the failure to find that the arrangement at the time of hearing pertaining to sampling in transit of ore and concentrates at the smelter plant of the

United States Smelting, Refining & Mining Company, in Midvale, Utah, was proper in all respects, and in no way in violation of the Interstate Commerce Act.

V

Exception is taken of the attempt by the proposed report to nullify in all respects the sampling in transit privilege with respect to ore and concentrates in the plant of the United States Smelting, Refining & Mining Company, at Midvale, Utah.

STATEMENT

This proceeding concerns the terminal services, charges and practices of respondents, the Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees, in the receipt and delivery of carload and less-than-carload freight at the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah, and to what extent there may exist violations of the Interstate Commerce Act. The Union Pacific is not participating in the filing of the exceptions herein, such action being entirely that of the Rio Grande.

1165

ARGUMENT

EXCEPTION I

In the proposed report that the Commission should find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points, that the assembly yard constitutes such reasonable points for delivery and receipt of cars by the respondents; that the transportation services for the Smelting & Mining Company at Midvale, Utah, under the line-haul rates, begin and end at the assembly yard; that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform; that the Commission should further find that the performance of service beyond the yard at the line-haul rates, without compensation, is a violation of Section 6 (7) of the Interstate Commerce Act.

The Rio Grande is well aware of the fact that the present proceeding is to enforce Section 6 (7) of the Interstate Commerce Act, and not Sections 2 and 3 (1) of the Act. Section 6 (7) prohibits departures from the filed tariffs and it is violated when carriers pay the industries for a terminal service not included in their transportation serv-

ice or when they render such terminal service free of charge. In the language of the Supreme Court of the United States: "This prohibition applies without qualification to every carrier and when, as here, the unlawfulness of the allowance or service is shown by the conditions prevailing at a particular industrial plant, it is unnecessary, in order to support the Commission's order, to consider
 1166 whether generally similar allowances or services at other plants are or are not, lawful under conditions prevailing there." *U. S. v. Wabash R. Co.*, 321 U. S. 403; 64 S. Ct. 752; 88 L. Ed. 582 (Advance Opinions No. 11). Thus at the outset, the position of the Rio Grande as to the purpose of this proceeding is made clear. Furthermore, it is our understanding that both the Commission and the U. S. Supreme Court have pointed out that "a preference or rebate is the necessary result of every violation of Section 6 (7) where the carrier renders or pays for a service not covered by the prescribed tariffs." See *Davis v. Cornwell*, 264 U. S. 560, 562; 68 L. Ed. 848, 850; 44 S. Ct. 410.

The above position, particularly the opinion of the Supreme Court, recognizes the fact that different conditions prevail at different plants and, therefore, what might appear to be unlawful at some plants might be proper and legitimate at others. However, a close examination can usually find some line of demarcation of the different conditions at the different plants, and this line of demarcation, we think, is the vital point: in *Ex Parte* 104 proceedings which the Commission should not overlook, and which, we think has been overlooked in the proposed report. For instance, it is utterly impossible for the operations and transactions within a smelter plant, such as the one at Midvale, to be the same, and affect all parties concerned the same, as the operations and transactions in the ordinary plants of business concerns. Thus, in dealings with the operations and transactions in smelter plants, it is always neces-
 1167 sary to keep before us the conditions prevailing in such plants, and the reasons therefor.

The ordinary business plant may or may not have track scales within the plant, and most certainly it does not have a thaw house, a sampler or a combination sampler and concentrator. All these things exist, however, within the Midvale Smelter and all exist for the mutual benefit of the parties concerned, that is, for the benefit of the shipper, the Smelter Company and the carriers. So far as we know, such mutual benefit is conceded by all, and this being the case we are at a loss to understand why when the Smelter

Company owns and provides the scales within its plant, owns and provides the thaw house, owns and provides the combination sampler and owns and provides the concentrator that it then has to pay the carrier who is mutually benefitted to move shipments from one of these conveniences to another. We are willing to concede that after the carrier has run the gauntlet of the conveniences which it enjoys that it is then entitled to charge for each movement within the plant made by it for the benefit of the smelter plant alone. In other words, it is our contention that the delivery of a line-haul carload shipment destined to smelter at Midvale will include movement within the smelter plant over track scales to and from thaw house, to and from a smelter sampler, or to and from a combination sampler and concentrator, to a designated unloading point indicated by the sampling company. Then after delivery of the designated unloading point, all movements of shipments from track to track within the smelter
 1168 plant, weighing over scales within the plant, are and should be assessed as intraplant switch movement. The principal reason why we here take the position we are taking is because we think it is the equitable position to take and, further, because the railroads must have, in order to assess freight charges, (1) the scale weight and (2) the valuation. The reason for this is stated by Mr. Carey at pages 88 and 89 of the Midvale transcript as follows:

"It is my thought that in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration for the following reasons. The railroads now allow free movement over the scales on line-haul traffic. This is necessary in order to assess our freight charges. By referring to pages Nos. 6 and 7 of Exhibit 3, it will be noted it is also necessary for the railroads to have the valuation of the ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, scales, thaw house and samplers are owned by the smelters, the railroads would have to

supply and operate them for their own purposes if the smelters did not. * * *

The carrier services in all the Utah smelter plants are the same or practically the same, and in his testimony concerning the services and the manner of arriving at the carrier line-haul charges at the plants of the American Smelting & Refining Company at Murray and Garfield, Utah, Mr. Carey further said on pages 70, 71, 72, 73 and 74:

"Exam. WAY: In other words, it is your thought that the free services should be reinstated under the line-haul rates?

The WITNESS: For that portion of those services that are necessary for the railroad to have the information required in order to assess their freight charges.

Exam. WAY: In other words, you mean the weighing of the cars and the movements for sampling?

The WITNESS: Yes, sir.

Mr. FINERTY: And thaw house if necessary?

The WITNESS: Yes, sir.

Mr. FINERTY: I then understand one spotting after those things have been accomplished?

The WITNESS: That is right. * * *

"Exam. WAY: Now, I have noticed in some instances where the shipments are moved to the thaw house. For example, that is, they are weighed, they move to the thaw house, and then they are moved back over the scales. It is your thought that the plant should be accorded more than one scaling?

The WITNESS (Mr. CAREY): Yes, for this reason, that it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. After it has gone through the thaw house—Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the orders and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary, not only for the railroad to have the actual weight of that ore but the smelter too, in their settlement with shippers.

Exam. Way: But what you haul, you haul the wet weight?

The Witness: We assess our charges on the wet weight.

Mr. FINERTY: Based on a dry weight valuation?

The Witness: That is right.

Mr. FINERTY: Translated into a wet weight.

The Witness: Yes.

Exam. Way: And that necessitates weighing twice?

The Witness: That is right.

Exam. Way: That also necessitates placing the car to the sampler for sampling.

The Witness: Yes, sir."

. . .

"Q. (By Mr. CAMPBELL) Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

Q. So it would have to build them and maintain them for the purposes.

A. Yes.

Exam. Way: Now, that contemplates the service that is satisfactory with the present method of making the rates. Is there any other way to make the rates so that the rates will cover the service?

1171 The Witness: No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that there wouldn't be any movement of the low grade ore, and the same thing would result.

Exam. Way: Why?

The Witness: Because the ore couldn't afford to pay the higher freight charge, the low grade ore.

Mr. FINERTY: In other words, the small miner and the small mine producing a fairly low grade ore could

not afford to produce that ore if you had your rates on a single-rate basis.

The WITNESS: That is correct.

Mr. FINERTY: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

The WITNESS: That is right.

Mr. FINERTY: And a declared value would let the big miner get the same transportation as the low grade ore and at the same time put the low grade ore mine out of business?

The WITNESS: I say in connection with that it would result in the railroads not getting the higher rates on this high-valued ore.

1172 Mr. FINERTY: Also it would mean there would be no inducement to the smelter to buy low-grade ore if it had to pay the same freight rate as on high-grade ore?

The WITNESS: That is right, only as a matter of getting it trucked."

The uncontradicted statements of Mr. Carey quoted above are set out herein for the purpose of showing that the operations and situations generally within smelter plants, particularly the plants in Utah, are altogether different from the operations and situations in the plants of ordinary business concerns; that such operations, particularly weighing, thawing, sampling, etc., and movements in connection therewith, are of vital concern to the carriers in the ascertaining of their line-haul freight charges; that such procedure in determining line-haul freight charges accruing under lawfully published tariffs is a fair and impartial way to ascertain and assess such charges; that for many years, and so far as any one has been able to show otherwise, the procedure thus used in assessing line-haul charges was and is still lawful.

On the other hand, the proposed report states:

"But there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier."

1173 It may be that there is no direct or specific requirement in the law that the railroad shall deter-

mine the assay value of ores or concentrates or thaw such traffic before delivery. On the other hand, we know of no provision in the law to the effect that a railroad shall not determine the assay value of ores or concentrates, or thaw such traffic before delivery. It appears to us, however, that a great deal of the thawing arises not in connection with delivery but in connection with determining the moisture content of the ore. As Mr. Carey says:

"That cannot be accomplished until the car has gone through the thaw house. * * * the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary. * * *

It may also be that where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier as set out in the proposed report. We cannot concede, however, that this is a requirement of the law, but, if it is, this is the first we have heard about it. We are not unmindful, however, of the fact that provisions of this kind have been provided by published tariffs, and under ordinary circumstances at business plants, such provisions have been regarded as reasonable. Also, we have not overlooked the further fact that in *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83

I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 *I. C. C.* 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value before deducting freight charges, as determined and certified by the smelter, mill or other industry, to which the shipment is consigned, will be a reasonable rule to apply in the future. We have no quarrel to make with the statement that this will be a reasonable rule to apply in the future, but if this statement implies that this is the only reasonable rule to apply in the future, then we do have a quarrel to make with it for the reason there is no basis under any law with which we are familiar for a conclusion of that nature. This brings us right back to the proposition that conditions prevailing at a particular industrial plant are the factors controlling in the making of a reasonable rule to apply in the future at such plant.

In connection with the subject here under consideration, suppose the Smelter Company should say to the Rio Grande, or the Union Pacific, that since you insist on charging me for the movements over the scales, to the thaw house, to the sampler or concentrator, all of which facilities are owned and furnished by me within my plant, then I will refuse to let you use such facilities for rate or any other purposes. Frankly, we know of no law that would force the Smelter Company to permit the railroads the use of such facilities. If we are correct in this statement, 1175 then the railroads would be compelled to construct facilities of that nature on their own premises. In the face of a situation of this kind, it is easy to see that a rule providing for the assessment of charges on the basis of rates dependent upon value as determined and certified by the smelter to which the shipment is consigned would be most unreasonable for future application.

EXCEPTION II

Exception II goes to the finding of the proposed report with respect to interference encountered in the switching of the plant. The report says that with respect to the movement of all commodities, not including miscellaneous supplies, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations, and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant yard without interfering with one another and without encountering interference from intrastate traffic and from the intraplant operations.

The statement of the proposed report in connection with this exception is a good example of how different men see the same thing at the same time in different ways, and draw conclusions for their particular way of seeing whatever it was they saw, and yet, one is as honest as the other, for instance, the Examiner states in substance that the 1176 evidence is convincing to the effect that there is considerable interference between the switching of the plant and the industrial operations thereof and that the line-haul carriers could not at their convenience deliver and remove the cars to and from loading and unloading points in the plant without interfering with one another and without interference from intrastate traffic and intraplant operations. From an overall picture of the testimony on this point, we reached an entirely different conclusion. It

was and is our thought based upon the evidence, that interference in the operations within the plant was or is nil or practically that way, and that what little interference existed was of a nature that it could not be considered as amounting to anything of probative value. Also it was our impression that there could not be interference within the plant of one line-haul line with another for the reason, as we understood it, only one line-haul line operates within the plant and that is the Union Pacific. However, the proposed report seems to consider that both the Union Pacific and the Rio Grande operate within such plant. Furthermore, we are at a loss to understand what evidence was looked to for the purpose of finding that the line-haul carriers could not move two cars within the plant to and from unloading and loading points "without encountering interference from intrastate traffic."

There is not used in the proposed report any reference to any specific instances of interference. We also
1177 can see no need to go into any further details with respect to the lack of interference. We do feel, however, that the Commission should find that when a positive conclusion is reached to the effect that interference existed in several particulars that there should be sufficient facts of probative force to fully sustain such conclusion.

EXCEPTION III

The arguments made under Exception I are sufficient, we think, for the argument under this exception. Therefore, rather than further burden the record, we will here adopt for this exception what we said with regard to Exception I.

EXCEPTIONS IV & V

Exceptions IV and V go largely to the same thing, and for that reason they will be considered together. The exceptions go to the point that if the proposed report is adopted in its present form it will abolish the sampling in transit privilege at Midvale, which privileges the carriers, the smelter people and shippers alike consider of vital importance. With reference to this sampling in transit privilege Mr. Victor, we think, aptly said (119 of Transcript):

"Due to the complex nature of ores produced in the intermountain district and shipped to the Utah smelters, it was found necessary for the mutual benefit of carriers, shippers and smelters and to assure maxi-

1178 mum recovery of vital metals and elements to publish in carriers tariffs an arrangement that would permit a free interchange of ores and concentrates between the various smelters. This assures payment of maximum transportation charges to the carrier, brought about by the carrier's tariffs specifically providing for assessment of transportation charges based on the value of the ore as ascertained from the settlement between the shipper and the consignee. These provisions allow shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then reforwarded to the smelter that would be most advantageous. These provisions have been in effect since the smelters were built and the line-haul rates have all been established with the full knowledge of this fact and that such line-haul rates include compensation to the carriers for the services involved. A typical example of the sampling in transit provision is found in Item 165, Local Utah Freight Tariff No. 6, F. A. McManus, Agent, I. C. C. No. 3." (By reference said tariff item was included in the record.)

Mr. Victor introduced a statement as Exhibit No. 9, and then proceeded as follows:

"This statement shows that shipments of ores and concentrates moving in intrastate and interstate traffic are now stopping under the line-haul rates at Midvale, Utah, for sampling and then reforwarded to another smelter in the Salt Lake valley, and this service is permitted in the tariffs to insure maximum payment for the values contained therein. Similar cars as the ones shown herein from the same and other similar origins during the same period were retained at Midvale, Utah, to insure the greatest recovery and return to both shipper and carrier, but on such cars, under the presently effective tariffs, extra switching charges were assessed for placement to a similar point of unloading at Midvale, while no such switching charges were assessed for placing these cars for unloading at similar places at the other smelter destinations.

1179 It is necessary that cars of ores and concentrates, upon arrival at the plant, be weighed, thawed, when necessary to unload, and then sampled. It is only

after the sampling has been completed that the final destination is known and, therefore, such cars are still in line-haul. It is only after the sampling in transit has been fully completed and the line haul service terminated that the cars could come within the scope of this investigation.

The Midvale plant, together with the other Utah smelters, was placed in operation about the beginning of the twentieth century, at which time agreements were entered into between the railroad companies and the smelting companies to provide proper line-haul and terminal services for the handling of ores, concentrates and other necessary and resulting traffic. An agreement was made with the carriers in consideration of the Smelting Company providing yard trackage, scales, etc., to furnish at the smelter all terminal services necessary in handling of ores and concentrates, compensation for which to be included in the line-haul rates."

We have used the above quotations for the reason they give, we think, a rather clear word picture of the necessity and purposes of the sampling in transit privileges, and why such privileges should not be readily cast away merely upon a supposed technical ground. And, we might add, why they should not be cast away by a collateral attack.

It has been rightfully said that transit privileges are services accorded in many different ways to a variety of commodities while in transit from points of origin to ultimate destination; and is a departure from the usual and ordinary transportation service. See *Transit on Cottonseed at Quanah, Texas*, 232 F. C. C. 183, 188. Again 1180 it is said transit is based on the fiction of a through movement and the application of a through rate, even though the actual movement is separated into two or more distinct hauls. Transit arrangements are made to meet the need of a free flow of traffic, and to aid as far as possible in the marketing of a particular product. Transit arrangements may be, and often are, a commercial necessity. The Commission has the power under Section 1 to require the establishment of such arrangements. *Central R. Co. of New Jersey v. United States*, 257 U. S. 247; 66 L. Ed. 217. In that case the Court says:

"Whether the privilege shall be granted or withheld is determined by the local carrier. If granted, the local carrier determines the conditions; and these

are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers."

See also—

Commercial Milling v. Pere M. 232 I. C. C. 39;

Garrett & Co. v. Alton R. Co., 245 I. C. C. 441.

Also in the Central R. R. Co. v. United States case cited above, the Supreme Court says that transit arrangements "rest upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination."

1181 The transit privileges accorded commodities are too numerous to mention, as nearly every material that is shipped can be stopped at one point or another for the application of some transit privilege. Some of the commodities, however, granted the privilege, are as follows:

Grain and Grain Products—inspecting, grading, sorting and weighing, etc. *re* Reconsignment Case No. 3, 53 I. C. C. 455; Transit Arrangements on Grain, 151 I. C. C. 12; Grain and Grain Products, 164 I. C. C. 619, and many others.

Grazing—Taylor v. Dir. Gen., 61 I. C. C. 109.

Live Stock—Thompson v. C., B. & Q. R. R., 157 I. C. C. 775, 778;

Advances on Live Stock and Packing House Products, 22 I. C. C. 151;

Charges for Feed, Albany Packing Co., v. A., T. & S. F., 245 I. C. C. 741.

Logs, Lumber, Lath and Shingles, etc., Sorting, Grading, Driving & Reshipping,

So. H. W. Ass'n v. Dir. Gen., 61 I. C. C. 132;

Transit Privileges on Lumber at Nashville, 58 I. C. C. 444;

Transit Privileges at Weston, W. Va.—Sawdust Sales Co. v. B. & O. R. Co., 186 I. C. C. 265;

Transit Lumber from Pacific Coast to Eastern, 218 I. C. C. 47; 227 I. C. C. 189, and a large number of other similar cases.

Fruit—Holloway Fruit Co. v. Atlantic, B. & C. R. Co., 190 I. C. C. 198;

Fruit Stored in Transit in S. W., 223 I. C. C. 483.

Further citations would merely be the burdening of the record and, therefore, will not be given.

1182

CONCLUSION

From what we have said above, coupled with other parts of the record, vital to the issues involved, we herewith earnestly submit that the report proposed by the Examiners for adoption by the Commission is opposed to both the law and the evidence as they should be applied to the smelter plant situation at Midvale and, therefore said report should not be adopted.

Dated at Denver, Colorado, this 8th day of January, 1945.

Respectfully submitted,

WALTER M. CAMPBELL
Walter M. Campbell,
Commerce Attorney,

W. M. CAREY,
W. M. Carey,
Freight Traffic Manager,
For The Denver and Rio Grande
Western Railroad Company,
Wilson McCarthy and Henry Swan,
Trustees,
604 Rio Grande Building,
Denver 1, Colorado.

Due Date: January 12, 1945.

1183

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record by mailing by first-class mail a copy thereof properly addressed.

Dated at Denver, Colorado, this 8th day of January, 1945.

W. M. CAMPBELL
W. M. Campbell
Of Counsel for The Denver
and Rio Grande Western
Railroad Company,
Wilson McCarthy and
Henry Swan, Trustees.

1184 Before the Interstate Commerce Commission

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING
REVENUE AND EXPENSES

PART II, TERMINAL SERVICES

UNITED STATES SMELTING REFINING AND
MINING COMPANY.

*Exceptions of Intervener United States Smelting Refining
and Mining Company to the Examiner's Proposed
Report—Filed January 15, 1945*

1185

STATEMENT OF THE CASE

These proceedings are the outgrowth of an investigation initiated and conducted by the Interstate Commerce Commission into the practices of the Respondents, The Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) and Union Pacific Railroad Company, at the plant of the United States Smelting Refining and Mining Company at Midvale, Utah under *Ex Parte* 104, Part II, 209 I. C. C. 11, to
(2)

1186 ascertain whether or not Respondents are rendering any services to the United States Smelting Refining and Mining Company which are not included in the line haul rates or paid for by assessment of tariff charges in addition to the line haul rates, or to what extent there may exist violations of the Interstate Commerce Act. It is the position of the Intervener, United States Smelting Refining and Mining Company, that (1) approximately 80 per cent of its total traffic is intrastate, which in no way interferes with free flow of interstate commerce; (2) all inbound shipments of ore and concentrates move to samplers in Intervener's Smelter Plant Yards for sampling in transit under sampling in transit provisions of Respondent lines tariffs on file with the Commission; (3) other traffic receives but one simple switch to point of unloading or from point of loading; (4) the line haul rates and terminal facilities as originally agreed upon were established with the full knowledge of the mutual needs of both Respondent lines and Interveners officials and therefore the line haul rates which include sampling in transit service are compensatory; and (5) terminal facilities installed and maintained by Intervener within his Smelter Yards such as track scales and samplers are for the convenience of Respondents in determining proper weights and actual values

to be used in assessment of legal rates and charges; and (6) that present tariff provisions are in violation of Section Six of the Interstate Commerce Act for the reason that under tariff provisions now in effect Respondents do not furnish to the Intervener without charge services contemplated in and compensated by the line haul rates.

(3)

1187 An investigation was conducted at the Intervener's Midvale Plant by four representatives of the Interstate Commerce Commission on March 28, 29, 30 and 31, 1944 and pursuant to orders of the Interstate Commerce Commission dated at Washington, D. C. on March 28, 1944 and April 4, 1944, a hearing on this proceeding was held at the Shirley Savoy Hotel, Denver, Colorado at 9:30 A. M. May 29, 1944 before Examiner Leonard Way at which time testimony was offered by numerous witnesses for the Interstate Commerce Commission, Respondents and Intervener.

INTERVENER EXCEPTS TO THE EXAMINER'S
REPORT IN THE FOLLOWING PARTICULARS

1. The report reads, first paragraph, Sheet 3: "The Rio Grande's Lake Bingham branch crosses the plant site from east to west, practically bisecting it."

ARGUMENT

Intervener's Exhibit No. 1 shows this to be the "Lark"-Bingham branch. Also on Pages 15 and 16 of the record, Witness O'Brien testified:

"Q. Will you explain in detail just what you mean by the north part of the yard by designations on Exhibit 1?

A. Well, I mean most of the switching north of the —where the Rio Grande-Bingham Branch goes by, or the bridge-over."

The correct facts are that the D&RGW Lark-Bingham branch parallels a county road running east and west through the town of Midvale and extending between

(4)

1188 the south and north sections of the Midvale Plant Yard, and the railroad connection of the industry between the north and south yard is laid on a bridge or an overpass over both the highway and the D&RGW Lark-Bingham branch, and the Lark-Bingham branch does not, therefore, bisect the plant yard, nor in any way interfere with the internal plant switching operations.

2. Last paragraph, Sheet 3, ending on Sheet 4 refers to several delays.

ARGUMENT

Testimony of the Respondent Witness Wengert, Page 84 of the record, shows that switching within the Plant is conducted in an efficient manner. Likewise the Commission witness, Page 109 of the record, testified that the delays in the switching at the plant could happen in the switching in any switch yard. The Assembly Yard as defined on Sheet 3 of the Examiner's proposed report consisting of Tracks 26 to 36 is provided by the Smelting Company principally for the use and convenience of the Respondents (Pages 13, 22, 23, 110, 111, 129, 130 and 135 of the record), thus eliminating the necessity of each of the two respondent carriers from providing similar yards at Midvale for the storing, assembling, switching, etc. of loads and empties. The various delays referred to by the Examiners were the result of carriers using the Intervener's Plant facilities, and in the event the industry did not provide this yard, similar delays may have occurred in each of the Respondent carriers switching yards. Likewise the Examiner's report fails to show the causes

(5)

1189 for the delays listed, and apparently overlooks the testimony of Witness MacDonald of the Interstate Commerce Commission, who on Page 102 of the record stated that the inspector's reports showed all of the movements within the Plant not only including those necessary to place the cars at the proper point of loading or unloading on orders of the industry but also the movement of the cars strictly for the convenience of the carriers in their normal switching operations in the Plant. It will be noted that seven of the eleven delays specifically listed by the Examiners were of durations ranging from three to twenty minutes. These seven delays were minor and the parties to these proceedings should be commended rather than criticized as such minor delays indicate an enviable record resulting from efficient cooperation of the two train crews, especially in view of the fact that the Respondents do not maintain a switch foreman either at the plant or at their Midvale Station. The delays of greater duration awaiting loading of cars were optional with the Respondents and undoubtedly it was the confirmed opinion of the train crews that it would be a more economical operation to wait for the cars rather than to go to their Midvale yard or to tie-up, requiring the performance of the service at a later time. Such delays were not the result of orders or the requirements of the Intervener. Likewise, the delays on account of the cranes were not customary because dur-

ing this period the overpass over the highway and the Lark-Bingham branch of the D&RGW was under repairs. During normal operation in the plant the cranes are not in this location and do not interfere with the switching operations of the Respondents.

(6)

1190 3. In paragraph 1, Sheet 4 of the report the Examiners state: "All inbound shipments except coal, coke and coke breeze are weighed."

ARGUMENT

Intervener's Witness Victor, Page 118 of the record, states:

"The carload traffic shown in Exhibit No. 2 consisting of coal, lime rock, burnt lime, scrap iron and also other similar commodities or supplies received in the plant on other days that are not reflected on this day, such as coke flotation re-agents and other milling and smelting supplies Where these shipments have not previously been weighed before arrival at the plant, it is the practice to weigh them, which weight is used in determining the freight charges. None of the empty cars on this traffic are weighed light."

4. Commencing with third paragraph, Sheet 4 and continuing through Sheet 5 and including paragraphs 1 and 2 on Sheet 6 of the report the Examiner lists several cars as representative shipments moving in switching service at the Intervener's Plant during the month of March, 1944. This information is taken from the Inspector's report as introduced into the records by Witness MacDonald of the Interstate Commerce Commission.

ARGUMENT

Page 107 of the record shows that under cross-examination Witness MacDonald admitted that he had no actual knowledge nor did he know the purpose of the moves that took place in the plant and so reported to him by the four inspectors. Cars USSCo 2, WP 5933, D&RGW 42492, UCR 21079, UCR 21403 are all specifically intrastate traf-

(7)

1191 fic, either moving purely in intraplant switching service for which an intraplant switching charge legally published and on file with the Public Service Commission of Utah was assessed, or in connection with line haul tariffs and fully compensated for in the line haul rates which are legally applicable and on file with the Public Service Commission of Utah, and all of which should not be in-

cluded as evidence in these proceedings. D&RGW 40320, UP 88706 and the related car D&RGW 40419, UP 62255 and the related car 43349, D&RGW 40500 and UP 375051 were all moving in interstate traffic under the sampling in transit provisions. Such provisions are legally published and are on file with the Interstate Commerce Commission which permits the ascertainment of value by sampling at the Intervener's Smelter, then after the sampling privileges are completed the cars may be moved to another smelter in the Salt Lake Valley or be placed at an unloading point within the Intervener's smelter where such sampling in transit privileges were accorded. Item 165 of Local Utah Freight Tariff I. C. C. 3 is typical of the sampling in transit privileges filed in accordance with Section 6 of the Interstate Commerce Act (Page 120 of record). Intervener's Exhibit No. 9 shows an actual typical group of cars that moved via the Intervener's smelter to destinations beyond under the sampling in transit provisions. Many other cars during this same period were retained at Intervener's Smelter after the sampling in transit privileges were completed. The sampling in transit provisions provide that sampling will be accorded without charge. Such line haul sampling in transit rates necessarily include the required switching and so testified to by Intervener's Witness

(8)

1192' Victor, Pages 119 and 120, and Respondent D&RGW Witness Carey, Pages 89 and 90 of the record. Furthermore the time between arrival at Intervener's Smelter and the actual placement for sampling was strictly for the convenience of the carrier. In the absence of an Assembly Yard, in the Intervener's Plant, these cars would be placed on constructive placement within the Respondent's yards at or near Midvale, Utah. Such an arrangement would cause such Respondent carriers additional switching services for the movement to and from the Intervener's Plant, and so testified to by Intervener's Witnesses O'Brien and Victor, Pages 22 to 27 and 135 of the record, and also under cross-examination by Witness MacDonald of the Interstate Commerce Commission, Pages 110 and 111. The last car listed on sheet 6 of the report, NYC 135827, was an empty brought into the Intervener's Plant purely at the convenience of the carrier and not because of direct request of Intervener. It was held in the Assembly Yard by Respondent awaiting a specific order from the industry for placement for the loading of bullion for subsequent movement to Graselli, Indiana. In the event the Respondent had

its own yard and facilities at Midvale, this car could have been brought into the Plant on the date ordered by the Intervener, placed directly without interference or interruption at the point of loading and when loaded moved directly from the Plant again without interference or interruption.

5. Last paragraph, Sheet 6 and ending on Sheet 7, Examiners refer to complex nature of the ore mined and handled in Utah and the necessity for free interchange between smelters, resulting in carriers providing free sampling in transit privileges. The Examiners fur-

(9)

- 1193 ther refer to publication of rates (dependent upon value) into the Utah Smelters on ores and concentrates as determined by the sampling and assay, citing *Arlington Silver Mining Company vs. Great Northern*, 83 I. C. C. 255, and *Non-Ferrous Metals* 204 I. C. C. 319, 327.

ARGUMENT

The sampling in transit provisions were mentioned and fully explained in our argument to Exception No. 4, herein. It might appear that the Examiners are confused in relating the sampling in transit provisions with the provisions for determining the value of the ores and concentrates used by the carriers in determining the legal rate applicable thereto. We agree with the Examiners that the conclusion in the Commission's decision in the *Arlington Silver Mining Case* is sound and proper. This case, however, dealt only with the method of arriving at a proper value for freight charge purposes. The Commission's consideration in the *Arlington Case* only went to the determination as to which method was the proper one to be used by the railroad companies in determining the legally applicable line haul freight rate. This case did not consider the propriety of establishing rates based on value, nor did the Commission determine that it was the legal obligation of the Smelting Companies to ascertain the value and furnish such information to the carriers without compensation. However, the Examiners contend that the *Arlington Case* places the obligation on the industry to furnish without compensation the services for the determination of value and the furnishing of a valuation certificate to the carriers. If this can be read into this decision then also it can be made to

(10)

- 1194 include approval by the Commission of free switching services by the carriers to secure the value, because

at the time of this case there were no switching charges in effect at the Intervener's Plant. It is the Intervener's contention that the determination of the value is one of the several reciprocal services (value, scales, yard facilities, etc.) agreed to between the Smelting Company and the Railroad Respondents which has been in effect for in excess of forty years and which is the consideration for the switching services performed by the Respondents. Furthermore, the Commission in the Arlington Case, *supra*, did not consider the propriety of tariff provisions covering the sampling in transit.

6. First paragraph, Sheet 8 of the report of the Examiners states: "On brief, the respondents differ with respect to the propriety of the switching charges presently in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original report in this proceeding. The Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from thaw house. This contention is based primarily on the ground that certain facilities, such as scales, samplers, and thaw houses are necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carriers with it the obligation to stand the expense of switching to and from such facilities. But there is no requirement in the law that the rail road shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests

(11)

- 1195 upon the shipper to ascertain and certify the value to the carrier. Moreover, it is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service and their duty in connection with the delivery of such cars does not extend beyond the point of interruption. Any service performed by them beyond such point without proper charge therefor would be unlawful in violation of section 6 of the Interstate Commerce Act."

ARGUMENT

The Examiners failed to indicate that the Intervener likewise opposed the present switching charges and presented evidence (Page 126 of the record) that this matter had been under active handling with the carriers since 1938. Intervener's contention was that not only the carriers were obligated from a reciprocal standpoint, and that it was their common carrier duty and obligation to determine the weights and values for freight charge purposes, but also that it was their common carrier obligation on shipments of ores and concentrates moving under the sampling in transit provisions legally on file with both the Public Service Commission of Utah and the Interstate Commerce Commission to perform all necessary switching services without compensation other than the line haul rates. All shipments of ores and concentrates are still in line haul under the sampling in transit provisions during the time the switching services are performed at the Intervener's Plant and, therefore, could not be considered as within the scope of these proceedings. The Examiners in the last paragraph, Sheet 7 of the report, state:

(12)

1196 "It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale. If, however, the final destination of the ore is Midvale, a charge of \$1 is made for switching from the sampler to unloading point, plus 50 cents per car for light weighing on demand of the smelter, and 50 cents per car for movement to and from thaw house, if such movement is required."

In spite of this admission and in spite of the evidence placed in the records, the Examiners presumably base their final conclusion of interruptions on the fact that such cars are held in the Assembly Yard awaiting instructions from the Plant and that Respondents are prevented from performing an uninterrupted service, yet the holding of such cars in the Assembly Yard is purely for the convenience of the Respondents, as these Assembly Yards are principally provided by the Intervener for the convenience of the Respondent; if otherwise the majority of the tracks could be removed from the Plant by the Intervener. Likewise the cars are at the Assembly Yard under the sampling in

transit provisions of the tariffs and are still in line haul because the destination of such shipments are not known until after this sampling service performed under legally published provisions in the tariffs has been completed. The Examiners also state that there is no requirement in the law that the railroads shall determine the assay value of ores or concentrates or thaw such traffic before delivery but on the contrary where rates are dependent upon value the duty rests upon the shipper to ascertain and

(13)

1197 certify the value to the carrier. The real issue is whether the Commission has held that it is the shipper's obligation to perform this service *without compensation*. In *United States vs. Baltimore and Ohio Railroad Company*, 231 U. S. 274, the court stated:

"And a carrier may receive services from an owner of property transported or use instrumentalities furnished by the latter, in which cases the carrier shall pay for them subject to the restriction that the compensation be no more than is reasonable."

It can reasonably be concluded that if the Intervener is obligated to furnish to the Respondents the values for freight charge purposes, then the Respondents are likewise legally obligated to fully compensate the Intervener for the service performed in ascertaining the value and furnishing such Respondents with the certified information.

7. Second paragraph, Sheet 8 of the report the Examiners state that no evidence was presented to show the actual handling of traffic on miscellaneous supplies.

ARGUMENT

On Page 118 of the record, Intervener's Witness Victor states:

"The carload traffic shown in Exhibit No. 2 consisting of coal, lime rock, burnt lime, scrap iron, and also other similar commodities or supplies received in the plant on other days that are not reflected on this day, such as coke, flotation re-agents and other milling and smelting supplies when received at the Midvale plant are spotted directly to the places of unloading without interruption from the smelting company. Where

(14)

- 1198 these shipments have not previously been weighed before arrival at the plant, it is the practice to weigh them, which weight is used in determining the freight charges. None of the empty cars on this traffic are weighed light."

8. Third paragraph, Sheet 8 of the report reads:

"With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both inbound and outbound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant yard without interfering with one another and without encountering interference from intrastate traffic and from the intra-plant operations."

ARGUMENT

Apparently the Examiners base their conclusion on the evidence introduced by the Examiners inspectors which under cross-examination was proven to be inaccurate and determined without knowledge as to the purpose of a movement or whether a movement was for carriers convenience in normal switching operations or whether by direct order of the Intervener. The switching contract of Respondents, as furnished at the request of the Examiner (Pages 1 and 2) reads:

"All necessary switching of cars to and from any of the said plants and such other switching in the vicinity of Midvale and Murray, Utah, as may from time to time be agreed upon by the parties hereto for account of both parties hereto, shall be exclusively directed and performed by the Short Line Company * * *"

(15)

1199 Further, regarding that: "The evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof * * *"

The following testimony appears on pages 19 and 20 of the record:

"Exam. WAY: May it be generally understood then that all of the switching that is done then, is done under the instructions of the plant, done under your instructions?"

The WITNESS: Yes.

Q. (By Mr. VICTOR) That is the general instructions. You don't tell them how to operate and switch their engines or how to take the cars or in any way handle them?

A. No.

Q. Your instructions, of course, go to just the spotting of the cars for unloading and loading?

A. Yes."

Likewise the Examiner finds interference from intrastate traffic and from the intraplant operations, this in spite of the testimony of Witness O'Brien, MacDonald and Victor that no interference resulted from the operations of the Plant, its equipment or facilities. Likewise Witness Victor specifically testified that intrastate and interstate traffic move freely together and without interference (Page 67 of the record). Furthermore Exhibits 15 and 16 show that 90.2 per cent of the inbound shipments of ores and concentrates were intrastate and 9.8 per cent interstate and 77.8 per cent of the total movement of all commodities to and from the Plant was intrastate and 22.2 per cent interstate.

Yet the Examiners propose to make drastic changes
(16)

1200 in the handling of traffic at the Intervener's Plant by concluding interference without evidence to support such a conclusion, thus causing 77.8 per cent of the traffic to be controlled by the much smaller 22.2 per cent interstate traffic. This appears to be a conclusion ordinarily determined under a Thirteenth Section Case and not a Sixth Section Case.

9. Last paragraph, Sheet 8, concluded on Sheet 9 of the report the Examiners state: "The Commission should find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining & Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. The Commission should further find that the performance of service beyond the yard as described at the line-haul rates, without compensation, is a violation of section 6 (7) of the Interstate Commerce Act."

ARGUMENT

If the Commission should follow the proposal of the Examiners, it would mean (a) that under proceedings covering terminal services and allowance the Commission would be nullifying legally published line haul transit provisions without determining the validity of such provisions; (b) the Commission would impose an obligation

(without compensation) on the industry to secure
(17)

1201 the weights and values for the railroad companies to be used by them in the assessment of their legal transportation charges; (c) would further create an unjustified and unnecessary duplicate expense on the industry through the assessment of switching charges for the services of sampling and weighing now included in the line haul rates. This duplicate switching expenses would force the Intervener to increase the cost of handling and treating such ores and concentrates at the Smelter by the amount of the increased switching costs. This increased handling and treating charge would increase the cost of producing each ton of ore, thus further limiting the quantity of ore that could be mined at a profit; and decreasing the shipments of ore so urgently needed for the war effort. Any increase in the cost of producing a ton of ore will automatically increase the marginal ore, and once this tonnage is put aside in the mine it is irrevocably lost to all as it cannot at a later date stand alone the cost of its production. In the event the Commission should make the recommended report its order, it would cause each of the Respondents to (a) provide additional yard facilities at Midvale; (b) provide scales for the weighing of the ores and concentrates; (c) either provide their own facilities for determining value or to pay an independent sampling company to ascertain the value for their use in the assessment of freight charges or to pay to the Intervener a reasonable charge for these services and facilities. It would likewise give cause for a reduction in the present line haul rates by the amount of the cost of the extra switching charges resulting from such an order, as such line haul rates have been established with a full knowledge

(18)

1202 and understanding that such rates include the necessary switching services for sampling. It would also cause a penalty on shipments other than ores and concentrates even though the evidence, (Page 118 of the record), shows conclusively that these cars may be spotted, loaded or empty, directly without interruption or interference.

CONCLUSION

The Commission should find that the receipt and delivery of carload shipments at the Intervener's smelter at Midvale, Utah are not the same as the receipt and delivery of the commodities considered by the Commission in their original proceedings 209 I.C.C. 11. The traffic considered under 209 I.C.C. 11 and reached its billed and ultimate

destination, whereas the ore and concentrate traffic considered under the supplemental proceedings herein is still in line haul under the sampling in transit provisions, and the ultimate and final destination may or may not be at the Intervener's Plant, and the Commission should further find that the receipt and delivery of other carload traffic at the Intervener's Plant is a customary and reasonable receipt and delivery of the commodities handled therein. This finding would be consistent with the Commission's language in 209 I.C.C. 17:

"The difficult thing is to ascertain when delivery at the Plant is made. In the nature of things no inflexible formula can furnish a solution for that problem. . . . All that we can safely say is that there must be such a delivery as is customary and reasonable."

(19)

1203 The Commission should further find that the Interstate line haul rates of the Respondents cover the receipt and delivery of carload shipments at all points within the Intervener's Plant and that no violation exists of Section 6, Paragraph 7 of the Act.

Your Intervener respectfully requests that this case be set for oral argument at such time as the Commission may decide.

Respectfully submitted,

OMAR O. VICTOR

Omar O. Victor

*General Traffic Manager and
Practitioner Representing Intervener
United States Smelting Refining and
Mining Company*

January 17, 1945.

(20)

1204

Certificate of Service

I hereby certify that I have on the 12th day of January, 1945 served a copy of the foregoing document upon the parties of record in this proceeding by mailing a copy thereof, properly addressed, postage prepaid, to each party.

Dated at Salt Lake City Utah this 12th day of January 1945

OMAR O. VICTOR

Omar O. Victor

General Traffic Manager of Intervener

1205

Ex Parte No. 104 Part II.
INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

BG:NEH,

February 1, 1945

UNITED STATES SMELTING, REFINING, AND MINING COMPANY

Ex Parte No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II. TERMINAL SERVICES

The above entitled proceeding is assigned for oral argument on March 7, 1945, at 10:00 o'clock a. m., at the office of the Interstate Commerce Commission, Washington, D. C., before Division 3.

By the Commission:

W. P. BARTEL
Secretary

A copy of the above-entitled notice sent to the following by regular mail on February 1, 1945. (6)

Elmer B. Collins,
1416 Dodge Street,
Omaha, Nebraska.

L. T. Wilcox,
1416 Dodge Street,
Omaha, Nebraska.

W. M. Campbell,
604 Rio Grande Bldg.,
Denver, Colo.

Omar O. Vietor,
906 Newhouse Bldg.,
Salt Lake City, Utah.

Charles A. Root
314 State Capitol,
Salt Lake City, Utah.

D. H. Williams,
I. C. C. Bldg.,
Washington, D. C.

W. M. Carey,
604 Rio Grande Bldg.,
Denver, Colo.

1206

Ex Parte No. 104 Pt. 2.
 INTERSTATE COMMERCE COMMISSION
 WASHINGTON 25

BG

February 19, 1945

UNITED STATES SMELTING, REFINING AND MINING COMPANY

Ex Parte Docket No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II, TERMINAL SERVICES

Oral argument in the above entitled proceeding now assigned March 7, 1945, at Washington, D. C., before Division 3, is postponed to a date to be hereafter fixed.

By the Commission:

W. P. BARTEL,
Secretary.

A copy of the above notice sent to the following by regular mail on February 19, 1945. (7)

F. B. Collins,
 1416 Dodge St.,
 Omaha, Nebr.

L. T. Wilcox,
 1416 Dodge St.,
 Omaha, Nebr.

W. M. Campbell,
 604 Rio Grande Bldg.,
 Denver, Colo.

O. O. Victor,
 Newhouse Bldg.,
 Salt Lake City, Utah.

C. A. Root,
 314 State Capitol,
 Salt Lake City, Utah.

W. M. Carey,
 Rio Grande Bldg.,
 Denver, Colo.

D. H. Williams,
 I. C. C. Bldg.

1207

Ex Parte No. 104 Part II
 INTERSTATE COMMERCE COMMISSION
 WASHINGTON 25

BG:GE

April 4, 1945

UNITED STATES SMELTING, REFINING, AND MINING COMPANY
EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
 AND EXPENSES

PART II, TERMINAL SERVICES

The above-entitled proceeding is assigned for oral argument May 3, 1945, 10:00 o'clock a. m., at the office of the Interstate Commerce Commission, Washington, D. C., before Division 3.

By the Commission:

W. P. BARTEL,
Secretary.

A copy of the above entitled notice sent to the following by regular mail April 4, 1945: (8)

Elmer B. Collins
 1416 Dodge St.,
 Omaha, Nebr.

Donald Hacking, Chairman,
 Public Service Commission
 of Utah,

L. T. Wilcox,
 1416 Dodge St.,
 Omaha, Nebr.

Salt Lake City, Utah.
 D. H. Williams,
 I. C. C. Bldg.,

W. M. Campbell,
 604 Rio Grande Bldg.,
 Denver, Colo.

W. M. Carey,
 604 Rio Grande Bldg.,
 Denver, Colo.

Omar O. Victor,
 906 Newhouse Bldg.,
 Salt Lake City, Utah.

Charles A. Root,
 314 State Capitol,
 Salt Lake City, Utah.

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING, AND MINING
COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
OR EXPENSES.

PART II, TERMINAL SERVICES

Submitted May 3, 1945. Decided October 1, 1945

Respondents' line-haul rates found not to include services beyond the assembly yard, as described in the report, and the performance of such services by respondents beyond that yard found to be in violation of section 6 (7) of the Interstate Commerce Act.

Elmer B. Collins, L. T. Wilcox, W. M. Campbell, and W. M. Carey for respondents.

Omar O. Victor for the industry.

Charles A. Root for the Public Service Commission of Utah.

D. H. Williams for Interstate Commerce Commission.

Seventy-Sixth Supplemental Report of the Commission

DIVISION 3, COMMISSIONERS MILLER, PATTERSON, AND BARNARD

By Division 3:

Exceptions were filed by the parties to the report proposed by the examiners, and the case was orally argued.

In the original report in this proceeding, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, certain principles were announced which the Commission indicated would be followed in considering the propriety and lawfulness of switching services performed by respondents at industrial plants. This supplemental report deals with the practice of respondent carriers in performing switching services within the plant of the United States Smelting, Refining & Mining Company at Midvale, Utah.

Midvale is about 12 miles south of Salt Lake City, Utah, on the Union Pacific¹ and Rio Grande.² The plant is about 100 yards from the Union Pacific station at Midvale and about 0.5 miles from the Rio Grande station. The plant

¹ Union Pacific Railroad Company.

² Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, trustees).

1209 occupies approximately 25 acres of land and is engaged in the processing of lead or ores and concentrates. Fourteen miles of trackage, comprising 48 separate standard-gage tracks and serving about 16 locations for the loading and unloading of cars, are located within the plant enclosure. There are also an unspecified number of electrified narrow-gage tracks in the northern section of the plant yard, operation over which by small electric locomotives, owned by the industry, does not interfere with operation over the standard-gage tracks. The industry does not operate a standard-gage locomotive but does have 3 locomotive cranes which handle loads and empties on standard-gage tracks in the northern part of the plant.

The industry is served by the Union Pacific and Rio Grande. At the northeast corner of the plant property there are 5 parallel tracks owned and maintained by the Union Pacific. These tracks, the car capacity of which is not shown of record, but which appear to be 600 to 1,000 feet in length,^a are used by the Union Pacific for the receipt and delivery of empty and loaded cars by its line-haul engines, and are hereinafter referred to as the interchange yard. Two parallel leads, 800 feet long, also owned and maintained by that carrier, extend southwestwardly from this interchange yard and merge into a single lead which extends for 150 feet before connecting with an industry-owned track near the center of the property. The latter track continues in the same general direction for a distance of 600 feet to a connection with the plant track layout in the southern portion of the yard.

From the Union Pacific leads a number of industry-owned stubbed tracks diverge in the reverse direction or to the north and form what will hereinafter be called the north yard. Track 1, 1,800 feet long, takes off from the southern end of the Union Pacific leads and serves the oxide mill sampler in the approximate center of the north yard. Ore is unloaded at this sampler or into adjacent bins. Track 2, directly east of, and parallel to track 1, is used for loading sampled ore from the sampler for further movement. This track merges with track south of the sampler and is 1,000 feet long. Track 3 is directly east of track 2 and connects with the latter at the south entrance

^aA map of record shows all the tracks involved in this proceeding drawn to scale. The distances used in describing them in this report are based on the scale and are approximate only.

to the sampler. This track, 600 feet in length, is used for dumping into bins miscellaneous commodities, such as roast, coke, and linerock. Tracks 1, 2, and 3 are on trestles. Track 4 takes off from the Union Pacific lead just east of track 1 and serves a storage platform for unloading scrap iron and supplies. It is over 1,900 feet long and, by short diverging tracks, designated track 4-A and 5, serves the high-grade sampling plant and for unloading flota-

(751)

1210 tion lead at the wedge roaster, respectively. Track 10 is a short stubbed track just east of track 4 and serves the plant warehouse. Track 7 diverges from the southern end of the interchange yard referred to above and, together with connecting tracks 8, 8-A, and 9, serves the sintering and roasting mills adjacent to that yard on the west. Track 11 is a short track just west of, and parallel to, track 1, and is also known as the sand-hole track. Connecting with the continuation of the Union Pacific lead near the center of the property is track 13 which extends in the reverse direction to the north for about 1,900 feet to the lead refinery, and, in conjunction with connecting tracks Nos. 14, 15, 18, and 19, serves facilities for loading lead bullion and matte. A water tank, maintained by the industry for respondents' switch engines, is located south of the lead refinery. Other tracks, designated 20, 21, 22, and 23, in the western portion of this yard, ranging in length from 500 to 800 feet, are used for storage purposes, and for stock piling coke and other commodities. There are a few tracks in addition to those described but they are relatively unimportant. The total number of tracks is about equally divided between the northern and southern sections of the plant yard and there are no excessive curves or grades.

The Rio Grande's Lark-Bingham branch crosses the plant site from east to west, practically bisecting it. From this branch 2 carrier-owned parallel tracks diverge towards the southern section of the plant yard in a left curve to connections with industry-owned tracks. One of the Rio Grande tracks is described as a receiving track, is about 800 feet long, and has a capacity of about 13 empty cars. The other is known as the delivery track, where the Rio Grande's line-haul engines cut loose from in-bound trains and pick up out-bound cars. This track is 1,100 feet long. All tracks except the 2 Rio Grande tracks and those hereinbefore described as owned by the Union Pacific, are

owned and maintained by the industry. The Rio Grande tracks connect with a number of tracks serving thaw houses, scales, and a combination concentrator and sampler in that portion of the plant hereinafter called the south yard. Tracks 26 to 36, inclusive, are parallel tracks used by both respondents as assembly and classification tracks for general switching and passing and storage tracks. These tracks are herein called the assembly yard, and, except track 26, range in length from 400 to 1,500 feet. Track 26 is 2,700 feet long from its connection with the Rio Grande's receiving track to its terminus. Tracks 34 and 35 also serve the so-called old thaw house in the assembly yard, used for thawing frozen ore for the smelter in the north yard. The plant scales are adjacent to each other on tracks 28 and 29. About 600 feet south of the scale on track 28 there diverges in the reverse direction to the north, track 42 for a distance of 600 feet, and taking off from this track in the same direction is track, (752)

211 43, 500 feet long. Just south of the scale on track 28, track 41, 800 feet long, diverges in the reverse direction to the north. A short stubbed track, designated 40, takes off near the northern end of track 41. Tracks 40 to 43, inclusive, serve as loading and unloading tracks for the combined concentrator and sampler located east of the assembly yard. Tracks in the assembly yard merge at their southern ends into track 26 which then serves as a lead, and with 6 connecting tracks, designated 45 to 50, inclusive, reach the so-called new thaw house and stock piles in the extreme southeastern portion of the south yard. These 7 tracks are also used for storage and general switching. Frozen ore for the concentrator and sampler is handled through the new thaw house. Track 44 is a restle track, 1,600 feet long, and is known as the high line. This track is used for unloading ore and concentrates at the concentrator and sampler and is reached in reverse movement to the north from its connection with track 45 near the new thaw house.

The switching within the plant is performed in accordance with an agreement which provides that the expenses incurred and switching charges received shall be divided on the basis of revenue carloads switched for each carrier. The Rio Grande furnishes and maintains two 6-wheel 5-ton switch engines and the Union Pacific furnishes 4 crews to operate these engines, in 4 shifts from 7 a. m.

to midnight. One engine operates generally in the north yard and the other in the south yard. Both engines can operate in the same section of the plant, but occasional delays occur by reason of such operation, as well as by reason of engine standing by while cars are loaded or unloaded. For example, some of the delays reported by our inspectors during the 4-day inspection period from March 28 to March 31, 1944, inclusive, were as follows: On March 28, from 8:42 a. m. to 8:45 a. m., waiting for engine to clear scale; from 10:30 a. m. to 11:10 a. m. waiting for engine to clear scale and blocked from south yard; from 5:28 p. m. to 5:38 p. m. waiting for completion of unloading at ore-crushing mill; from 10:40 p. m. to 10:55 p. m., delayed on high line waiting for cars to be dumped; and from 7:30 p. m. to 1:30 a. m. waiting for cars to be loaded at roast-mill. On March 29, from 10:50 a. m. to 11:05 a. m. blocked from entering south yard; from 5:38 p. m. to 6:20 p. m., delayed awaiting completion of loading on track 1; from 4:20 p. m. to 4:40 p. m., blocked from entering south yard; several other delays in switching due to interference by industry cranes. On March 30, from 9:25 a. m. to 9:45 a. m., blocked by other engine switching south yard; from 7:30 p. m. to 10:46 p. m., waiting for completion of loading of cars on roast hole track. On March 31, from 4:20 p. m. to 4:55 p. m., blocked from entering south yard. Written switching instructions are given to the Union Pacific by the industry, and charges for switching are paid to that carrier.

(753)

1212 In the normal switching operations, a switch crew handled on an average of from 4 to 10 cars at a time.

The in-bound traffic consists principally of ore, concentrates, scrap iron, limerock, coal, coke, sand, and miscellaneous supplies. The general practice is to switch all shipments to the assembly yard. All in-bound shipments, except coal, coke, and coke breeze are weighed. The preponderance of the in-bound shipments are intrastate. For example, during the period from January 1 to March 31, 1944, 2,889 cars were handled into the plant from intrastate origins and 330 cars, or 10.3 percent of the total, from interstate origins. Of these 330 cars, 17 contained miscellaneous supplies which are stated to have been spotted directly at unloading points. The remaining 313 cars contained ore and concentrates moving under a sampling-in-transit arrangement, and were handled as more particularly described hereinafter. The bulk of the out-bound traffic during that period consisted of lead bullion, speiss,

zinc concentrates, arsenic, and pyrites, all of which, with the exception of lead bullion, move to the assembly yard for weighing. Some ore is shipped to other smelters. Of the outbound movement, 579 carloads, or 66.2 percent of the total of 875 cars, moved to interstate destinations. A total of 4,094 loaded cars were handled in-bound and out-bound during the first 3 months of 1944. It appears that the volume of interstate shipments at the present time is heavier, owing to war conditions, than in normal times.

The following examples depict the switching performed in connection with representative shipments during March 1944:

Car USSSCo 2 was switched loaded from track 8-8, also called the wedge roast track, in intraplant movement to the scale in the south yard, weighed and placed on the track where it was unloaded and the empty car switched to the sand hole track.

Car WP 5933, limerock from Dolomite, Utah, was switched from the Rio Grande delivery track to the assembly yard. This car was received in the plant prior to March 28 and was switched to the scale on March 30. The car then moved to track 1 for unloading and was switched empty to the Rio Grande receiving track.

Car D & RGW 42492, containing ore from Bingham, Utah, was switched from the Union Pacific's interchange yard to the assembly yard on March 28, weighed, and hence to the sampler on track 1 for unloading. The empty car was returned to the scale for weighing light and moved to the Union Pacific yard. The contents of this car, after sampling, were reloaded on track 2 into car UCR 21079. The latter car was then switched to the assembly yard to be held awaiting disposition instructions. Those instructions are governed by the assay value disclosed by sampling, more particularly discussed

(754)

213 hereinafter. In this instance, the car was ordered switched on March 30 to the high line, track 44, and unloaded at the concentrator.

Car UCR 21403, lead ore from Lark, Utah, was switched to the assembly yard from the Rio Grande's delivery track on March 29, weighed, and switched to track 34 serving the old thaw house. The same day the car was switched to track 44 where it was unloaded and returned to the scale and delivered to the Rio Grande for out-bound movement. This carrier transports all ore to the plant from Lark, averaging 15 or 16 cars daily, except Sunday. These ship-

ments are generally switched to the assembly yard and weighed. The number of cars that can be set for unloading at one time on the high line serving the concentrator is not shown of record, but our inspectors' reports indicate that all of the in-bound cars of Lark ore cannot be spotted for unloading as soon as received, the number of cars switched being limited by the inability of the engine to push more than 8 cars at a time up the grade to the trestle. The remaining cars are generally held in the assembly yard until the high line has been cleared of empties. After unloading, the cars are returned to the scale, weighed, and then move to the Rio Grande receiving track.

Car D&RGW 40320, crude lead and zinc ore from Leadville, Colo., was switched from the Rio Grande delivery track on March 29 to the assembly yard. On March 31 this car was shifted to the scale and then to track 1 for unloading. The empty car was returned the same day to the scale and after weighing to the Rio Grande receiving track.

Car UP 88706, ore from Dillon, Mont., arriving at the plant on March 28 and was switched from the Union Pacific yard to the assembly yard. On March 29 the car was switched to the scale, weighed and moved to the sampler on track 1 and unloaded. On March 30 the car was returned over the scale to the Union Pacific. On the same day the contents of this car were reloaded, after sampling, into car D&RGW 40419 on track 2 and switched to the assembly yard. On April 3 the car was switched to track 1 where the sampled ore was dumped into unloading bins.

Car UP 62255, ore from Basin, Mont., on March 29, was handled the same as car UP 88706, except that the sampled ore, after reloading into car D&RGW 43349 on track 2, moved to the assembly yard and on April 4 was switched to the concentrator in the south yard.

Car D&RGW 40500, crude ore from Sargent, Colo., sampled in transit at an independent sampler at Murray, Utah, arrived at Midvale on the Rio Grande prior to March 28, and was switched to the assembly yard. On March 30 the car was switched to the scale, weighed, and moved to track 35 and thence to the high line, for unloading at the concentrator. On the same day, the empty
(755)

1214 car, without being weighed, was switched to the assembly yard for delivery to the Rio Grande.

Car UP 375051, concentrates from Silverton, British Columbia, Canada, switched from the Union Pacific yard

to assembly yard on March 29. The car was weighed on March 30 and moved to track 4 in north yard where the concentrates were pipe-sampled without being unloaded and then on March 31, switched to the ore bin on track 3 and dumped. This car then moved light to the scale and returned to the Union Pacific yard.

Car NYC 135827 arrived empty on March 16 and moved from the Union Pacific yard to the assembly yard for storage and thence, on March 29, to bullion track 14. The car was loaded with lead bullion for Grasselli, Ind., and was switched directly to the Union Pacific yard. Cars for loading lead bullion are not weighed either loaded or light, the cast bullion being weighed over small scales.

Prior to February 25, 1920, respondents accorded free switching from track to track within the plant under the line-haul rate. On that date, the free switching was limited to one movement of a line-haul shipment within the plant over track scales to and from smelter sampler or to and from combination sampler and concentrator,⁴ to an unloading point designated by the smelter. For each additional movement from track to track within the plant the switching charge was \$2.50 per car.

In purported compliance with the principles announced in the original report in this proceeding, respondents' tariffs were amended effective July 5, 1938, on interstate traffic, to provide, in substance, that the line-haul rate would include the movement of loaded cars from the road-haul point of delivery to the switching line to track scales and subsequent delivery to any designated track within the plant which could be accomplished by one continuous switching movement without interruption resulting from orders from, or requirements of, the smelter. A similar provision also applied on the out-bound movement of loaded cars from point of loading to track scales for weighing and subsequent movement to the point of interchange with the road-haul carrier. For each additional movement within the plant, except as hereinafter shown, a charge of \$1 per car was applicable. Ore or concentrates arriving at the smelter in a frozen condition would be switched to and from the thaw house at a charge of 50 cents per car. After thawing, the car could be switched to track scales and thence to the sampler or other designated location within

⁴ Effective November 27, 1920, a free switch was also accorded on line-haul shipments moving to and from the smelter thaw house.

the plant as indicated above. In-bound or out-bound empty cars could be switched to track scales for weighing,

(756)

1215 on demand of the smelter, at a charge of 50 cents per car. When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within the plant) will be charged for at \$2.70 per car for each movement. These tariff provisions and charges are in effect at the present time.

Owing to the complex nature of ores produced in the inter-mountain district and shipped to Utah smelters, there has been in effect for many years a sampling-in-transit arrangement whereby ores and concentrates may be freely interchanged between the various smelters. This arrangement is stated to inure to the mutual benefit of shippers, railroads, and smelters by allowing shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murry, Utah, and then move to the smelter selected by the shipper. During the period from January 1 to March 17, 1944, a total of 34 cars were sampled in transit at Midvale, and reforwarded to other destinations, 9 of which were interstate in character. The sampling-in-transit provision published in D. & R. G. W. tariff I. C. C. No. 757, currently in effect, provides, so far as here pertinent, that shipments of ore or concentrates from specified origins may be sampled in transit at Midvale without charge for the first stop at sampler or for out-of-line or back-haul service performed. A similar provision is published in U. P. tariff I. C. C. No. 565. The propriety and lawfulness of such practices are not within the scope of this proceeding. The tariffs governing the transportation of ores and concentrates to the Utah smelters publish rates dependent on the value per ton of the ores after assay at the mill, smelter, or other industry to which the shipment is consigned. In *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255, cited with approval in *Nonferrous Metals*, 204 I. C. C. 319, 327, it was stated that a rule which provides for the assessment of charges on the basis of rates dependent upon value, before deducting freight charges, as determined and certified by the smelter, mill, or other industry, to which the shipment is consigned will be a reasonable rule to apply in the future. Such ores and concentrates are generally waybilled from point of origin at a rate based on approximate value, and, after

the ore has been sampled, the rate is revised in accordance with the value determined and certified to the carrier as the basis for settlement between shipper and consignee.

Under the present operating arrangements, in-bound or out-bound shipments are switched without charge between respondents' interchange yards and unloading or loading points in the plant, including movement over scales, provided there is no interruption caused by the plant. Cars containing ore or concentrates are switched to the
(757)

1216 assembly yard and are held in that yard pending instructions from the plant. The cars are then weighed and move to either the combined concentrator and sampler in the south yard or to the sampler in the north yard. These shipments are generally unloaded at the sampler and reloaded into other cars after sampling and switched to storage tracks in the assembly yard awaiting further instructions from the plant. As previously indicated, the final point of delivery of sampled ore or concentrates depends upon the assay after sampling. A small percentage of the shipments are pipe-sampled, which does not require unloading the car, or sampled in transit prior to arrival at Midvale. These cars are also switched to the assembly yard in the first instance. It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading point at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale. If, however, the final destination of the ore is Midvale, a charge of \$1 is made for switching from the sampler to unloading point, plus 50 cents per car for light weighing on demand of the smelter, and 50 cents per car for movement to and from thaw houses, if such movement is required.

On brief, the respondents differ with respect to the propriety of the switching charges at present in effect. The Union Pacific is of the view that the present switching charges are in conformity with the principles announced by the Commission in the original report in this proceeding. The Rio Grande, on the other hand, takes the position that the line-haul rates include compensation for the plant switching necessary to determine weights and values of ores and concentrates, and also the switching performed in connection with cars to and from thaw houses. This contention is based primarily on the ground that certain facili-

ties, such as scales, samplers, and thaw houses are necessary in order for the carrier to determine the applicable rate on the traffic; that the smelter furnishes these facilities rather than requiring the railroad to provide them; and that the use of those facilities by the railroad carries with it the obligation to stand the expense of switching to and from such facilities. However, there is no requirement in the law that the railroad shall determine the assay value of ores or concentrates or thaw such traffic before delivery. On the contrary, where rates are dependent upon value, the duty rests upon the shipper to ascertain and certify the value to the carrier. Moreover, it is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted service, and their duty under the line-haul rate in connection with the delivery of such cars does

(758)

not extended beyond the point of interruption. Any
1216 A service performed by them beyond such point without proper charge therefore would be unlawful in violation of section 6 of the Interstate Commerce Act.

The industry asserts that miscellaneous supplies move directly from the points of entrance into the plant to the place of unloading without any interference or interruption. No facts have been presented which show the actual handling of that traffic and such information as we have in connection with the other traffic indicates that, except possibly at the warehouse, such traffic could not be placed at the convenience of the carrier without encountering interference from other traffic. We have not been advised as to what commodities are embraced within the description "miscellaneous supplies" but presumably it is intended to cover commodities other than coal, coke, limerock and scrap iron and other material used in the smelting process. Under the circumstances no finding will be made as to that traffic.

With respect to the movement of all commodities, not including miscellaneous supplies, referred to above, both inbound and out-bound, the evidence is convincing that the switching of the plant has to be coordinated with the industrial operations thereof and that the line-haul carriers could not at their own operating convenience deliver and remove cars to and from numerous unloading and loading points in the plant without interfering with one another

and without encountering interference from intrastate traffic and from the intraplant operations.

Under the terms of the switching agreement between the Rio Grande and the Union Pacific, hereinbefore referred to, the expense incurred and the switching charges received are divided on the basis of revenue carloads switched for each carrier. This is a pooling arrangement for which no authorization under section 5 (1) of the act is shown.

We find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the assembly yard as described herein constitutes such a reasonable point for the delivery and receipt of cars by the Union Pacific and Rio Grande; that the transportation services which it is the duty of respondents to perform for the United States Smelting, Refining and Mining Company, at Midvale, Utah, under the line-haul rates begin and end at the assembly yard; and that the movement of carload shipments within the plant beyond those tracks is a service which it is not the duty of the carriers to perform. We further find that the performance of service beyond the yard as
(759)

1216 B described at the line-haul rates, without compensation, is a violation of section 6 (7) of the Interstate Commerce Act.

An appropriate order will be entered.

MILLER, *Commissioner*, dissenting in part:

What I have said in my dissenting-in-part expression in *American Smelting and Refining Co.*, 263 I.C.C.—, decided concurrently herewith, applies with equal force to the situation here involved.

1217

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 1st day of October, A. D. 1945.

UNITED STATES SMELTING, REFINING AND MINING
COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES PART II, TERMINAL SERVICES

Upon further consideration of the record in this proceeding concerning the lawfulness and propriety of the terminal services, charges and practices of the Union Pacific Rail-

road Company and Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees), in the receipt and delivery of carload freight at the plant of the United States Smelting, Refining and Mining Company at Midvale, Utah, and the Commission having under date of May 14, 1935, made and filed a report, *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, containing its legal conclusions with respect to the general situation presented, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions with respect to the services rendered to the United States Smelting, Refining and Mining Company at Midvale, Utah, which reports are hereby referred to and made a part hereof, and the Commission having found in said supplemental report that the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) violate the Interstate Commerce Act in the particulars as set forth in the above report:

It is ordered, That the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company (Wilson McCarthy and Henry Swan, Trustees) be, and they are hereby, notified and required to cease and desist, on or before January 10, 1946, and thereafter to abstain, from such unlawful practice.

By the Commission, division 3.

W. P. BARTEL
Secretary.

(Seal)

1218

ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF RESPONDENTS' TELEGRAPHIC REQUEST FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

PRESENT: CARROLL MILLER, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of respondents'

telegraphic request for postponement of the effective date of the order; and good cause appearing therefor:

It is ordered, That the order entered in said proceeding on October 1, 1945, which by its terms is made effective on or before January 10, 1946, be, and it is hereby modified to become effective on or before February 11, 1946, instead of January 10, 1946.

Dated at Washington, D. C., this 29th day of November, A. D. 1945.

By the Commission, Commissioner Miller,

W. P. BARTEL
Secretary.

(Seal)

OK.

MILLER.

1219

BEFORE THE
INTERSTATE COMMERCE COMMISSION
EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES

PART II, TERMINAL SERVICES

UNITED STATES SMELTING, REFINING AND MINING COMPANY
MIDVALE, UTAH, PLANT

AMERICAN SMELTING, AND REFINING COMPANY
GARFIELD AND MURRAY, UTAH, PLANTS

*Petition of Respondent, Union Pacific Railroad Company,
for Re-opening, Oral Argument Before, and Reconsider-
ation by the Entire Commission, and Postponement of
Effective Date of Orders Pending Action on Petition—
Filed December 10, 1945*

1220 Union Pacific Railroad Company, one of the re-
spondents in the above-entitled proceeding, hereby
petitions that the Commission re-open these proceedings,
permit oral argument before the entire Commission, and
that the entire Commission reconsider the reports and
orders issued by Division 3 on October 1, 1945, in the light
of the record herein and oral argument before the entire
Commission. This respondent also petitions the Com-
1221 mission to postpone the effective date of said orders
(2)

of Division 3 to a reasonable time after action by
the Commission on this petition.

In support of its petition, respondent respectfully shows:

The Decisive Factors Which Distinguish These Smelter Switching Cases From Any Others of the Terminal Switching Cases, Were New to Division 3, and Have Not Been Considered at All by the Entire Commission. Division 3, Without Precedent, Has Dealt Improperly and Erroneously With Those Distinguishing Factors, and a Miscarriage of Justice and Unfairness to the Parties to These Cases Will Result if the Entire Commission Refuses to Hear Oral Argument, to Reconsider These Cases, and Correct the Errors of Division 3.

The fundamental error of Division 3 lies in its apparent purpose to brush aside the facts which clearly distinguish these smelter switching cases from any one of the numerous terminal switching cases heretofore decided by the Commission, and to fit these cases into the pattern and principles of the Commission's original report in this proceeding, 209 I. C. C. 11.

This, we submit, the Division has done, despite the fact that the Supreme Court, in sustaining the Commission's own holding in 209 I. C. C. 11, said in *U. S. v. Am. Tin Plate Co.*, 301 U. S. 402, 411:

"The Commission properly held that each case must be decided upon the circumstances disclosed."

In that decision the Supreme Court points out that the conclusions in the Commission's report in 209 I. C. C. 11, were based on evidence of conditions at some 200 industrial plants. But if any one of the 200 plants was a smelter plant, it is not apparent from the report, and it neces-

(3)

1222 sarily follows that, unless the rule that each case must be decided upon its own facts is to be ignored, the conclusions reached and principles laid down in that report, and applied by Division 3 in the instant cases, may not be used as the test of the lawfulness of practices at smelter plants in which, as we will presently show, the facts and operations are unique and clearly different from the operations and circumstances at the numerous plants to which the Commission in its later reports has applied the principles of its original report in the terminal switching service proceeding.

I.

Division 3 Ignores the Fact That Unlike Any Other Case Decided by the Commission in the Terminal Switching

Proceedings the Rates on the Principal Inbound Commodities, Ores and Concentrates, Are Based on Both the Weight of the Commodity and Its Value Per Ton, and Further Ignores or Erroneously Determines the Effect of the Fact That the Tariffs Publishing the Line-Haul Rates and the Uncontradicted Testimony Conclusively Proves That the Line-Haul Rate Includes Such Switch Movements as Are Necessary to Enable the Carrier to Ascertain Weight and Value of the Commodity.

The reports of Division 3 in these cases state the fact that the rates are based upon value of the ore and concentrates per ton as well as the weight, but brushes aside this fact, not present in any of the previously decided cases, with the mere assertion that the fact that the rates are based on value as well as weight does not place the smelters in a special class as to the quantum of service embraced in those rates, and with the further assertion that the furnishing of information as to values is the obligation only of the smelters and not of the carriers.

The presently effective tariffs publish rates per ton based on a sliding scale which results in a different
(4)

1223 rate for ores and concentrates of different values ranging from \$100.00 per ton to \$2,000.00 per ton. The rate to be applied cannot be known until the value of particular cars of ores and concentrates has been ascertained along with the weight of the lading in a particular car. In other words, without both the weight and the value per ton the carriers could not possibly calculate the freight charges on a particular car load. As shown in the reports of Division 3, the carriers have no scales or samplers of their own between the points of origin and the smelter plants and could not themselves obtain the weight and value of the shipments of ore without installing scales and samplers at points along the routes of the line-haul movements. Instead of going to this expense the carriers accept the weights and values ascertained at the scales and samplers within the several smelter plants. As further shown by the reports, the actual weighing and sampling is done by the smelters without charge to the carriers. The carriers make no charge against the smelters for the switch movements necessary to place the cars at scales for weighing or to the samplers for ascertaining value. Likewise, no charge is made by the smelters against the carriers for the smelter facilities and services in weighing and sampling.

Division 3 holds that the carriers violate Section 6(7) of the Act in failing to assess an extra charge for the switch movements necessary to obtain the weights and values of the ore. Apparently this decision is based upon the fact that the smelters must also have and make use of the weight and value of the ore in order to make settlement with the seller.

The decisions of Division 3 attempt to dispose of these cases by referring to wholly dissimilar cases heretofore decided, and in doing so they give no weight whatever to the following provisions of the tariff or to the fact, to which Commissioner Miller calls attention in his dissent in part, that the undisputed testimony shows that the line-haul rates include certain switch movements. The pertinent provisions of the presently effective tariff are as follows:

“(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

“Note—By ‘uninterrupted movement’ is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

“(b) During the winter months when ore, concentrates or other commodities are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore, concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

.

“(c) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.”

(6)

1225 The foregoing tariff provisions were published in 1938, following the Commission's decision in 209 I. C. C. 11, although, as stated in the reports of Division 3, the carriers accorded free switching within the smelter plants under the line-haul rates prior to February 25, 1920, on which date the free switching was limited to one movement within the plant over track scales to and from smelter sampler to an unloading point designated by the smelter, and for each additional movement within the plant a charge of \$2.50 per car was assessed.

As indicated above, Union Pacific Railroad Company disagrees with the holding of Division 3 that a violation of Section 6(7) of the Act results from failure to collect charges for switch movements necessitated by weighing and sampling, without which the freight charges could not be ascertained. These switch movements must be made regardless of any necessity, convenience or desire of the smelter company. Therefore, they should be regarded as movements for carrier convenience and as necessary to ascertainment of the tariff charges to be made against the shipper. This, in justice and fairness, should be the conclusion regardless of the fact that movement of the cars is briefly interrupted in the plant yard. As recited in the reports, the complex nature of ore and physical features of transporting and assessing freight charges upon it are such as to require relaxation from a rigid or fixed rule invoked by Division 3 that a carrier's line-haul duty ends at the point of brief interruption even though there are additional movements which it must make in order to obtain the information necessary in determining its freight charges. These movements would necessarily and most certainly be regarded as movements for carrier convenience.

(7)

1226 if the shipper did not also use the same information required by the railroads in assessing their charges.

There may be, as stated by Division 3, no requirement in the law that railroads shall determine the value of ore for the benefit of shippers, but likewise there is no requirement in the law that the smelter company shall determine such values for the carriers, or provide and furnish, free of charge to carriers, facilities and services required to enable carriers to obtain information essential to application of their tariff charges. Where, as in this case, the carriers base their rates upon value of commodities, and such values can be determined only by a process such as

sampling, they should not be charged with a violation of law merely because they do not charge the shipper for such movements of the cars as are necessary to enable them to obtain the required information for assessment of their published rates.

Since the undisputed testimony and the published tariffs show indisputably that the involved line-haul rates have always included and now include switch movements necessary to ascertain the weight and value of ores and concentrates, and there being no evidence to the contrary in the record in these cases, the decisions of Division 3 are necessarily contrary to the evidence and are arbitrary and thus unlawful and should be corrected by the entire Commission. Since the tariffs and the testimony show beyond dispute that compensation for switch movements necessary to ascertain weight and value of the ores is included in the line-haul rates, it necessarily follows that the smelters are not obtaining free switch movements for such purposes but are paying for them by payment of the line-haul rates.

(8)

1227 Furthermore, since the carriers must have weights and values under their method of rate publication, we submit that Division 3 has no foundation in law for its conclusion that the shipper must not only furnish the facilities and service but also pay for the switch movements connected with weighing and sampling. The carriers must have this information regardless of the fact that the smelters must also have it, and we submit that the carriers are no more in violation of Section 6(7) of the Act, or any other provision thereof, for failing to assess charges for such switch movements against the shippers than they would be in violation of the Act for failure to publish a special charge against the shippers for necessary clerical and other expenses incurred by the carriers in calculating their freight charges and in making out their freight bills for submission to the smelters.

II.

Division 3 Has Ignored or Attempted Erroneously to Explain Away the Sampling-in-Transit Provision of the Tariffs.

As explained in the reports of Division 3, the tariffs publishing the line-haul rates provide, without extra charge, for sampling in transit for the purpose of ascertaining weight and value of ores and concentrates moving through-

out the wide territory to which the published line-haul rates apply. Under this sampling-in-transit privilege the shipper may have that service rendered by the carrier without charge at any sampler en route, for example, at the independent sampler nearby the Murray Plant of the American Smelting & Refining Company. After such sampling in transit, which determines the weight and value of the ores and concentrates, the smelter determines the parti-

(9)

cular plant to which the shipment will be moved.

Under this sampling-in-transit privilege, as clearly shown in the reports, cars may be weighed and sampled in any of the smelter plants and upon the determination of the quality and value of the ore the car may be transported on to some other plant without charge for any of the switch movements necessitated by the weighing and sampling done within the plant from which the car moves to another plant, several miles away.

Division 3 does not condemn this sampling-in-transit provision of the tariff, or failure of the carriers to exact a charge from the smelters for the switch movements necessary to obtain the weights and values at such independent samplers. But the Division holds, entirely inconsistently, that if, upon sampling the contents of the car within a particular plant, it is determined that the ore is of such quality and value as to be processed in the plant where the sampling is done a charge must be made for the switch movements necessitated by the weighing and sampling process. That is the Division's conclusion despite the fact that obviously much greater service is performed in connection with the cars which move through and are sampled at one of the smelter plant and after weighing and sampling move on to some other smelter, than is performed on cars which are weighed, sampled and unloaded at the same smelter. Under the tariff, weighing and sampling is as much a transit privilege under the line-haul rates on a car weighed, sampled and unloaded at Midvale, Garfield or Murray as it is on cars weighed and sampled at either of those plants and forwarded to some other smelter for unloading. In other words, weighing and sampling are transit privileges under the line-haul rate re-

(10)

1229 regardless of the final destination and unloading point of the car, and the decisions of Division 3 to the contrary are obviously arbitrary and erroneous. Moreover, it is apparent that by its inconsistent and erroneous inter-

pretation and application of the sampling-in-transit privilege Division 3 necessarily leaves a situation in which a discrimination in violation of Section 2 of the Act would result against the shipments which are weighed, sampled and unloaded at the same plant, and in favor of the shipments which are weighed and sampled at one plant and moved on to another plant for unloading. This is necessarily so because the decisions would permit free switch movements for the latter shipments but would compel assessment of charges for switch movements against the former shipments.

III.

Division 3 Has Gone Beyond the Scope of This Investigation by Arbitrarily and Erroneously Holding, Without Hearing or Evidence, That the Switching Arrangements Between the Union Pacific and the Denver, Rio Grande & Western at Midvale, Garfield and Murray, Utah, Constitute Pooling Arrangements Within the Meaning of Section 5(1) of the Act.

Division 3 holds that the joint switching operations of the Union Pacific and Denver, Rio Grande & Western at the above-named plants constitute pooling arrangements for which no authorization under Section 5(1) of the Act is shown. The reports adequately describe the joint switching arrangements and the description need not be repeated for the purposes of this petition. The record shows, however, that there has been no hearing whatever on the question whether the joint switching operations constitute pooling arrangements which require the Commission's

(11)

1230 authorization under Section 5(1) of the Act. The orders instituting the investigations herein made no mention of any purpose to examine into the legality of matters coming within Section 5(1) of the Act and indeed all that took place in this respect was that at the hearings the Examiner requested that copies of the switching contracts be submitted for the record.

Clearly the record does not justify any such pronouncement as Division 3 has made with respects to these contracts. Moreover, the Division itself in denying that it should pass on the question whether Section 2 of the Act would be violated if it construed the sampling-in-transit privilege as it does, asserts that

"this proceeding is one to determine whether Section 6(7) is being violated." (Sheet 9, report covering

switching at Garfield and Murray, Utah, and Leadville, Colorado.)

We submit that the attempt of Division 3 to reach beyond the scope of this investigation and delve into considerations beyond its own admitted scope of the investigation is arbitrary action which should be corrected by the entire Commission upon reconsideration.

This respondent's fundamental point in this connection, however, is that Division 3 has committed error in its conclusion that the contracts covering joint switching operations in these plants constitute pooling arrangements within the meaning of Section 5(1). It will be observed on the face of the Division's own description of the contracts that competition between the two common carriers, parties thereto, is not and could not be affected in the least. Division 3 apparently would consider that any joint

(12)

1231 switching arrangement is necessarily a pooling arrangement within Section 5(1). This, of course, is an entirely erroneous view of the purpose of Section 5(1) and is totally at variance with all of the interpretations of that section by the Commission and by the courts. In *Application of Pullman Co. Under Section 5(1), I. C. C. Act, 259 I. C. C. 41*, the Commission said at page 43-44, in discussing Section 5(1):

"The purpose was to encourage free competition between railroads and to prevent a practice which was regarded as having a tendency to prevent or check competition" (citing cases). "The keynote of the enactment was the competitive relationship of the railroads involved."

After discussing further the history of that section the Commission said, at page 45:

"A 'pooling contract' in railroad nomenclature is almost a term of art. It connotes the existence of competition between the parties to the contract."

The Commission then cites *I. C. C. v. Southern Pac. Co.*, 132 Fed. 829, 839, in which it is said:

"In this sense pooling is a system of reconciling conflicting interests or of obviating ruinous competition
* * *

As clearly appears from the descriptions given by Division 3 in its reports in these cases, the contracts in question have nothing to do with common carrier obligations, line-haul service or any other competitive situation which might exist between them. Each carrier receives its

own tariff charges for the switching movements against which charges are assessed, and each carrier pays its
(13)

1232 share of the expenses incurred in the performance of such switching. Neither traffic, service nor earnings, or any portion thereof, is pooled or divided, but if it be thought that service is divided or pooled, the Commission's attention is called to the fact that the contracts were consummated long before the term "service" was written into Section 5(1) by the Act of 1940.

Division 3 not only erred in the conclusion that the switching contracts constitute pooling within the meaning of Section 5(1), but even if it were correct in that view, it further erred in its failure to hold that Commission approval of the contracts is specifically exempted by the last sentence of Section 1(18) of the Act, which provides:

"Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching or side tracks."

The quoted language is clearly applicable to the joint arrangements at the three plants under consideration because at each of the plants at Midvale, Garfield and Murray the trackage used pursuant to the contracts is "industrial" trackage owned entirely by the respective smelter companies, and its use by the respondents is thus clearly exempt from Commission jurisdiction. The exemption applies regardless of the fact that the industrial trackage is being used in switch movements connected with the line-haul for the purpose of ascertaining weights and values in order that the carriers may apply their tariff rates.

(14)

1233 The foregoing sets forth the essential errors committed by Division 3, which we respectfully ask the entire Commission to consider and to correct, but the reports as a whole which the Division has rendered in these cases, instead of clarifying and giving proper emphasis to obvious distinctions between these smelter switching operations and those in plants involved in cases heretofore decided by the Commission, leave the parties in confusion and uncertainty.

We submit that the character of the reports is such as to justify the parties to the proceedings in asserting that Division 3 has not performed its full function as an administrative body and that it is the duty of the entire Commis-

sion to take these cases upon oral argument and reconsideration, and to rectify and correct the errors and infirmities in the reports of Division 3. *U. S. v. C., M., St. P. & P. R. R.*, 294 U. S. 499.

WHEREFORE, respondent Union Pacific Railroad Company prays that the Commission re-open these cases, hear oral argument, and reconsider the cases in their entirety and, further, that the Commission postpone the effective dates of the outstanding orders in these cases until a reasonable time after its action on this petition.

Respectfully submitted,

ELMER B. COLLINS,
Elmer B. Collins,
Attorney for Respondent,
Union Pacific Railroad Company.

1416 Dodge Street,
Omaha 2, Nebraska.
December 13, 1945.

(15)

1234

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed to each other party.

Dated at Omaha, Nebraska, this 7th day of December, 1945.

ELMER B. COLLINS,
Elmer B. Collins,
Of Counsel.

1235

BEFORE THE INTERSTATE COMMERCE COMMISSION EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUE AND EXPENSES

PART II, TERMINAL SERVICES

UNITED STATES SMELTING REFINING AND MINING COMPANY
*Petition of Intervenor United States Smelting Refining and
Mining Company for Re-opening, Re-argument and Re-
consideration in the Above Entitled Proceedings—Filed
December 13, 1945.*

1236 Comes now the Intervenor, The United States Smelting and Refining and Mining Company, and respectfully petitions the Commission to grant re-opening.

reconsideration and re-argument before the entire Commission of the above entitled proceedings.

The Intervener also petitions the Commission to postpone the effective date of the order of October 1, 1945 of Division Three of the Commission pending the re-consideration and re-argument.

(2)

1237 In support of this petition the Intervener respectfully shows:

I. That the findings of Division Three are indefinite, vague and ambiguous as more specifically set forth hereinafter.

II. The testimony and evidence of the Respondents and the Intervener, as fully set forth at the hearing in Denver, Colorado on May 29, 1944; in briefs of Respondents and Intervener; in the exceptions to the Examiner's proposed report of Respondents and Intervener; and in the arguments of the Respondents and Intervener at Washington, D. C. on May 3, 1945 before Division Three; shows that the movement of ores, concentrates, matte, flue dust, speiss, and other related products are all moving from the original point of origin to the ultimate destination under legal and applicable sampling in transit provisions on file with both the Public Service Commission of Utah and the Interstate Commerce Commission, and as such are permitted to stop at the sampler of the Intervener or samplers at other smelting companies or at the public sampler at Murray, Utah, for the determination of the weight and value, also for the determination of the final destination. The Respondent's line haul rates have all been created and established with full knowledge that this sampling in transit provision was in effect, and further, with full knowledge that the sampling in transit necessitated and contemplated the line haul movements within the Intervener's plant yard for the determination of the weight, value, and ultimate destination. The

(3)

1238 sampling in transit provisions are applicable to the same extent on cars remaining at the smelter where the sampling is performed as on the cars that are moved beyond the smelter (where the sampling is performed) to another smelter within the Salt Lake area, to which the through line haul rates, including the sampling in transit, are provided. On sheet 7 of the mimeographed Decision of Division Three, after considering the sampling in transit provisions applicable at Intervener's plant, they find, "the propriety and lawfulness of such practices are not within the scope of this proceeding"; yet in spite of this finding the Division proceeds to place a restriction on

the movement of these line haul cars by defining the plant movements that allegedly are within and without the carriers' obligations under their line haul rates. The Commission further finds on sheet 7 that "the final point of delivery of sampled ore or concentrates depends upon the assay after sampling", which is a direct admission on the part of Division Three that during the time of sampling and assaying the cars are in line haul service.

III. Respondents herein testified that the line haul sampling in transit rates on ores, concentrates and the related products are fully compensatory, (and the record does not contradict it) and which testimony was accepted by Commissioner Miller in his able dissent.

IV. On sheet 8 of the mimeographed Decision in connection with the findings on miscellaneous supplies, the Division stated that no facts had been presented to show the actual handling of that traffic. The balance of the materials other than ores, concentrates, etc. received at and forward-

(4)

ed from the Intervener's plant may and do move 1238a directly to and from the point of unloading and loading as a simple switch and without any interferences or interruptions from orders or operating requirements of the Intervener, and which was so testified to at the hearing and reiterated in the brief, exceptions and argument. (Page 118 transcript of hearing in Denver, Colorado)

V. In Decision of October 1, 1945 Division Three found Respondents' line haul rates not to include services beyond the assembly yard and the performance of such services by Respondent beyond that yard found to be in violation of Section 6 (7) of the Interstate Commerce Act Intervener is of the belief that this conclusion is contrary to the testimony and evidence herein; for the afore stated reasons and also in that the finding states "the Rio Grande Lark-Bingham branch crosses the plant site from east to west, practically bisecting it", which obviously indicates possible interferences and interruptions. The true facts of the case are that the north and south plant yards of the Intervener are connected with each other by an overhead structure passing over the Rio Grande Lark-Bingham branch and on an entirely different level. These facts are fully outlined on Page 40 of the Intervener's Exceptions to Examiner's proposed report. Furthermore, the findings include a series of delays as reported by the Commission's inspectors, which purportedly show further interference and interruptions. One such delay is reported as lasting from

8:42 a. m. to 8:45 a. m., or three minutes. This alleged delay is of such insignificant duration that it tends to cloud
(5)

the issue rather than clarify and presumably the
1239 Commission has considered this type of evidence in arriving at its conclusion.

VI. Division Three has cited with authority original report in 209 ICC 11. As to that traffic moving under sampling in transit rates there is no similarity with the conditions that were under consideration in 209 ICC 11.

VII. If the findings and order herein are allowed to become effective, it will have a detrimental effect on the entire mining industry in Utah and the other western states.

Therefore, your Intervener respectfully requests that this proceeding be re-opened for re-consideration and re-argument before the entire Commission and also requests that the Decision of Division Three of October 1, 1945 in the proceedings herein be postponed pending such further consideration and argument.

Respectfully submitted,

OMAR O. VICTOR,
Omar O. Victor

*General Traffic Manager and
Practitioner Representing Intervener
United States Smelting Refining and
Mining Company.*

December 18, 1945.

(6)

1240

Certificate of Service.

I hereby certify that I have on the 11th day of December, 1945, served a copy of the foregoing document upon the parties of record in this proceeding by mailing a copy thereof, properly addressed, postage prepaid, to each party.

Dated at Salt Lake City, Utah this 11th day of December, 1945.

OMAR O. VICTOR,
Omar O. Victor,
General Traffic Manager of Intervener.

1241

Order

Interstate Commerce Commission

UNITED STATES SMELTING, REFINING AND MINING COMPANY
EX PARTE No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
OR EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF TELEGRAPHIC REQUEST OF THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY, RESPONDENT,
FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION
FOR REHEARINGPRESENT: CARROLL MILLER, Commissioner, to whom the
above-entitled matter has been assigned for ac-
tion thereon.Upon further consideration of the record in the above-
entitled proceeding, and upon consideration of telegraphic
request of The Denver & Rio Grande Western Railroad
Company, respondent, for extension of time within which
to file petition for rehearing; and good cause appearing
therefor;*It is ordered*, That said respondent be, and it is hereby,
granted leave to file such petition on or before December
20, 1945.Dated at Washington, D. C., this 13th day of December,
A. D. 1945.

By the Commission, Commissioner Miller.

W. P. BARTEL
Secretary.

(SEAL)

O. K.
Miller
O. K.
F. E. M.

1242 Before the Interstate Commerce Commission
 AMERICAN SMELTING & REFINING COMPANY
 UNITED STATES SMELTING, REFINING AND MINING COMPANY
 Ex PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
 OR EXPENSES

PART II, TERMINAL SERVICES

Petition of The Denver and Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees, for (a) Reconsideration by and Reargument Before the Entire Commission of the Report and Order of October 1, 1945 of Division 3, and (b) the Stay of Such Order Pending Final Determination Under this Petition—Filed December 17, 1945.

Comes now The Denver and Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees, one of the carrier respondents in the above entitled proceedings, and respectfully petition the Commission for (a) reconsideration by and argument before the entire Commission of the Report and Order of October 1, 1945, of Division 3, in the above proceedings, and (b) the stay of such orders pending final determination under this petition.

The grounds of this petition are as follows:

Switching at smelters is peculiar to that industry and differs materially from the ordinary industry switching heretofore considered by the Commission, from 1243 which has stemmed the broad principle laid down in their original report in these proceedings, 209 I. C. C. 11, and subsequent proceedings, which should not properly be used as the yard stick in determining the lawfulness of such practices at smelting plants, as will hereafter be shown.

1

Division 3 dismisses as having no weight in arriving at its conclusions in these cases—(1) the fact that the carriers must have for their own use, in order to determine and assess their line-haul freight charges, weights and valuations of ores and concentrates, and, in the absence of smelter owned and operated facilities, would for their own purposes have to supply and operate such facilities, and, (2) in the face of undisputed evidence to that effect, ignores

the fact that those commodities move on rates that now and always have included compensation for the terminal switching and weighing services necessary for the carriers to have in order to assess their freight charges.

It is stated on Sheet 9, in Paragraph 1, of the report that

"Where rates are based on value, the obligation is generally on the consignor to furnish the true value. An exception to this general practice is made on ore and concentrates to meet the needs of the smelters and mines, due to the fact that there is considerable variation in the value of ores from the same region, and consignors in many instances do not have facilities for sampling at origin. It is a custom of the industry to make settlement between the seller and buyer on the basis of weights and value determined by the buyer. The Smelters voluntarily agreed to furnish the necessary information, and the carriers provided specifically in their tariffs that the rates collected on approximate values will be revised in accordance with

1244 the value determined and certified to the carrier by such mill, smelter, or other industry. There is no sound basis for the contention that such a concession increases respondents' common carrier obligations and requires them to establish and operate thaw houses and samplers, or, as an alternative, to perform all switching and weighing attending the sampling. The furnishing of the values is the obligation only of the Smelters and not of the carriers."

One of the fundamental factors in the making of ratings in the Classification, and freight rates themselves, is that of value, it being a well-established principle that higher valued articles should bear higher ratings and rates. The transportation characteristics of ore or concentrates valued at \$5.00 per ton, for example, differ in no respect from those valued at \$100.00 or \$1,000.00. Yet the latter can and should bear a higher rate. Consequently, rates on ores and concentrates almost without exception have been published on a graded basis dependent on valuation. These rates are made by the carrier and filed pursuant to the law with the Interstate and State Commissions. It is the duty of the carrier under the law to charge and collect its published tariff rates. The information necessary to accomplish this in the case of ores and concentrates is not available until those commodities have been weighed and sampled. Most assuredly, were not the facilities for as-

certaining these values furnished by the Smelters, the carriers themselves, in protection of their revenues, would supply them, and in all probability the quantum of switching service thus necessitated would differ in no material respect from that occasioned by use of the facilities of the Smelting Companies; HOWEVER, additional expense would be entailed in the proper maintenance of such facilities and the trained personnel, material, and supplies necessary for their operation. Obviously, therefore, the switching movements involved in ascertaining the weights and values of the ores and concentrates would be peculiar to the railroad alone were not the same information used by the Smelters in the conduct of their business, and they should be determined to be movements necessary for the carrier to make in order to determine the tariff charges to be made against the shipper, even though in the making of these movements slight interruptions occur in the plant yard. It would seem to be quite conclusive that the duty of the carrier is to perform the necessary switching without additional charge over and above their line-haul rates to the point where the information necessary for them to assess their freight charges is obtainable, and furnish a free switch from that point to the designated point of unloading—the latter being the equivalent of ordinary team track spotting.

The Denver and Rio Grande Western Railroad Company is not in agreement with Division 3 in their conclusions that Section 6 (7) of the Act is violated by reason of its failure to collect charges for switch movements necessary to ascertain weights and values on which the proper tariff charges must be collected, and which it is the obvious duty of the carrier to obtain. Such duties cannot be made to rest upon the carriers and at the same time say to such carriers that the means of determining weights and values must be furnished by an industry, or some other consignor or consignee, free of charge. If shippers or others furnish these facilities and services to carriers, it is nothing but right and just that they be compensated, and we know of no law to the contrary. It is, therefore, our conviction that Division 3 was clearly in error in its position that

“There is no sound basis for the contention that such a concession increases respondent's common carrier obligation and requires them to establish and operate

thaw houses and samplers, or, as an alternative, to perform all switching and weighing attending the sampling."

The case under consideration is highly important to all parties concerned, since the present method of operation has extended over many years, and the question presented here should, as we insist, have the careful consideration of the entire Commission. Somewhat closely allied to the above is what is shown in the last paragraph of Sheet 9 of the report to the effect that the industry contends that any charges for the various services attending the weighing of the cars and switching to and from the thaw house and sampler would be unjustly discriminatory in violation of Section 2 of the Interstate Commerce Act, as no charges are made for identical services when the ore and concentrates are sampled and reshipped out of the plant, in many instances from one smelter owned by the American Smelting & Refining Company to another owned by the same company. This position of the industry was also taken by this petitioner, but Division 3 disposed of the whole matter by saying:

1247 "This proceeding is one to determine whether Section 6 (7) is being violated. If it is, a continuation of such a violation cannot be sanctioned because its removal may necessitate changes in other concessions granted in the carriers' tariffs. If the industry's contention were sound, a question on which it is not necessary for us to pass on here, the obvious and only remedy available to respondents would be to cancel the offending transit provisions."

We would like to consider this question at length, but due to the fact the language of Division 3 speaks for itself we deem it unnecessary to go into details. The purpose of the Commission, as we understand it, is to reconcile and make workable, where possible, transportation problems. In this instance, however, no violation of either law or tariffs was pointed out under the contention made by the industry with respect to the violation of Section 2, yet, the whole controversy on this point was settled by Division 3 with the remark:

"This proceeding is one to determine whether Section 6 (7) is being violated."

We submit without further argument that the respondents' interests should have more complete consideration than

given to it by Division 3 with respect to the principle here involved.

II

On Sheet 8 of the report the Commission states:

"Under the terms of the switching agreement between the Rio Grande and the Union Pacific, hereinbefore referred to, the expenses incurred and switching charges received by the former are apportioned between the two carriers in the ratio that the number of revenue carloads handled under the joint switching service for each carrier bears to the total number of such revenue carloads handled. This is a pooling of traffic for which no authorization under Section 5 (1) of the Act is shown."

1248 It seems to us that the above statement shows within itself that the switching agreement of the Rio Grande and the Union Pacific is not a pooling of traffic such as that contemplated by Section 5 (1) of the Act. The record shows that under the agreement each carrier receives the same amount of the revenue it would receive if no contract whatsoever existed. It is merely an operating convenience for each carrier, and is not a combination of the interests of competing carriers as rival transportation lines. In no sense is it a system of reconciling conflicting interests and of obviating competition. For instance, the word "pool" is defined in the Century Dictionary, and we think it is as good a definition as can be found, and under such definition it seems to us it would take an extremely broad stretch of the imagination to say that said agreement falls under such definition, and we say this with all due respect, and with the highest regard for the Division which held that it was a pooling of traffic. The dictionary definition reads as follows:

"Pool (noun) A combination intended by concert of action to make or control changes in market rates.
 ... A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public, and distribute the profits of the business among themselves equally or according to special agreement. In this sense—pooling is a system of reconciling conflicting interests and of obviating competition, by which the several competing parties or companies throw their revenue into one common fund, which is then

divided or redistributed among the members of the pool on a basis of percentage or proportions previously agreed upon or determined by arbitration."

249 This definition has been used many years by the courts, one of the older cases being that of *In Re Pooling Freights*, 115 Fed. 588. Other decisions have been based upon it, but if granted the privilege, we would prefer to set them out later by brief.

It is our firm conviction that the law with respect to pooling of traffic is as above claimed by us and for that reason alone this petition should be granted. Assuming, however, that for some reason the Commission should consider that we are in error, we are wholly unable to see how the Commission could deprive us of the privilege granted in the latter part of Section 1 (18) of the Act which the Commission ignored in its report. The applicable part so overlooked reads as follows:

"Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

This quoted language speaks for itself, and notwithstanding the fact it is plain and clear in all respects, this respondent as well as others is being deprived of its protection by Division 3, not intentionally to be sure, but we feel through error, in its meaning and application. At any rate, it is our conviction that this quotation coupled with the applicable meaning of the words "pooling of traffic" should be sufficient to permit this respondent and others to have the privilege of having the entire Commission pass upon the question involved.

250

III

The report of Division 3, Sheet 21, about the middle of the page, states in substance that this petitioner, the Rio Grande, in connection with the Leadville Smelter, makes the argument that because the large preponderance of the inbound traffic, 93 percent, is intrastate and that traffic exceeds the outbound traffic, 2,102 to 476 cars, although 98.9 percent of the latter is interstate, and because the supply of ore at Leadville is precarious, it should close its eyes to any and all violations of the Interstate Commerce Act and/or Elkins Act and leave the parties to continue the

present practices subject only to such control as the State authority may choose to exercise over intrastate traffic.

It appears to us that Division 3 perhaps is a little strong in the language used by it in describing the attitude or position of this petitioner, the Rio Grande, with respect to the Commission shutting its eyes to any and all violations of the Interstate Commerce Act or the Elkins Act. Your petitioner has certainly never advocated the wilful violation of either Act. On the other hand, the Commission, as we understand it, has no more jurisdiction over strictly intrastate matters than the State Commission has over interstate matters, and where there is such a small percent of either commerce the two Commissions should work together to have the traffic handled in an equitable way for the good of the public generally rather than have one Commission handle 95 percent of traffic over which it has no jurisdiction merely for the purpose of preventing violations to a handful of traffic. This proposition here considered has never been settled by the Commission or the courts to the satisfaction of carriers generally, and it certainly ought to be presented to the Commission as a whole, and determined once and for all, and there is no better time to do it than now. The issue is clear and further comment would not be of aid.

IV

Rates based on value are necessary in order to move the various grade ores to the smelter plants in question. It is the contention of respondent carriers as well as the industry that the line-haul rates were made with full knowledge that respondents, for a long period of time, had been performing the intra-plant switching without the imposition of additional charges for such switching against the industry, since that service was included in the line-haul rates; and that such line-haul rates were made sufficiently high to compensate them for such intra-plant switching services. As stated by Commissioner Miller of Division 3, wherein he dissented in part, the record does not contradict this position of the respondents and, therefore, it is their firm position that this position of respondents should be adopted by the Commission as a whole.

WHEREFORE, petitioner prays for (a) reconsideration by and argument before the entire Commission of the 1252 Report and Order of October 1, 1945, of Division 3, in the above proceedings, and (b) for the stay of such

order pending final determination under this petition; and
 but the Commission enter such further order or orders in
 the premises as to it may seem reasonable and just.

Respectfully submitted,

WALTER M. CAMPBELL
 Walter M. Campbell
Commerce Attorney.

W. M. CAREY

W. M. Carey,

Freight Traffic Manager,

*For The Denver and Rio Grande Western
 Railroad Company, Wilson McCarthy
 and Henry Swan, Trustees,
 604 Rio Grande Building,
 Denver 1, Colorado*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing
 document upon all parties of record in this proceeding by
 mailing a copy thereof properly addressed to each party.

Dated at Denver, Colorado, this 13th day of December,
 1945.

WALTER M. CAMPBELL
 Walter M. Campbell
Of Counsel

253 ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
 EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF RESPONDENTS' TELEGRAPHIC REQUEST FOR
 POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

PRESENT: CARROLL MILLER, Commissioner, to whom the
 above-entitled matter has been assigned for
 action thereon.

Upon further consideration of the record in the above-
 entitled proceeding, and upon consideration of respond-

ents' telegraphic request for postponement of the effective date of the order; and good cause appearing therefor:

It is ordered, That the order entered in said proceeding on October 1, 1945, which was subsequently modified to become effective on or before February 11, 1946, be, and it is hereby, further modified to become effective on or before April 1, 1946, instead of February 11, 1946.

Dated at Washington, D. C., this 29th day of December, A. D. 1945.

By the Commission, Commissioner Miller.

(Seal)

W. P. BARTEL
Secretary.
OK.
MILLER.

1254

ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF POSTPONEMENT OF THE EFFECTIVE DATE
OF THE ORDER

PRESENT: CARROLL MILLER, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in said proceeding on October 1, 1945, which was subsequently modified to become effective on or before April 1, 1946, be, and it is hereby, further modified to become effective on or before May 1, 1946, instead of April 1, 1946.

Dated at Washington, D. C., this 12th day of February, A. D. 1946.

By the Commission, Commissioner Miller.

(Seal)

W. P. BARTEL
Secretary.
OK.
MILLER.

255
OK
UB

ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY
EX PARTE No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF POSTPONEMENT OF THE EFFECTIVE DATE
OF THE ORDERPRESENT: CARROLL MILLER, Commissioner, to whom the
above-entitled matter has been assigned for
action thereon.Upon further consideration of the record in the above-
entitled proceeding, and good cause appearing therefor:*It is ordered*, That the order entered in said proceeding
on October 1, 1945, which was subsequently modified to be-
come effective on or before May 1, 1946, be, and it is here-
by, further modified to become effective on or before June
1, 1946, instead of May 1, 1946.Dated at Washington, D. C., this 19th day of March, A.
D., 1946.

By the Commission, Commissioner Miller.

W. P. BARTEL
Secretary.

(Seal)

256

ORDER

At a General Session of the INTERSTATE COMMERCE
COMMISSION, held at its office in Washington, D. C., on the
22nd day of March, A. D. 1946UNITED STATES SMELTING, REFINING AND MINING COMPANY
EX PARTE No. 104PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES AND
EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in the above-
entitled proceeding, and upon consideration of petitions for
reconsideration and reargument filed by the United States
Smelting, Refining and Mining Company and respondents

Union Pacific Railroad Company and The Denver and Rio Grande Western Railroad Company:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

(Seal)

W. P. BARTEL
Secretary.
OK.
MILLER.

1257
OK
UB

ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY
EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR
EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF POSTPONEMENT OF THE EFFECTIVE DATE
OF THE ORDER

PRESENT: CARROLL MILLER, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in said proceeding on October 1, 1945, which was subsequently modified to become effective on or before June 1, 1946, be, and it is hereby, further modified to become effective on or before August 1, 1946, instead of June 1, 1946.

Dated at Washington, D. C., this 23rd day of April, A. D., 1946.

By the Commission, Commissioner Miller.

(Seal)

W. P. BARTEL
Secretary.
O.K.
MILLER.

1258

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 3rd day of June, A. D. 1946

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in the above-entitled proceeding, and for good cause appearing:

It is ordered, That the above-entitled proceeding be, and it is hereby, reopened for oral argument, at a time to be hereafter fixed, and for reconsideration.

It is further ordered, That the order entered in said proceeding on October 1, 1945, which was subsequently modified to become effective on or before August 1, 1946, be, and it is hereby further modified to postpone the effective date thereof until the further order of the Commission.

By the Commission.

(Seal)

W. P. BARTEL
Secretary.

1259

ORDER

INTERSTATE COMMERCE COMMISSION

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

IN THE MATTER OF LETTER REQUEST BY THE PARTIES FOR POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER

PRESENT: CHARLES D. MAHAFFIE, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of letter request by the parties for postponement of the effective date of the order; and for good cause appearing:

It is ordered, That the order entered in said proceeding on October 14, 1946, which by its terms is made effective

January 31, 1947, be, and it is hereby, modified to become effective March 31, 1947, instead of January 31, 1947.

Dated at Washington, D. C., this 29th day of November, A. D. 1946.

By the Commission, Commissioner Mahaffie.

W. P. BARTEL
Secretary.

(Seal)

1260

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of February, A. D. 1947.

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of telegraphic request on behalf of the United States Smelting, Refining and Mining Company, concurred in by respondents; and for good cause appearing:

It is ordered, That the order entered in said proceeding on October 14, 1946, which was subsequently modified to become effective March 31, 1947, be, and it is hereby, further modified to become effective May 31, 1947, instead of March 31, 1947.

By the Commission.

W. P. BARTEL
Secretary.

(Seal)

1261

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of April, A. D. 1947

UNITED STATES SMELTING, REFINING AND MINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES OR EXPENSES

PART II, TERMINAL SERVICES

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of telegraphic

request on behalf of the United States Smelting, Refining and Mining Company; and for good cause appearing:

It is ordered, That the order entered in said proceeding on October 14, 1946, which was subsequently modified to become effective May 31, 1947, be, and it is hereby, further modified to become effective July 31, 1947, instead of May 31, 1947.

By the Commission.

W. P. BARTEL
Secretary.

(Seal)

1265

Exhibit H-2 (No. 1324, Civil)

Before the Interstate Commerce Commission

AMERICAN SMELTING & REFINING COMPANY

EX PARTE NO. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II, TERMINAL SERVICES

REPORTER'S TRANSCRIPT OF HEARING

Denver, Colo., May 26, 1944.

9:30 a. m.

Before: LEONARD WAY, *Examiner*, Bureau of Rail Carriers, Interstate Commerce Commission.

Met Pursuant to Notice.

APPEARANCES:

W. M. Campbell and W. M. Carey, 604 Rio Grande Building, Denver, Colo., appearing for The Denver & Rio Grande Western Railway Company (Wilson McCarthy and Henry Swan, Trustees), respondent.

Elmer B. Collins and L. T. Wilcox, 1416 Dodge Street, Omaha, Nebraska, appearing for Union Pacific Railway Company, respondent.

O. W. Tuckwood and John F. Finerty, Room 3526, 1266 120 Broadway, New York, N. Y., appearing for the American Smelting & Refining Company, intervener.
Thomas S. Wood, 310 State Office Building, Denver, Colo., appearing for Public Utilities Commission of the State of Colorado, intervener.

Charles A. Root, 314 State Capitol, Salt Lake City, Utah, appearing for Public Service Commission of Utah, intervener.

D. H. Williams, Interstate Commerce Commission, Washington, D. C., appearing for Interstate Commerce Commission.

Exam. Way: Come to order, please. The Interstate Commerce Commission has set for hearing before me at this time and place, *Ex Parte* No. 104, Part II, American Smelting & Refining Company, Terminal Services, with respect to the terminal services, charges and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plants of the American Smelting & Refining Company at Garfield and Murray, Utah, and Leadville, Colorado, with a view of determining whether and to what extent there may exist violations of the Interstate Commerce Act, and in making such findings of fact and order or orders as may be appropriate under the said Act.

Who appears for the respondents, the rail carriers?

Mr. CAMPBELL: W. M. Campbell and W. M. Carey.

Exam. Way: Is Mr. Carey here?

Mr. CAMPBELL: Mr. Carey is here by me, appearing for the Denver & Rio Grande Western Railroad Company, Wilson McCarthy and Henry Swan, Trustees.

Mr. COLLINS: Elmer B. Collins and L. T. Wilcox, the Union Pacific Railway Company.

Exam. Way: And for the industry?

Mr. FINERTY: O. W. Tuckwood and John F. Finerty.

Exam. Way: And for the Commission?

Mr. WILLIAMS: D. H. Williams.

1270 **Exam. Way:** I understand that all of you gentlemen are practitioners?

Mr. CAMPBELL: I am supposed to be a lawyer and Mr. Collins too. I suppose we are practitioners.

Exam. Way: Off the record.

(Discussion off the record.)

Colloquy between Examiner and Counsel

Exam. Way: On the record. My understanding then, Mr. Finerty, is that you decline to proceed in this case until the Commission has gone forward, is that the idea?

Mr. FINERTY: I would hardly put it as strong as that. I state I am not prepared to proceed. I have participated in a lot of hearings of this sort, and in each instance the Commission and railroads have proceeded the industry, and with that in view we have so prepared our case and are still preparing it, and are not prepared to go ahead at this time, and I do not think we can be called upon to go ahead. As a matter of orderly procedure we have a right to know what the Commission has developed from its investigation.

and would have the Commission give us that information and then we can correct any errors in their investigation, and that is also true with the railroad.

Exam. Way: Mr. Collins, what have you to say about it?

Mr. COLLINS: I had hoped that the industry would place in the record the maps that they have of these plants particularly, because they are the only parties who have 1271 authentic maps of their properties, and then give us the benefit of a detailed description of the services which are performed for them by the carriers. We are here with the best of our operating men to give the Commission the benefit of such information as we have at such time as it may suit the Examiner's convenience to call upon us. I do think that the industry ought to describe their properties and their services first.

Exam. Way: It seems to me that that is the orderly way to proceed. I mean, the Commission does not have maps of these particular plants.

Mr. FINERTY: Mr. Way, to remove any misapprehension in that respect, I entirely agree with Mr. Collins, you should have maps before you. I am in agreement with Mr. Collins you should have maps, and Mr. Carey of the Denver & Rio Grande. We have prepared maps as a matter of fact in collaboration with them, and those maps are here, and their witnesses and your witnesses may use those maps. Now, it is rather absurd of you to suggest that the railroads who are performing services to these smelters do not know what services they are performing, and I must, if necessary, decline to go ahead.

Mr. COLLINS: For instance, Mr. Examiner, I do not know, and I don't believe the railroad witnesses are competent to state the acreage, sizes of these plants that appear on the map.

Mr. FINERTY: That all appears on the maps.

1272 Mr. COLLINS: And requires no oral explanation?

Mr. FINERTY: No oral explanation, except reading the scale on the map. That can be done as to length of tracks; movements that your Interstate Commerce Commission examiners have noted can be noted from the maps.

Exam. Way: Mr. Williams, are you prepared to proceed?

Mr. WILLIAMS: Well, after the maps are put in evidence, Mr. Examiner, if the carriers are in a position to proceed then with what they have, they had better go on with theirs.

Exam. Way: You mean the industry put in the maps and let the carriers follow?

Mr. WILLIAMS: If the carriers are in a position to undertake it at that time.

Mr. CAMPBELL: I think we are willing to do whatever the Examiner thinks best.

Exam. WAY: I suggest the industry put the maps in the record.

Mr. FINERTY: Off the record.

(Discussion off the record.)

Exam. WAY: On the record. We will take up Garfield first, and we will complete the Garfield plant before we proceed to the next one.

Mr. FINERTY: Mr. Way, I want to make this suggestion. It appears that we have general testimony directed to all the plants.

1273 Exam. WAY: Well, that is understood, but I mean as far as the factual matters relating to the particular plants, there should be no difficulty about keeping that separate. There should be no confusion about testimony as to one plant and the other.

Mr. FINERTY: That will be all.

Exam. WAY: Call your witness, please, to introduce the maps.

Mr. FINERTY: If we may adjourn just a minute, I will distribute them, Mr. Way.

Exam. WAY: All right, Mr. Finerty.

Mr. FINERTY: Mr. Examiner, under agreement with counsel for respondents, we are offering a map of the Garfield smelter of the American Smelting & Refining Company as Exhibit 1.

Exam. WAY: It will be received.

(Intervener's Exhibit No. 1, Counsel Finerty, received in evidence.)

Exam. WAY: Are you going to put on a witness to explain this map?

Mr. FINERTY: I don't think it needs any explanation. The map shows on its face the direction and scale, track designations, coordinates, etc.

Exam. WAY: All right. Is that the only map you have, the only one you intend to introduce?

Mr. FINERTY: No, I understood you wanted only the
1274 Garfield smelter.

Exam. WAY: That is the only one you have.

Mr. CAMPBELL: Mr. Examiner, may I suggest that before we start it might be easier for us to follow the course of events if I hand you a map of the Denver & Rio Grande

Railroad system. It is a large map. We only have one like that, and I would like to mark that Respondent's Exhibit No. 2, and that shows the location of all these smelters, that is, where Garfield is and Murray is, and also Leadville over in Colorado.

Exam. WAY: It is a map of the Denver & Rio Grande Western?

Mr. CAMPBELL: Yes, sir.

Exam. WAY: And you will furnish copies to the other parties?

Mr. CAMPBELL: Yes, sir; I will furnish copies to the other parties. I didn't really know whether we needed this or not, but I decided we might, and as you told me a while ago we probably would need it, so I will distribute the copies a little later.

Mr. FINERTY: Can we have them by noon?

Mr. CAMPBELL: Yes, we will have them by noon if we possibly can.

Exam. WAY: It is received in evidence.

(Respondent's Exhibit No. 2, Counsel Campbell, received in evidence.)

1275 K. L. MORIARTY WAS SWORN and testified as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) State your name for the record.

A. K. L. Moriarty.

Q. Now, will you please state what position, if any, you hold with the Denver & Rio Grande Western?

A. I am superintendent of the Salt Lake Division of the Rio Grande which extends from Helper, Utah, to Ogden, Utah, including the various branches leading off the main line between those two points.

Q. How long have you been superintendent of that division?

A. Since July of last year.

Q. While you are here I had just as well ask you about your official work at other places. Have you been superintendent at other places on the Rio Grande system?

A. Yes, for about three years prior to that time superintendent of the Grand Junction Division which extends from Salida, Colorado, to Helper, Utah, including the branches leading off of the main line between those two points.

Q. Those divisions are known as the Salt Lake Division and the Grand Junction Division?

A. That is correct.

Q. Now, you know the location of these smelters involved in this case, *Ex Parte* 104, Part II?

A. Yes, sir.

1276 Q. Are those smelters located within the districts over which you preside as superintendent?

A. The American Smelting & Refining Company smelter at Eilers, or Leadville, located on the Grand Junction Division; the American Smelting & Refining Company smelter at Garfield, Utah, located on the Salt Lake Division.

Q. And likewise Murray and Midvale?

A. Murray and Midvale are located on the Salt Lake Division of the Rio Grande Railroad.

Q. As superintendent you are the operating officer?

A. Yes.

Q. And have supervision of the operation of these smelter plants, all except two?

A. Yes. That is the two that we have. We are in charge of the operation at Leadville and Garfield.

Q. Who has the supervision of the other two plants?

A. The Union Pacific Railroad.

Q. Do they have supervision of Murray and Midvale?

A. That is right.

Q. As superintendent then you are familiar with these operations so that you can give the details of such operations?

A. That is right, sir.

Q. Very well. Now, will you proceed, Mr. Moriarty, to tell us what occurs at Garfield? Now, we will leave everything but Garfield, and tell us what occurs at Gar-
1277 field from the time a shipment of ore, or any other shipment that goes into the plant at Garfield, arrives at the smelter yards to be delivered. Give us those movements, and first I will ask you if you have prepared a statement to aid you in regard to this matter, giving these movements?

A. I have prepared a statement, Mr. Campbell.

Q. Would you prefer to read that statement?

A. Yes, a portion of it at least.

Q. Now, have you copies?

Exam. WAY: Just a minute, about reading this statement, the rules of practice provide that if he is going to read from a statement copies will be furnished on the record as well as to the other counsel.

Mr. CAMPBELL: Very well.

Q. (By Mr. CAMPBELL.) I am going to ask you if you have sufficient copies for that purpose.

A. I have them.

Q. How many copies have you?

A. I think I have eight or nine here.

Q. Let me ask you first, before we go into that matter, if you have all the details that you want to recite in this statement, or will there be some modifications?

A. There will be some additions.

Q. Now, Mr. Moriarty, as you go through this statement and you get to a point, will you hesitate and tell us
1278 so that we can, everybody can get that straight. I understand you are using this for your convenience to help you keep this testimony correct in the record.

Now, Mr. Moriarty, will you proceed to give us the movements of the shipment or shipments as they arrive at the plant and go through the whole story with us?

A. This statement that I am about to read, in addition to discussing the movements, will also outline a description of the location of the Garfield smelter, together with the volume of business in and out of the smelter, so I will start.

Garfield is located approximately 18 miles west, compass direction, from Salt Lake City. It is reached by three railroads, as follows:

Rio Grande from its Salt Lake yard at Roper eight miles east (time-table direction) on main line to Midvale, thence five miles west (time-table direction) to Welby on the Bingham Branch, of Sub-division 6-K, thence seventeen miles west (time-table direction) to Garfield Smelter on Sub-division 6-L. Before reaching the smelter, track passes Garfield Station, located 1.9 miles east (time-table direction) from the smelter yard. Total—thirty miles from Roper to Garfield smelter. Track connects with the smelter at the east entrance of the smelter yard and all
1279 trackage in the smelter plant yard is the property of the smelting company and is maintained by the Smelting company. It consists of 21.58 miles, of

which Rio Grande can use 17.14 miles, standard gauge track, and in addition 5.98 miles of narrow gauge track. Delivery of business to the smelting company is made at approximately this east gate entrance to the smelter yard.

Bingham & Garfield Railroad operating between Bingham, where the copper mine and some other mines are located, and the Garfield smelter, a distance of 20.3 miles. Approaching the smelter, the B & G track parallels the Rio Grande track and enters at the east entrance of the smelter yard, approximately the same location the Rio

Grande does, making its delivery of smelter business at approximately that point.

The Union Pacific on its main line between Salt Lake and Los Angeles connects with the smelting company at the west yard entrance, a distance of 14.7 miles west U. P. freight yard at Salt Lake. Its deliveries to the smelting company are made at approximately the west gate entrance mentioned.

All three railroads accept business delivered them by the smelting company in the same portion of the smelter yard as they make their deliveries to the smelting company.

Road-haul loads delivered to the smelting company by the Rio Grande in March, 1944, were—

	Ore	233 cars
	Matte	16 cars
	Machinery	1 car
1280	Scrap	2 cars
Total		262 cars

Road-haul loads received by the Rio Grande from the smelter—

Acid	8 cars
Flue Dust	11 cars
Ore	3 cars
Company material	2 cars

24 cars

Road-haul loads delivered to the smelting company by the Bingham & Garfield Railroad in March, 1944, were—

Concentrates	1,077 cars
Sand	123 cars
Ore	74 cars

1,274 cars

Road-haul loads received by the Bingham & Garfield from the smelter—

Acid	7 cars
Bullion	486 cars
Sulphur	2 cars

496 cars

MR. COLLINS: In each instance these are carloads?
The WITNESS: Carloads, Mr. Collins.

If this business routes to the Rio Grande, it is moved in road haul by the B & G from Garfield smelter to 1281 Magna and interchanges to the Rio Grande there; if routed either W. P. or U. P., it is moved from the smelter yard interchange track east (time-table direction) to Sand Spur Junction on the B. & G., located about mid-way between Garfield smelter and Magna, and is then moved down the Sand Spur to an interchange with either the U. P. or the W. P.

Road-haul loads delivered to the smelting company by the Union Pacific Railroad in March, 1944, were—

Ore	265 cars
Bfick	2 cars
Clay	1 car
Sand	5 cars
Gravel	1 car
Steel	1 car
Lumber	3 cars
Merchandise	8 cars

Total	286 cars
-------------	----------

Road-haul loads received by the Union Pacific from the smelter—

Acid	44 cars
Flue Dust	7 cars
Merchandise	3 cars
Sulphur	1 car
Company material	1 car
Scrap Iron	1 car

57 cars

1282 The smelting company owns three small steam switch engines, one of which is worked daily in handling various intraplant movements, the other two engines being held in reserve. These engines are designated by the smelting company as one 50-ton engine and two 43-ton engines. The engine worked is as required by the smelting company and generally from about 8 a. m. to 4 o'clock or 5 o'clock p. m.

The Rio Grande performs all of the intra-plant switching, except that handled by the smelter-owned engine, for the smelting company and the three railroads, working as follows:

On shift 7:30 a. m. to 3:30 p. m.—In the east end of the smelter yard.

One shift 7:30 a. m. to 3:30 p. m.—In the west end of the smelter yard.

One shift 3:30 p. m. to 11:30 p. m.—Covers all necessary switching throughout entire smelter yard.

The engines on the above shifts are worked seven days per week and take care of the weighing of loads in and out and the placement of such loads to the proper portion of yard or the building as directed by the smelting company. During the winter months, or from about October to April, inclusive, the majority of the ore shipments moved into the smelter yard are placed in the thaw house, and when the ore is thawed out, cars are then switched and placed in the usual manner. These engines also removed from various portions of the yard, loads and
1283 empties for delivery to the three railroads and place them to appropriate transfer tracks. The switch engines so assigned receive light maintenance work at the railroad tie-up point near the Rio Grande Garfield Station, at which point engines are coaled, watered and serviced. When water is needed during the working hours, it is obtained from the smelter water supply at railroad expense. Water furnished in the Rio Grande yard between engine shifts is obtained from the Garfield Town Site water supply. When the above switch engines require boiler wash, inspection, or heavy repairs, they are operated between Garfield and the Rio Grande shops at Salt Lake for such attention.

MR. COLLINS: Mr. Moriarty, may I interrupt you a moment? You stated the number of railroad engines that perform switching services within the plant. Do you know how many?

The WITNESS: Yes, we maintain two engines there, one engine working two shifts and one engine working one shift.

Exam. WAY: You mean by "we" the Denver & Rio Grande or all the carriers?

The WITNESS: All the carriers.

Exam. WAY: That is the D. & R. G. and the Union Pacific?

The WITNESS: Yes, sir.

Mr. CAMPBELL: Is there another one?

The WITNESS: No.

Exam. WAY: That is three engines altogether?

1284 The WITNESS: Two engines working three shifts.

Mr. FINERTY: Mr. Moriarty, handling the ore shipments for the B. & G. as well as the Denver & Rio Grande?

The WITNESS: Yes, my statement shows that.

Mr. CAMPBELL: That is what I had in mind when I asked my question, but I thought he had it covered, and I didn't want to go into more detail about it.

The WITNESS: All movements of various loads and empties within the smelter yard are covered by switch order issued by smelter officers, except Utah Copper concentrates.

The smelting company also owns at least controlling interest in the Garfield Chemical Company which is also located in the plant yard. The business for this company is handled just the same as for the smelting company; acid moving out is moved out under the name of Garfield Chemical Company.

The Bingham & Garfield makes three trips per day—

2—9 a. m. to noon.

1—8 p. m. to 11 p. m.

The Rio Grande makes one trip per day—11 a. m.

The Union Pacific makes one trip per day—11 a. m.

That is all of the written statement.

Q. (By Mr. CAMPBELL) Mr. Moriarty, your written statement covered the description of the location and largely the history of the operations over there, together with certain facts as you have related. Now, will you start 1285 in, as I started in a while ago, a little more in detail, and tell us where you cut your road engine off and then the movements from there on?

A. Our movements into the smelter are delivered at a receiving yard which is shown on the map. Shall I refer to this map, Mr. Examiner?

Exam. WAY: Yes, indeed.

The WITNESS: As we started out to relate, the Bingham & Garfield and the Rio Grande deliver their inbound loads to this yard, which is located—

Exam. WAY: Describe the yard so we can locate it on the map.

The WITNESS: The yard consists of nine parallel tracks, ten parallel tracks, on a high level located between the scale and the thaw house.

Exam. WAY: At the bottom of the map?

The WITNESS: At the bottom of the map. The Union Pacific movements into this yard are from the other end.

Mr. FINERTY: Mr. Moriarty, you are just turned around, aren't you?

The WITNESS: Yes, you are right. The Rio Grande comes in from the east end with the B. & G., and the Union

Pacific comes in from the west end, the Union Pacific just delivering their ore to this same yard which I have previously described.

Exam. WAY: Now, are certain of these tracks 1286 designated for Union Pacific delivery?

The WITNESS: No, they are not, sir.

Exam. WAY: There is no separation of the receiving tracks at all?

The WITNESS: No, sir. I will now take up the receipt of the various loads into the yard and their disposition. The sand, which is received from the Bingham & Garfield Railroad in this same receiving yard is weighed over the scale and then placed on the dock, either B or C line, which trestles are marked, and placed on either one of these tracks for unloading.

Exam. WAY: Let me understand that. Sand comes in from the right-hand side of the map and moves through the receiving yard?

The WITNESS: Pulls back to the scale.

Exam. WAY: And where is the scale?

The WITNESS: Right there, sir (indicating).

Exam. WAY: And moves over the scale, or is it switched back to the scale?

The WITNESS: Switched back to the scale. As I stated before, all the loads received in the yard are received at this receiving yard.

Exam. WAY: All right, then it moves.

The WITNESS: It moves.

Mr. FINERTY: Mr. Moriarty, as a matter of fact it 1287 is pulled back here and moves over the scale?

The WITNESS: That is right.

Mr. FINERTY: It comes into this yard, is taken out here, and then pulled back over the scale?

Exam. WAY: That is, it is pulled to the east?

The WITNESS: Yes.

Exam. WAY: All right. Now, you have got it over the scale track. Where do you go from there?

The WITNESS: Down this lead and place it on either B or C trestle for unloading.

Exam. WAY: That involves how many movements?

The WITNESS: One, from the receiving yard to the scale track to point of unloading on B or C trestle.

Mr. FINERTY: The scale being in the receiving yard?

The WITNESS: Yes.

Exam. WAY: Let me understand just a little more about

this. As I understand, all of this switching is done by switch engines which are owned by you?

The WITNESS: Rio Grande.

Exam. WAY: All right.

Q. (By Mr. CAMPBELL) You might make it a little clearer. The receiving yard you are talking about is within the plant of the American Smelting?

A. That is right.

Q. Just the same as the scales where the sand is weighed?

1288 A. That is right.

Q. Very well.

A. That is included in the original description of the property.

Q. Now, is that all you have to say about sand, Mr. Moriarty?

A. Yes, sir.

Q. Now, the next one you have, the next movement?

A. The next is handling of the ore from the Bingham & Garfield.

Exam. WAY: Just one other question if you please. What is the distance from the receiving yard to points B and C?

The WITNESS: Well, we would have to get a ruler and measure it.

Exam. WAY: Well, I mean approximately.

The WITNESS: I don't know.

Exam. WAY: A mile or five miles, or just a few feet?

The WITNESS: About 3200 feet.

Mr. CAMPBELL: It is a little over a half a mile.

Exam. WAY: Now, approximately how many placements a day are there of this sand?

The WITNESS: That is very indefinite to state. It comes in sometimes in bunches, and sometimes it is scattered. However, as I stated before there are 123 cars per month.

Exam. WAY: What is the capacity of point B for the unloading?

The WITNESS: You mean the track capacity?

1289 Exam. WAY: Yes, sr.

The WITNESS: Oh, you could put about ten or twelve cars in there if you care to.

Exam. WAY: They can all be unloaded simultaneously?

The WITNESS: Now, they have to move over bins, but those may be in there at once, but that subsequent placing is done by the plant.

Exam. WAY: In other words, all you do is to put them on B or C and the plant takes care of them from there on?

The WITNESS: That is right.

Exam. WAY: That is right.

The WITNESS: The next is ore from the Bingham & Garfield Railroad. It comes in—

Q. (By Mr. CAMPBELL.) Mr. Moriarty, that from the Bingham & Garfield, you have explained it from the Union Pacific and how it comes in and from the Rio Grande, is that delivered the same way, and if so where does it come from?

A. The record, I have got it in there, but I will describe it again. The Bingham & Garfield enters the smelter yard at approximately the same point the Rio Grande does.

Q. That is all right.

A. And delivers their business to the smelter in this yard, receiving yard.

Q. Very well.

A. This ore.

1290 Mr. FINERTY: What you mean by this last statement is that they cut off their road-haul engine there?

The WITNESS: Yes, they are done.

Mr. FINERTY: And you carry on delivering their business?

The WITNESS: We carry on and deliver their business through the plant. To get back to this ore, it comes back in the same manner as the sand, delivered to the smelter on one of the receiving tracks, and then pulled back and weighed and thence set to one of the unloading docks, either B, C or D line. Concentrates from the B. & G. are received in the same manner, weighed and set to what the smelter people, for some reason, call the posthouse, which is located immediately west of the scale and leads off the scale track. That is right in there (indicating).

Exam. WAY: It doesn't seem to be marked here.

The WITNESS: We will mark it. They call it the Martin machine.

Exam. WAY: The Martin machine?

The WITNESS: That is it.

Exam. WAY: That is shown just immediately north of the receiving yard.

The WITNESS: Yes, and these tracks parallel the receiving yard and are at the same level as the receiving yard.

Exam. WAY: Now, I didn't ask you how many cars of ore you had per day.

1291 The WITNESS: That is another variable, Mr. Commissioner.

Exam. Way: Examiner.

The Witness: Mr. Examiner, rather. I have been talking to the P. U. C. gentlemen. The receipts of ore total 233 from the Rio Grande, 74 from the B. & G. and 265 from the Union Pacific for the month of March.

Exam. Way: How many times a day do you switch that ore?

The Witness: Well, we generally try to switch it immediately after each road delivery, and as I stated in my written statement, there are five inbound trips per day. As nearly as possible we try to get this ore spotted immediately after an arrival.

Exam. Way: Is that delivered all in one solid train?

The Witness: No, sir; it is like any other delivery; it is scattered.

Exam. Way: I mean, you have five trains a day bringing the ore. Do you just take a few cars over there at a time, or how do you deliver it?

The Witness: You understand these same trains bringing in ore also bring in concentrates. Some of them bring in empties for acid; some of them bring in gravel, sand, etc. In other words, deliveries to the smelter yard are not solid of any one commodity.

Exam. Way: In other words, you bring in this ore 1292 and put it on this receiving track, and there it is classified and moved over to the ore track?

The Witness: Right.

Exam. Way: In moving it to the ore track, how many cars at a time do you place?

The Witness: That generally—that sometimes depends upon the smelter requirements. Sometimes we haul a few cars to match up with other cars. It may come later.

Exam. Way: And what is the process of the placing of the ore cars?

The Witness: It is a simple shove to the dock.

Exam. Way: You simply shove in a string of cars and cut off your switch engine, and then what happens?

The Witness: Any further placement of those cars is done by the smelter.

Exam. Way: All right. Now, the concentrates.

The Witness: Well, let's go into this ore a little bit further. Some of this ore moves to the sampler. I should judge of the total month's receipts about 15 percent goes to the sampler.

Exam. Way: Where is the sampler?

The WITNESS: That is the sampler right there (indicating).

Exam. WAY: The sampler is immediately north of the receiving yard and is designated on the map as sampler?

Mr. FINERTY: It is located on one of these so-called unloading tracks.

The WITNESS: That is right.

Exam. WAY: The track being where?

The WITNESS: B. Line.

Exam. WAY: Indicated as B line.

The WITNESS: The reason I am bringing it up at this time is to definitely locate the sampler.

Mr. FINERTY: Mr. Moriarty, just so there won't be any confusion, those cars moving to the sampler are unloaded at the sampler by the smelter company?

The WITNESS: Yes.

Mr. FINERTY: And don't require any extra move?

The WITNESS: No, just your set spot.

Mr. FINERTY: The cars are dropped down this B dock track, your engine cuts off, and they are handled down to the sampler by the smelting company?

The WITNESS: That is right.

Exam. WAY: All right.

The WITNESS: Our next inbound shipment of any large amount are bullion empties. These are received from the Bingham & Garfield, and they are moved from the receiving yard to the location of the bullion-loading dock.

Exam. WAY: Moved from the receiving yard to the bullion dock, which is loaded—How are we going to describe that, how is it indicated on the map?

1294 The WITNESS: It is shown as copper casting machine.

Exam. WAY: All of these points should be designated in a very positive way. The Examiner who writes this report may not have the benefit of your explanation.

Mr. FINERTY: I think, Mr. Way, when we finish our testimony, Mr. Moriarty is clearly designating the points, but we will further emphasize the movements.

Mr. FINERTY: We will mark the points. Mr. Moriarty has marked most of the points.

Mr. Campbell: I understood somebody marked each place.

Mr. FINERTY: No, marked certain stock piles.

Exam. WAY: Just off the record.

(Discussion off the record.)

Exam. Way: All right, proceed.

The WITNESS: These bullion empties are not weighed inbound.

Q. (By Examiner Way) When you say 'bullion empties, you mean empty cars?

A. Yes, for bullion loading. They are not weighed inbound empty. When they are loaded they are moved up to what we have so far called the receiving yard and weighed and then set to various tracks, and then set to tracks for the B. & G. to take out.

Q. Now, they are loaded and brought to the receiving yard, and in the receiving yard they are weighed and then they are classified for further movement?

A. Yes, for further movement out.

Q. That weighing is in the receiving yard?

A. Yes, sir. Salt is received in the receiving yard, set to the scale, weighed, and unloaded generally on trestle A which you have marked. There are some subsequent moves made with the salt, but they are made by the smelter engine. Precipitates from the Bingham & Garfield are received in the yard, weighed, and then switched to docks 1, 2 or 3 by the Rio Grande engine.

Q. To where?

A. These docks 1, 2 and 3 over here (indicating).

Q. They are on the east end of tracks—

A. B, C and D.

Q. B, C and D? Where does that salt come from?

A. Most of it comes from Sale Lake City itself. Precipitates come in on the B. & G. I have already talked about them, haven't I?

Q. You are talking about them now.

A. I have talked about them. I have already finished. That is what you have got down there. These are the precipitates, are the ones set to 1, 2 and 3, continuation of B, C and D. Acid empties are weighed upon arrival and set for loading where needed. Generally, if we can find that on here now—

1296 Q. What are the coordinates?

A. It is 0-0 and W-1500.

Q. Now, the movement there is from a road-haul engine, sets out the load in the receiving yard?

A. That is the acid empties.

Q. Well, sets out the empties, and then the empty cars are weighed and they are set for loading at the acid plant you have described?

A. That is right.

Q. You want to give the reverse movement, or will they?

A. I think that will come on a little later.

Q. All right.

A. Coal is a very small commodity in the plant, and some of it—the cars are received in the receiving yard, set to the scale, and some of the coal goes over either to the thaw house, a little of it, a small amount is set—

Q. The thaw house is located at the bottom of the map and coordinate what?

A. We will get that for you. That is W-500 and this one here is S-1000. Some coal is set to trestle A, an occasional car.

Q. And trestle A—

A. We have got that marked.

Q. Is so marked.

A. During the month of March, as I stated before, we received three cars of coal in the smelter. Brick 1297 received, received in the receiving yard, set to the scale, and delivered to the smelter on track 3, approximately in this location here (indicating). It isn't marked, but it is set at coordinate 0-0 and W-2000, from which point it is delivered to where wanted by the smelter engine. Some shipments—

Q. Now, that track is—it is on the west end?

A. Yes, west end.

Q. Now, how do you get that car in there, do you have to pull that car up?

A. Up here (indicating) and then down in there. That is a distance of about—these coordinates are 500 feet apart—about 4,000 feet.

MR. CAMPBELL: Now, Mr. Moriarty, you say up here and down there.

THE WITNESS: I was talking to myself.

MR. CAMPBELL: Maybe you had better be a little more definite about it.

EXAM. WAY: You will be definite about it. We are not going to be able to follow it from this testimony unless the testimony describes it.

MR. CAMPBELL: Instead of saying up here and down there, give the distances so we can have them definitely.

THE WITNESS: Move west to the entrance switch to one of the lower yards, and thence east, a distance of approximately 4,000 feet. Pig iron received in the receiving yard in the same manner as the other commodities, sent to the scale and weighed and then

moved down and set in one of the tracks in the lower yard for the smelter engine to handle further. This track in the lower yard is designated at approximately the, located over a row.

Q. (By Exam. Way) A row?

A. That is about the location where that is delivered. There is no particular track, there is no definite location. It is just a location where the smelter engine can get a hold of it. Receiving a few cars of acid inbound and Dissel fuel inbound, a very light amount of it, but it is received in the yard in the same manner as the other commodities, set to scale for weighing, and thence moved to previously described acid plant, and the fuel oil is generally set to trestle A for unloading or further handling by the smelter engine. Frozen ore received, it is received in the yard in the same manner, set to scale and weighed, moved to thaw house, the location of which has been previously described. After it is thawed sufficiently, moved to scale, weigh, and then set to any of the previously described unloading points for ore.

Q. Well, can you indicate those points?

A. Well, we previously have, sir, on other ore. This ore, after removal from the thaw house is the same as any other ore.

Q. All right. That means that after the road 1299 engine is cut off you made about four switches, is that right, moved it to scale, and then you moved it back to the scale.

A. And the point of unloading, three.

Q. Move it to the scale, one; the thaw house is two; moved it back to the scale is three; and point where it is unloaded is four.

A. That is right.

Q. Who weighs these cars?

A. Smelter. Smelter weighmaster. Some of this ore received isn't unloaded directly, it is moved to the stock pile. I mean any ore, sir.

Q. Where is the stock pile?

A. The stock piles are located about coordinate N-500 and approximately between W-2500 and W-1000, and there are a few other small scattered piles which aren't used very frequently, but this is the big pile over in here (indicating) that I have just described. The acid loads are taken from the acid plant to the scales for weighing, thence either to the proper track in the receiving yards for movement out of the smelter.

Mr. CAMPBELL: Are you through with all engine movements, Mr. Moriarty?

The WITNESS: I think so, yes.

Mr. CAMPBELL: Now you are on the outbound movements?

The WITNESS: Yes, starting with the outbound movements. The concentrate empties after being made 1300 empty, set to the scale and weighed, set over in the receiving yard for departure.

Q. (By Exam. Way) Well now, those cars move from the point of unloading?

A. Point of unloading to the scale and to the receiving yard for departure.

Q. And the point of unloading—the unloading points are those which you have described for the inbound loads?

A. Right.

Q. All right.

A. The ore empties are picked up by a switch engine and about 85 percent of them are weighed.

Q. You are talking about the concentrate now?

A. No, the ore.

Mr. CAMPBELL: Ore empties.

Exam. Way: Repeat that.

The WITNESS: Picked up at the various points of unloading, set to the scale and weighed. About 85 percent of them are so done. That is because some of these, some of this ore is unloaded at a stock pile and the empties so released from stock pile ore are not reweighed light, and then after being weighed, they are set in the receiving yard on the proper track for departure. Coal empties are handled in the same manner except that they are not weighed light.

That, I think, constitutes a brief description of the 1301 handling of most of the loads and empties into the smelter.

Q. (By Exam. Way) I want to ask you some more questions about the map. Is this plant closed?

A. Yes, and has guards at most entrances to it at the present time.

Q. Is that a usual thing or just during this particular period of wartime?

A. I don't know, sir. It was guarded when I first saw the plant. I don't know whether they have maintained guards previous to that there or not.

Q. What is the arrangement for getting in and out of the plant?

A. You must call at the main office and secure a pass.

Q. I don't mean that, I mean trains coming in and going out.

A. How do you mean, sir? I don't want to extend your question.

Q. You have cars coming into this plant and you have cars moving out and the plant is entirely closed, and you can't either get in or get out without something being done.

A. There is nothing required for movement of the railroad cars in and out of that plant except a straight movement, not interrupted at all by means of the plant being guarded.

Q. What are all these tracks you have here in the upper right-hand corner?

A. That is the Union and Pacific and Western Pacific main line.

1302 Q. What are all these tracks over here on the right-hand side of the map, are they all switch points?

A. Yes, but they are points that are reached, because of the apparent curvature on the map, which can't be reached by our engines. The work over in that portion is done almost entirely, in fact entirely by smelter engines.

Q. Can you distinguish on the map the part of the plant which is switched by the rail carrier, respondents here, and that which is switched by the plant?

A. We seldom, if ever, go beyond the bullion loading point in the lower levels.

Q. And that is where?

A. Well, we have described that, sir. We will describe it again. We will call it W—this point here (indicating) where the bullion is loaded, where we previously pointed, we previously described.

Q. It is marked here as copper casing machine?

A. That is it.

Q. Now, in the upper part of the map—

A. The center of the map we seldom go beyond W-500. On the next level we take in all of the tracks the full length of the yard.

Q. That is the first time I heard about the levels.

Mr. CAMPBELL: There are two levels. That will be covered before he gets through there.

1303 Mr. FINERTY: Three levels.

Q. (By Exam. WAY) Have we just been talking about one level up to now?

A. No, these various places are located on different levels.

Mr. CAMPBELL: You had better explain to the Examiner these different levels so he will know.

The WITNESS: All right. From the bullion loading point which is on the lower level and which we have described previously as being the copper casting machine and located about 90 feet below the scale, the tracks lead down into this point, this lower level, reached by a series of switchbacks on an approximate maximum grade of 3 percent.

Mr. FINERTY: That is probably known as the "hole" down there?

The WITNESS: The hole, yes. The next level constitutes that area in the vicinity of the acid plant and these trestles B, C and D, and the top level is the receiving yard.

Q. (By Exam. WAY) Now, how many districts, how many unloading districts have you in this plant, that is, reached by the locomotives of the carrier?

A. Three, three levels.

Q. That is three levels. How many districts?

A. That is the districts, the set of levels.

Q. And that also holds true as to the movement of the empties?

A. The same thing exactly.

1304 Mr. FINERTY: Generally speaking, however, Mr. Moriarty, all your empties are pulled out from the first and second levels through the east end, and your empties from the hole are pulled out up to the west end and then out east?

The WITNESS: That is right. We will recite that again for you to make it clear. From the middle of the yard or the second level the empties move out to the east and along a continuation of B, C and D tracks, and from the lower level or the hole they are moved up through a switchback out the west end of the yard into the receiving yards.

Q. (By Exam. WAY) Now, when they are moved out over these B, C and D tracks, are they moved back into the receiving yard?

A. Yes, sir.

Q. That is, they move them to the east?

A. Back west into the receiving yard. All empties and all loads go through the receiving yard.

Q. Now, did I understand you to say that the Denver & Rio Grande did all the switching in this yard?

A. Which yard is that?

Q. The yard we are talking about.

Mr. CAMPBELL: At Garfield.

A. No, the smelter engine goes in these same tracks also, seldom, if ever upon this top level, but the rest of the yard he moves all over.

1305 (By Mr. CAMPBELL) What the Examiner wants to know, he wants to know insofar as the responsibility is concerned, the Rio Grande does all the switching, employs all the labor, and supplies all the equipment, isn't that true?

A. That is, leaving out the smelter.

Q. Leaving out the smelter. He understands the smelter has certain crews and does certain switching, but insofar as the Rio Grande is concerned, the Rio Grande does it all?

A. That is right.

Q. (By Exam. WAY) And, of course, you switch all the cars for the Union Pacific?

A. Yes, sir.

Q. And for the B. & G.?

A. Yes, sir.

Q. Who owns all of these plant tracks?

A. The smelter people.

Q. Who maintains them?

A. The smelter people.

Q. Now, I want to ask you about the condition of those tracks, what is the condition of the tracks?

A. Very well maintained for yard tracks under present conditions.

Q. The tracks are adequate for operation of the carrier's locomotives?

A. Yes, sir. We have had very—The derailments
1306 are very few and far apart.

Q. And under whose supervision is the railroad switching?

A. We have a footboard yardmaster who accepts instructions from the smelter people for the placing of cars and handling of empties, and so forth.

Q. (By Mr. CAMPBELL) Is he a railroad employee?

A. Oh, yes. He acts as a footboard yardmaster and is nothing more or less than an engine foreman.

Mr. CAMPBELL: I see.

Q. (By Exam. WAY) Now, he receives all of your instructions from the plant, I assume?

A. Right.

Mr. FINERTY: I don't want to let that go by unchallenged. We will take that up later.

Exam. WAY: All right. Proceed. Just a moment. Do

you want to ask any questions about this yard at this time, Mr. Williams?

Mr. WILLIAMS: Well, I have just a few questions to ask.

Mr. CAMPBELL: Do you want me to finish with Mr. Moriarty?

Exam. WAY: I thought this would be an appropriate time to finish up the description of the yard, if we can.

Mr. WILLIAMS: Mine would relate somewhat to switching, if that is what you had in mind.

Exam. WAY: That is what I had in mind.

1307

Cross Examination.

Q. (By Mr. WILLIAMS) I don't recall, Mr. Moriarty, that you mentioned the switching to the thaw house during the winter months.

A. I did, sir.

Q. You did mention that and describe it?

A. Yes, sir.

Q. In any case does the plant engine operate over tracks which are not used by the carrier's switch engine?

A. Oh, yes, quite a number of tracks in the plant they operate on exclusively. In my opening statement I made this statement which I will refresh your memory with. Of the 21.58 miles of track in the smelter yard we use only 17.14 miles, which is standard gauge track. The balance is used exclusively by the smelter equipment.

Q. Well, in addition to that the plant engines use, of course, the narrow gauge track exclusively?

A. Oh, yes, certainly.

Exam. WAY: Do they operate also over broad gauge?

The WITNESS: They have two different types of equipment, electric narrow gauge, and the steam engine is standard. We have nothing to do with the narrow gauge movement at all.

Mr. FINERTY: I think, Mr. Moriarty, you said that the standard gauge, or plant dinkey, seldom came into the upper yard or the upper level?

1308

The WITNESS: That is right.

Mr. WILLIAMS: I am going to defer any further questions until a little bit later.

Mr. FINERTY: I have some questions, unless you prefer to finish, Mr. Campbell.

Mr. CAMPBELL: Go ahead while he has this map open and the Examiner's mind is on this particular situation and have it cleared entirely.

Q. (By Mr. FINERTY) Mr. Moriarty, you stated that Gar-

field Station on the D. & R. G. is 1-9/10 miles east of the plant?

A. That is right.

Q. What facilities do you have at Garfield station?

A. We have an agent and a clerk and a small engine, conditioning trackage.

Q. Do you have any scales?

A. No.

Q. Do you have any sampler?

A. No.

Q. Do you have any side tracks?

A. Not to speak of, no.

Q. Do you have any connection with the Bingham & Garfield?

A. No.

Q. You couldn't get a connection there, could you, on account of the levels?

A. I wouldn't say you couldn't. I would say it 1309 would be difficult to do it.

Q. It would take a good many switchbacks?

A. That is right.

Q. You have no connection there with the Union Pacific?

A. No.

Q. And you couldn't get a connection there for about the same reason?

A. It would be difficult to do it.

Q. Where is the nearest Union Pacific station to the Garfield smelter?

A. I don't know. I think it is about approximately the same, a little bit further than ours.

Q. It is Lake Point to the west?

A. That is right.

Q. Have you ever been up there?

A. No, I haven't.

Q. So you don't know what facilities they have?

A. No, sir; I don't.

Q. And so far as you know they don't maintain any train yards up there, do they?

A. No, I don't think they do.

Q. And do you know whether they maintain any scales or samplers up there?

A. I don't know, but I don't think they do.

Q. Now, where is the nearest B. & G. station to the plant?

1310 A. Magna.

Q. And how far is Magna? That is east of the plant, isn't it?

A. East, yes. Magna is 4.2 miles.

> Q. 4.2 miles? At that station does the B. & G. maintain any scales?

A. No.

Q. Does it maintain any sampler?

A. No.

Q. Where in the vicinity of the plant, or in the vicinity of Salt Lake have the three railroads, using what we will call the joint railroad terminal yard in the plant, where have they any facilities for handling jointly, say, approximately 22,000 loads in, a year, and approximately 7,000 out?

A. No place.

Q. What I shall refer to as the joint railroad terminal yard is comprised of the ten tracks that you have mentioned on the upper level, the highest level?

A. Correct.

Q. And of those ten—

Exam. WAY: The ones you are referring to are down at the bottom of the map called the receiving yards?

Mr. FINERTY: That is correct, Mr. Examiner.

Q. (By Mr. FINERTY) It is a receiving yard, Mr. Moriarty, for the road-haul trains of the three lines, isn't it?

A. Right.

1311 Q. And the three lines have no place they could break up the road-haul trains, have they?

A. No, sir.

Q. And the principal use of that yard is for the road-haul trains of the three railroads to come in there, their road-haul engines cut off, and then those trains are broken up by the D & R. G. switch engine in that yard?

A. Correct.

Q. And conversely, on outbound traffic, the principal use of that yard is for the D. & R. G. to pull empties into that yard and make-up trains for the three railroads outbound?

A. Right.

Q. And in that yard, Mr. Moriarty, what permanent facilities are maintained by the three railroads?

A. We have a small—The only thing we have there is a small repair track.

Q. Well, you have two repair tracks as a matter of fact, haven't you?

A. Yes, that is right.

Q. And you also have a track on which you store bad-order cars until at your convenience you can put them on the repair tracks?

A. That is right.

Q. So the three tracks in that yard are used either as repair tracks or storage yards for your bad-order cars?

1312 Exam. WAT: Will you describe the location of those three tracks?

The WITNESS: Those three tracks are immediately—

Q. (By Mr. FINERTY) Are they in the east end of the receiving yard?

A. East end.

Q. Bottom of the map?

A. Right.

Q. Now, all movements in that yard, as far as the actual movement of the engines are concerned, are controlled by your engine foreman who receives a yardmaster's pay, is that not right?

A. Well, he receives a foot board yardmaster's pay, but he acts in the capacity of yardmaster and foreman.

Q. Yes, and so far as the actual movement of the engine is concerned, it is exclusively under his jurisdiction, isn't it?

A. That is right.

Q. And the only orders given that engine, so far as the smelter is concerned, are orders of the placement of cars after the trains are broken up and after the road-haul trains are broken up, weighed, and placed on the hole tracks in that yard?

A. The footboard yardmaster or foreman receives information from the smelter people as to the placement of these cars.

Q. And he exercises his discretion after receiving
1313 those orders as to when he will execute them, except there is very good cooperation between the smelter and the railroad in that respect, is there not?

A. I suppose that could be true.

Q. Well, I want to know, what is the truth, Mr. Moriarty?

A. The fact is that he, as nearly as possible, carries out the wishes of the smelter in the placing of these cars and the time which he places them.

Q. And that would be true of any railroad yard where they are handling any other industry?

A. There is no difference here than any other industrial switching job.

Q. That is right, and treating your ten tracks upon the upper level, or the joint railroad terminal of these three railroads, it is the only place in the yards where the railroads can haul cars for spotting orders of the consignee?

A. That is right. Any other place further away would be almost impossible.

Q. And I think as you say, Mr. Moriarty, quite truthfully, there isn't any other place in reasonable distance of the plant?

A. That is right.

Q. I think that you have stated that generally speaking that all empty cars from the first and second levels, that is from the concentrates, Utah concentrates placed in 1314 the Martin machine and ore cars on the unloading docks on the second level, are all taken out of the east end of the yard by your switch engine and pushed back into the joint terminal yard?

A. That is right.

Q. And there made up by your switch engine into appropriate trains for the three railroads so that their road-haul engines can haul their trains out?

A. That is right. When the road-haul engine arrives to pick up a train to leave it is already made up for them.

Q. It is already made up for them, and that is no different than the handling of any other joint terminal of the three railroad companies?

A. That is right.

Q. The only empties that go out, as I understand it, that are hauled out by your engine at the west end of the yard, are empties from the so-called—or which is the third or lowest level?

A. That is right.

Q. And there hauled out to the point shown on the extreme left-hand side of the map where they connect with the main track coming into the joint terminal yard?

A. That is right.

Q. And those cars are likewise, when they get in that yard, placed by you on whatever tracks you may be making up trains for the three railroads on the outbound road haul?

1315 A. That is right.

Q. And you select those tracks, the smelter does not tell you when to make up trains?

A. No, the circumstances determine that from a switching standpoint.

Q. Your engine foreman exercises his judgment when those trains are to be made according to the requirements of the three railroads?

A. That is right, so he will have clear tracks for delivery of cars en route to the smelter.

Q. And also hauling out cars from the smelter?

A. Yes, sir.

Q. In other words, you don't deliberately block your main line into that yard?

A. No, and we don't block the cars altogether.

Q. You do what every efficient railroad man would do in making up trains for those railroads, you, as nearly as possible, use the most convenient tracks for assembling three different trains?

A. That is right.

Q. And when you put those cars in there, after weighing, and hold them for spotting orders of the industry, you likewise select the hold tracks upon which you will place those cars so as not to block either your incoming trains or your outgoing trains?

1316 A. That is right.

Q. And so as not to block yourself in switching the orders?

Q. We won't let ourselves. They are pretty good switchmen, they won't get tied up.

Q. They are pretty good switchmen and they won't get tied up?

A. Yes, sir.

Q. Under your agreements with the brotherhoods, would your road-haul engines be permitted to do the switching at this plant, at road-haul pay, I mean?

A. Well, I have never been able to get them to perform that type of switching. Where switch engines are maintained, the fact that they are maintained precludes the possibility of getting that work done by a road-haul crew.

Q. The proof of the pudding is in the eating in that instance?

A. That is right.

Q. Then would you say from a railroad operating point of view that it is commonly to the advantage of the three road-haul railroads using the joint terminal yard to have the switching done by one road in place of having three different switch engines of the three roads in there?

A. If that were done by three roads, you would have rather a chaotic condition around there insofar as trying to

get anything done. There is only one lead on each end of that receiving yard, and you wouldn't have more than one engine working on that lead at a time.

1317 Q. It certainly wouldn't be practicable, Mr. Moriarty?

A. No. In the first place you wouldn't get the work done, and in the second place the cost would be prohibitive.

Q. And would it be practicable, even if the brotherhoods would permit you to, to have three road-haul switch engines around that yard placing cars for weighing, placing empties for hauling off and placing cars individually?

A. No. That is evident, that we don't do it in our own terminals, and this switching at Garfield, your weighing and all that stuff, and lining all the cars for spotting at various points and various sequence wanted is very similar to any industrial switching at any large city where your cuts must be made up in the order in which they are going to be spotted, etc., and so on, in advance of the spotting engine's arrival, to working. This is practically the same as that. The only difference is this is one industry and the other may be twenty or thirty industries.

Q. In other words, Mr. Moriarty, it happens there are no other industries out here to use those joint facilities used by the three railroads?

A. That is right.

Q. But that is no different than any joint terminal, any joint railroads might maintain in any terminal district?

A. Or you might say a terminal used by any other railroad.

Q. Any other road and generally interchanging.
1318 Mr. Moriarty, you have had considerable experience as an operating man or you wouldn't be where you are now. Mr. Moriarty, would you say it is a rather efficient operation out there?

A. I think so. I think it is. Now, comparing this yard with other yards, they must have a pretty uniform index of efficiency as far as cars handled per engine hour. In 1941 we handled 6.1 per engine hour.

Exam. WAY: One-tenth car per engine hour?

The WITNESS: 1942 was 6 and '43 was 7.

Q. (By Mr. FINERTY) And may I ask, is that good or bad?

A. That is pretty good for an industrial job. The effect of industrial switching, for instance, can be readily determined, when you consider a yard like Helper handling

about 8,000 cars a month with no industrial switching, cars handled per engine hour run around forty. Salt Lake terminal where we have some, considerable industrial switching, yet we handle the same cars that Helper handles in a through movement. The cars handled per engine hour is about twelve, so the effect of industrial switching is shown. So this isn't bad where every car handled is in industrial switching. That is pretty good going.

Q. Also, Mr. Moriarty, when you consider a great deal of the switching isn't really industrial switching but really is road-haul, into road-haul trains?

A. Regardless of its name under the tariff it is 1319 still industrial switching after we get hold of it.

Q. Just as the switching in your terminal in the Salt Lake yard is industrial?

A. Yes, similar to it.

Q. So it is not just a yard where you make up and break up trains?

A. That is right.

Q. And wherever you have deliveries in and out of a yard it reduces proportionately your cars per engine hour?

A. That is right.

Q. And this compared favorably, would you say, with your Salt Lake operation?

A. Yes, sir.

Mr. FINERTY: I think that is all, Mr. Moriarty.

Re-direct Examination.

Q. (By Mr. CAMPBELL) Mr. Moriarty, I believe you haven't been asked about the lay of the ground generally out there in that territory. Is it a rolling or mountainous country or a level country?

A. Well, your lower level, as we call it and have called it and described it is approximately the old lake level and from there to the lake there is a very, very light fall, the lake being over there, the lake over a few miles. Up from the lower level we are on a distinct hillside, mountainside.

Q. Is that why you referred to the fact a while ago 1320 that this locality is about the only one without great expense where you could have tracks and operate on them as you do here?

A. It is about the only place where you could get the three railroads together because the B. & G. comes in at a rather high level and the U. P. at another level.

Q. That is the point I am making, they come in at different levels, and it is about the only place where you could get them on the same level.

A. Yes, sir; where it is close enough to do that.

Q. (By Exam. Way) Are you at liberty to spot these cars as fast as they come in without receiving instructions from the plant?

A. No, sir. Some of them, I would say they are in the minority, are held for various reasons.

Q. What do you have to do with them when you hold them, put them on some hold track?

A. We leave them in the receiving yard.

Q. You leave them in the receiving yard and wait instructions from the plant?

A. That is right.

Mr. FINERTY: You do just what any railroad would do in a city, it pushes them in on a hold track in the receiving yard, notifies the industry, and the industry then gives its spotting orders?

The WITNESS: Right.

Exam. Way: Now, have you any questions?

Re-cross Examination.

1321 Q. (By Mr. WILLIAMS) Are your switching instructions from the industry written or oral?

A. Most of them are written, except as I explained before, the concentrate handled into the pest house, which is a routing job and handled every day is not. Because of the variance in the type of ore obtained, it is necessary that we receive instructions as to where they want it placed.

Q. Did you say your footboard yardmaster acted also as foreman?

A. Yes.

Q. As a foreman on the engine?

A. We have on one engine the footboard yardmaster. He performs the work on the engine as well as being yardmaster. I might add that position was pushed on us by the organization rather than because we wanted it.

Q. You stated it wouldn't be practicable for more than one carrier's engine to do the switching in there?

A. That is right.

Q. Is there any interference at all, for similar reasons, between the carrier's switch engine and those of the plant?

A. To make that clear, I was principally talking of the receiving yard. However, there is a possibility of interference down in the hole and at the various levels by the smelter engine, but the smelter engine's time is

1322 taken up largely in that part of the plant which the Denver & Rio Grande engines, because of their size,

cannot traverse. You understand, the smelter engine is a very small engine, saddle tank, built for negotiation of sharp curves, etc. But there is a possibility of interference on some of the tracks, on the west leads, but this is not serious. It is minimized. These switchmen on the smelter engine are pretty good men and so are our own men, and they arrange their work to avoid this interference.

Q. That interference does happen, but in your judgment it is kept to a minimum?

A. Well, if it amounted to anything, I, as superintendent, would insist that the smelter people keep their engine out of our way, because we would insist on preferential movement through that yard.

Mr. FINERTY: You haven't had to do that as yet?

The WITNESS: No, I don't think so.

Q. (By Mr. WILLIAMS) Are your bullion empties set for movement immediately, or are they stocked there?

A. That depends upon the availability of the empties, if we can begin to get enough. Empties of that type of railroad car are hard to find right now, very difficult to get. They have to meet certain specifications and requirements. If we do get a surplus, we try to store them down in the stock track, adjacent to the point of use, although at times 1323 they may hold a few on top for them.

Mr. FINERTY: That is an economy operation for you?

The WITNESS: Yes.

Mr. FINERTY: In place of holding them in the upper yard and bringing them down one by one?

The WITNESS: We get them down as fast as we can.

Q. (By Mr. WILLIAMS) At how many points in the plant movement is the plant to complete the movement of cars, either loaded cars or empty cars? My recollection is that you referred in your testimony to two points, at one of which I seem to recall the engine of the plant completed the movement. Do I make that question clear?

A. Well, I think I understand what you mean. I would say that there might be fifteen or twenty of those points throughout the plant.

Q. At which the plant's engines would complete such movement?

A. No, at which they could and might, not that they do.

Q. How many that they do actually participate in movement?

A. I suppose there are eight or ten places in here where they complete the movement.

Q. Is that a regular occurrence?

A. Yes, I would say so, may not be daily, but it happens frequent enough to be regular.

Q. Why is it necessary for the plant's engines to complete that move?

1324 A. Our obligation has ceased when we have once set it.

Q. You refer to your obligation as covered by your tariffs?

A. Our tariffs; yes, sir.

Mr. WILLIAMS: You will have a traffic witness, will you, Mr. Campbell?

Mr. CAMPBELL: Yes, sir; we will have a traffic witness.

Q. (By Mr. WILLIAMS) I would like to ask another question. How are the empties handled from B, C, D and F lines?

A. They are pulled out the east end by our engines.

Q. What is the name of that track, is that coke dock 4?

A. Yes.

Mr. WILLIAMS: No further questions.

Q. (By Mr. FINERTY) May I ask you just one more question, Mr. Moriarty? We will show that of the total inbound shipments to the plant, which are something over 22,000 cars a year, over 13,000, approximately 14,000, consist of these Utah concentrates, and that they are by far the majority of the total metal shipments, metal-containing shipments shipped in there. As I understand you, on those Utah concentrates, your engine crew, just as a routine matter, set those in on the pest house track or the next track to it, to the Martin machine. Now, as a matter of fact, Mr. Moriarty, what they do, your engine pushes those cars, your engine from the east and pushes those cars over the scale. They are cut off at the scale and they just
1325 drift down to the Martin machine without any further handling by that engine?

A. That is right. It is almost a continuous move.

Q. And then they drift out from the Martin house down to where your west end engine will ultimately pick them up?

A. That is right.

Q. Empty. And that is the vast majority of your movement into this plant.

A. That is our big business.

Q. (By Exam. WAY) How many spotting points are there in the plant?

A. Oh, I would say approximately twenty. I never counted them up because there are some today and some tomorrow.

row and then maybe you won't have a car to go to a place for a month.

Q. How many possible points are there?

A. Every track is a possible point.

Q. And every point on that track?

A. Yes.

Mr. FINERTY: We will show you, Mr. Examiner, by exhibits that are being prepared, exactly the points at which cars are spotted and unloaded in the plant, and I may say that we will show the vast majority of our cars are unloaded, as Mr. Moriarty just testified, in the Martin house, the Martin machines, and the next largest movement is unloaded on the ore docks, and there is only a small minority ever unloaded any place else.

1326 The WITNESS: That is correct.

Exam. WAY: And you will also show the proportion of this traffic which is intrastate and interstate?

Mr. CAMPBELL: Yes, sir; we will do that by our traffic man.

Exam. WAY: We will recess for five minutes.

(A short recess was taken.)

Re-direct Examination.

Q. (By Mr. CAMPBELL) Mr. Moriarty, have you a map that you have marked and made more simple than the map here?

A. Well, I think it is more simple, Mr. Campbell.

Q. Is it easier to follow?

A. I think so, yes.

Q. Would you have any objection to filing that map? You have just one, I understand?

A. Yes.

Q. Do you have any objection to filing that with the Examiner and furnishing copies of it a little later when you can make others?

A. How many more copies? How many more would you want?

Exam. WAY: We want one for the reporter and one for myself, and of course the different parties interested will probably ask for a map.

Mr. FINERTY: Just off the record.

(Discussion off the record.)

1327 Exam. WAY: On the record. Suppose we have this map marked for identification Exhibit No. 3 and have the witness state in a general way what it is.

(Marked for identification "Respondent's Exhibit No. 3, Witness Moriarty.")

The WITNESS: The map marked Exhibit 3 corresponds to map marked Exhibit 1, except missing from Exhibit No. 3 is a great amount of the trackage not used by Rio Grande engines. This map shows the trackage used by Rio Grande engines.

Exam. WAY: And it eliminates all of the plant tracks which are used by the plant engines?

The WITNESS: Plant engines.

Exam. WAY: It will be received.

(Respondent's identification Exhibit No. 3 Witness Moriarty, received in evidence.)

Mr. FINERTY: There is no conflict between the two maps, they complement each other?

The WITNESS: Yes, and I had our boys check your map with ours to be sure that didn't exist.

Q. (By Mr. CAMPBELL) Mr. Moriarty, you have completed your statement on this situation at Garfield?

A. Yes, sir.

Q. You don't have any exhibits as to those other matters or anything like that?

A. No, sir.

1328 **Q.** Are there any points you want to explain that you haven't yet made clear?

A. No, sir.

Mr. CAMPBELL: I think as far as we are concerned we are through with Mr. Moriarty.

Exam. WAY: We will excuse you temporarily.

(Witness excused.)

Exam. WAY: Are we ready to proceed with our traffic witness?

W. M. CAREY was sworn and testified as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) Mr. Carey, will you state your name and occupation for the record?

A. W. M. Carey, C-a-r-e-y, freight traffic manager of the Denver & Rio Grande Western Railroad Company, Denyer, Colorado.

Q. How long have you been freight traffic manager?

A. Since 1939.

Q. Were you in the traffic department of the Denver & Rio Grande prior to that time?

A. Since 1917.

Q. During all those years you have handled traffic matters for the Rio Grande, is that right?

A. Right, going on up through the various departments of the traffic department.

Mr. FINERTY: We will admit his qualifications.

1329 Mr. CAMPBELL: I think we have about got them in. Very well.

Q. (By Mr. CAMPBELL) Mr. Carey, have you prepared some exhibits in connection with the Garfield Smelter plant situation?

A. Yes, sir. May I explain?

Q. First I was going to ask you another question. Do you have those exhibits with you here ready to introduce?

A. Yes.

Q. Are those exhibits compiled with regard to any other plant, or do they stand alone for the Garfield plant?

A. The charge said with the A. S. & R. smelters, Garfield, Murray and Leadville, and I have prepared my exhibit separately for Garfield, Murray and Leadville with respect to each of those smelters, except where similar tariff provisions are carried at all smelters.

Q. That is the point I am getting at there exactly. Will you proceed with reference to first just your exhibits at Garfield, Mr. Carey?

A. Yes.

Q. Have you something else you want to explain?

A. No.

Mr. CAMPBELL: Very well. Now, for identification purposes may this be marked as Exhibit No. 4?

Exam. WAY: Yes.

1330 (Marked for identification: "Respondent's Exhibit No. 4, Witness Carey.")

Q. (By Mr. CAMPBELL) Now, Mr. Carey, will you proceed to explain this Exhibit No. 4?

A. Pages 1, 2, and 3 of Exhibit No. 4 are a historical statement.

Exam. WAY: Now, as far as the exhibit itself is explanatory, it is not necessary to read it. If there is any particular thing that you want to say about it, we shall be glad to hear it.

Mr. CAMPBELL: That is what I started to say. He is not going to read the exhibit itself.

The WITNESS: Pages 1, 2 and 3 are a historical statement of the tariff charges applicable on line-haul shipments and intra-plant shipping at Garfield smelter, showing that prior to February 25, 1920, free switching was accorded on freight which had paid transportation charges to the plant.

On February 25, 1920, under a freight rate authority of the Director General of Railroads, a charge of \$2.50 per car was made effective for so-called intra-plant switching.

Mr. FINERTY: Mr. Carey, may I interrupt just to ask you, your exhibit shows that as a fact, prior to 1920 there were no intra-plant switching charges at all?

The WITNESS: That is correct.

Mr. FINERTY: Up to 1920 both road-haul and intra-plant switching was done without additional charge?

The WITNESS: That is true; yes, sir. The charges made thereafter up until June 25, 1938, represent increases and decreases in *ex parte* proceedings of the Commission, except that on November 27, 1920, a free switch to and from the thaw house, in addition to the free movement over track scales to and from the sampler to the designated unloading point was added. On June 25, 1938, as the result of an understanding reached by the smelting companies and the Union Pacific and Rio Grande railroads as to the intent of the findings of the Interstate Commerce Commission in *Ex Parte* 104, Part II, Terminal Services, decided May 14, 1935, all free movements within the plant under the line-haul rate were eliminated except the movement over the scales and subsequent delivery to any designated track within the plant which could be accomplished by one uninterrupted movement.

On Pages 4 and 5 is a statement showing the present tariff, switching provisions, and charges for delivery of line-haul carload shipments at Garfield and Murray, Utah smelters. That is an exhibit that covers both smelters because the tariff provision is the same.

Q. (By Mr. CAMPBELL) We understand.

A. Additional movements of such shipments within the plant, intra-plant switching at Garfield and Murray, Utah smelters, and other specific switching at Garfield.

1332 Page 6 is a statement showing number of cars and tons switched by the D. & R. G. W. Railroad for the A. S. & R. Company at Garfield, Utah, during the month of March, 1944, and the revenue accruing thereon, the switch revenue.

Now, I have detailed statement of the various intra-plant moves involved, Mr. Examiner, if you desire them.

Exam. Wav: I think we would like to have them.

Mr. CAMPBELL: Now, I suppose this should also be marked as an exhibit for the record.

(Marked for identification "Respondent's Exhibit No. 5, Witness Carey.")

Exam. Way: Yes. There are 48 sheets.

Mr. Root: Excuse me. I didn't just understand what our Exhibit 5 is, Mr. Carey?

The Witness: They are the detailed statements of the switching performed for which a charge is made.

Mr. CAMPBELL: Did everybody get one now?

The Witness: 48 sheets is correct, Mr. Examiner. That will be Exhibit No. 5.

Exam. Way: Yes, marked Exhibit No. 5 for identification.

The Witness: Consisting of 48 sheets.

Q. (By Mr. CAMPBELL) Now, wait, Mr. Carey, before you go into that, will you kindly explain this Exhibit 5 for the record, just what it is and what it is supposed to be?

A. That is a detailed statement of switch charges for the month of March, Garfield smelter.

Mr. FINERTY: As shown on Page 6 of your exhibit?

The Witness: Yes, sir.

Mr. CAMPBELL: Is that a full enough description, Mr. Examiner?

Exam. Way: These figures that are shown here were the car movements that were switched on the particular date?

The Witness: That is correct.

Exam. Way: And the amount shown at the bottom is the total which you collected on the movement of cars shown to have been switched during that time?

The Witness: That is correct; yes, sir.

Exam. Way: All right, thank you.

The Witness: Pages 7 and 8 of the exhibit cover Murray, Utah, plant only, and are excerpts from the tariff showing the applicable switching charges, and the same explanation can be made for those as was made for Garfield.

Exam. Way: All right.

The Witness: Pardon me, that is 7, 8 and 9. Page No. 10, I think, is self-explanatory, Mr. Examiner. It shows the tariff provision as to the manner of waybilling the ore and rule for determining rate upon which freight charges shall be assessed, and the weights.

Page 11 covers the information for Murray, Utah, as to the method of determining your rates with respect to values, certificates that must be furnished to determine those rates.

Q. (By Mr. CAMPBELL) That is the same situation as at Garfield?

A. Yes, sir.

Mr. COLLINS: Mr. Carey, I think it relative to explain to the Examiner right as part of your testimony just how these rates are made, and what is necessary to apply the rates.

The WITNESS: I was going to do that, Mr. Collins.

Mr. CAMPBELL: He was leading up to that, Mr. Collins.

Mr. COLLINS: All right.

The WITNESS: Pages 13 to 19, inclusive, cover the Leadville smelter only, so I won't go into that.

I would like to elaborate on certain portions of these exhibits. As I stated before, prior to February 25, 1920, free switching was given within these plants on all freight which had paid transportation charges to the plant, and effective on that date a charge for intra-plant switching of \$2.50 per car was provided, and that up to June 25, 1935, on intrastate traffic and July 5, 1938, on interstate traffic, the tariff provisions remained the same, with the exceptions of the fluctuations made necessary by decisions of the Commission in various *ex parte* proceedings. Now, with respect to the change that was made in June and July, 1938. I would like to state that while it was felt at the time these changes were made, the findings of the Commission 1335 of May 14, 1935, in *Ex Parte* 104, Part II, Terminal

Services, required these changes, it is my thought in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration. The railroads now allow free movement over the scales on line-haul traffic.

Exam. WAY: In other words, it is your thought that the free service should be reinstated under the line-haul rates?

The WITNESS: For that portion of those services that are necessary for the railroad to have the information required in order to assess their freight charges.

Exam. WAY: In other words, you mean the weighing of the cars and the movement for sampling?

The WITNESS: Yes, sir.

Mr. FINERTY: And that house if necessary?

The WITNESS: Yes, sir.

Mr. FINERTY: I then understand one spotting after those things have been accomplished?

The WITNESS: That is right. By referring to Pages 10, 11, and 16 of the exhibit, it will be noted that in addition to having the weights, the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation.

1336 While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the the smelters did not. In the latter event, in all probability after the railroad had performed for itself the operation over the scales, through the thaw house, and through the sampler, a free movement to a designated point of unloading would be accorded providing that movement could be accomplished without interruption, resulting from orders from or requirements of the smelter. So, as I say, it is my thought that because of the fact that the railroads have to have this information, in order to assess their freight charges, that the smelting company should be accorded this free movement through the sampler and to the first designated point of unloading.

Exam. WAY: Now, I have noticed in some instances where the shipments are moved to the thaw house. For example, that is, they are weighed, they move to the thaw house, and then they are moved back over the scales. It is your thought that the plant should be accorded more than one scaling?

The WITNESS: Yes, for this reason, that it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. After it has gone through the thaw
1337 house—Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary, not only for the railroad to have the actual weight of that ore, but the smelters too, in their settlements with shippers.

Exam. WAY: But what you haul, you haul the wet weight?

The WITNESS: We assess our charges on the wet weight.

Mr. FINERTY: Based on a dry weight valuation?

The WITNESS: That is right.

Mr. FINERTY: Translated into a wet weight?

The WITNESS: Yes.

Exam. WAY: And that necessitates weighing twice?

The WITNESS: That is right.

Exam. WAY: That also necessitates placing the car to the sampler for sampling?

The WITNESS: Yes, sir.

Exam. WAY: I don't assume you are the proper witness to ask about that, the servicing, but in any event, it includes the sampling, whatever service is necessary in the sampling?

The WITNESS: That is right, in order to ascertain 1338 the correct value.

Q. (By Mr. CAMPBELL) Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

Q. So it would have to build them and maintain them for those purposes?

A. Yes.

Exam. WAY: Now, that contemplates the service that is satisfactory with the present method of making the rates. Is there any other way to make the rates so that the rates will cover the service?

The WITNESS: No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that there wouldn't be 1339 any movement of the low grade ore, and the same thing would result.

Exam. WAY: Why?

The WITNESS: Because the ore couldn't afford to pay the higher freight charge, the low grade ore.

Mr. FINERTY: In other words, the small miner and the small mine producing a fairly low grade ore could not afford to produce that ore if you had your rates on a single-rate basis?

The WITNESS: That is correct.

Mr. FINERTY: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

The WITNESS: That is right.

Mr. FINERTY: And a declared value would let the big miner get the same transportation as the low grade ore and at the same time put the low grade ore mine out of business?

The WITNESS: I say in connection with that it would result in the railroads not getting the higher rates on this high-valued ore.

Mr. FINERTY: Also it would mean there would be no inducement to the smelter to buy low-grade ore if it had to pay the same freight rate as on high-grade ore?

The WITNESS: That is right, only as a matter of getting trucks.

Mr. FINERTY: Yes.

340 Q. (By Mr. CAMPBELL) Now, Mr. Carey, have you completed all that you have on that?

A. Yes, sir.

Q. Have you any other?

A. That is all I have.

Q. On the Garfield. I was going to ask you, have you explained fully about certain matters in the plant?

A. Yes, sir. Off the record a moment.

Exam. Way: Yes.

(Discussion off the record.)

Mr. CAMPBELL: I think that is all? Mr. Carey, as far as that is concerned.

Cross Examination.

Q. (By Mr. WILLIAMS) I suppose the switching charges are collected by the D. & R. G. W. and that in some instances they are absorbed by the other carriers.

A. That is true, so far as the Union Pacific and the Rio Grande are concerned. Yes, the D. & R. G. W. performs the switching for the Union Pacific in the plant. There is no absorption in connection with that. It is done under a contract.

Q. Between the D. & B. G. W. and the Union Pacific?

A. Yes, sir.

Mr. COLLINS: You mean the intra-plant switching of cars, Mr. Williams? The question wasn't clear to me.

341 Mr. WILLIAMS: No, I didn't mean the intra-plant switching charges.

The WITNESS: He has in mind, I think, Mr. Collins, the switching charges that we have specifically published with respect to movements to the B. & G. Railroad. That is what you had in mind.

Mr. WILLIAMS: To and from loading and unloading points in the plant not involving a strictly intra-plant movement. No further questions.

Q. (By Mr. FINERTY) Mr. Carey, you referred in your exhibit No. 4 to certain tariff provisions up to 1920, which, I understand, gave not only switching under the line-haul rate on line-haul movements, but on intra-plant movements?

A. That is right.

Q. After 1920, and until the publication of the tariffs applicable to the Utah smelters in 1938, the tariffs all specifically covered a provision that the line-haul rate included movement to the thaw house, weighing, sampling and one spotting?

A. That is correct.

Q. Now, some of those tariffs, early tariffs especially, referring to that switching and free switching, it wasn't free in the sense that it was something the carriers weren't compensated for, it was switching included in the line-haul rate?

1342 A. It was switching included in the line-haul rate.

Q. Now, there was a hearing in these proceedings held here on May 19, 1932—held in Salt Lake, I am sorry, on May 19, 1932, before Examiner Bardwell, in connection with the Garfield Smelter. At that hearing a Mr. George Williams testified for your company. Will you state who he was?

A. Mr. Williams, at that time, I believe, was general freight agent of the Denver & Rio Grande Western.

Q. And do you know what he subsequently became?

A. Yes, he is traffic counsel of the Denver & Rio Grande Western Railroad Company here in Denver.

Q. At the present time?

A. Yes, sir.

Q. What experience had he in connection with the rates of the Denver & Rio Grande?

Exam. WAY: Hasn't that gone a little far?

Mr. FINERTY: What?

Exam. WAY: Hasn't that gone a little far, to ask a man what experience some other man has had?

Mr. FINERTY: This gentleman knows what he had.

Exam. WAY: The record will show what he had; the record will show what he has.

Mr. FINERTY: It is quite all right with me, and I refer to the official transcript and the hearing before the Commission on May 19 at Salt Lake City. This question was
1343 asked by the counsel, Mr. Gallaher, "Let me put it this way—" That is Page B-44 of the official transcript. I am reading the answer made by Mr. Williams to a question some pages back. I want to read you the answer.

"A. Let me put it this way—I don't think we are thinking along the same line exactly—when we bring a carload of ore or concentrates into the smelter yards we have to get the weight first; we have to get the assay certificate; we will perform switching service for the purpose of scaling this car; we will take it to the sampling plant for the purpose of the assay; if it is the wintertime we will take it to the thaw house to have the ore thawed out.

"Q. You will do both services?

"A: All those are included in our line-haul rate."

Q. (By Mr. FINERTY) With your knowledge of tariffs, Mr. Carey, is that answer of Mr. Williams correct, that all those services testified to by him, the weighing, sampling, and spotting service are included in the line-haul rate?

A. Yes, sir; that is shown in this exhibit of mine.

Q. Now, just one small matter on this Exhibit No. 4 on Page 1 of the exhibit, Page No. 1 of the exhibit, at the bottom, you call attention to an item published November 27, 1920.

A. That is right.

Q. Including a movement to the thaw house?

A. Yes, sir.

Q. That item was published twenty days after the 1344 original item which did not include that movement to the thaw house?

A. Yes, sir.

Q. In your opinion was the omission of the thaw house movement inadvertent?

A. I didn't check into that to see, but it would appear so.

Q. As a matter of fact up to 1920, all movements, thaw house, weighing, sampling, and all intra-plant movements of any sort were handled under the line-haul rate?

A. That is right.

Mr. TUCKWOOD: That is where you completed the line-haul?

The WITNESS: That is correct, where the freight paid transportation to the plant.

Mr. TUCKWOOD: Thank you very much.

Mr. WOOD: I have a question referring to Page 19 of this Exhibit 4, Mr. Carey. What is the source of the information shown in the column headed "Truck":

Mr. FINERTY: What page is that:

Exam. WAY: This is the Leadville plant. We haven't reached that yet.

Mr. WOOD: You don't want that?

Exam. WAY: Not at this time.

Mr. Wood: Very well.

Exam. Way: Apparently that is all at this time. You are excused.

(Witness excused.)

1345 Mr. CAMPBELL: Before we recess, Mr. Examiner, Mr. Moriarty wants to make one little correction in his testimony and we will have that complete.

Mr. MORIARTY: I gathered from the remarks made that all cars from the thaw house were weighed the second time. That isn't correct. Only a portion of them are. For various smelter reasons they didn't require the second weight.

Mr. CAMPBELL: You didn't want it understood that all of them are, only a portion of them?

Mr. MORIARTY: That is right.

Exam. Way: We will recess until two o'clock.

(Whereupon at 12:30 p. m. a recess was taken until 2 o'clock p. m. of the same day.)

AFTERNOON SESSION

2 o'clock, p. m.

Trial Examiner Way: All right, Mr. Campbell.

Mr. CAMPBELL: Mr. Examiner, as far as the Garfield plant is concerned, I think the Rio Grande has finished.

Exam. Way: Mr. Finerty, do you desire to follow Mr. Campbell on this plant at this time?

Mr. FINERTY: I am sorry, I didn't hear.

Exam. Way: I say, do you want to follow Mr. Campbell? Mr. Campbell has completed his case.

Mr. FINERTY: No, I would like, if it is satisfactory to you, I would like to hear the Commission's testimony.

1346 Exam. Way: Are you ready to proceed, Mr. Williams?

Mr. WILLIAMS: The Union Pacific has nothing to put on at this time?

Mr. COLLINS: No.

WILLIAM O. MCCORMICK was sworn and testified as follows:

Direct Examination.

Q. (By Mr. WILLIAMS) Will you state your name, please, and your address?

A. William O. McCormick, 1905 Westminister Avenue, Salt Lake City, Utah.

Q. What is your present position?

A. Inspector of safety appliances with the Interstate Commerce Commission.

Q. How long have you had that position?

A. Five years.

Q. What is your prior experience?

A. I had approximately thirty-five years as a switchman, brakeman and conductor with various railroads.

Q. During the course of your present position were you assigned by the Commission to assist in the investigation of switching operations at the plant of the American Smelting & Refining Company at Garfield, Utah?

A. I was.

Q. Under whose supervision did you make that investigation?

347 A. Mr. F. C. McDonald.

Q. Upon what dates did you make the investigation?

A. Upon the 23, 24, 25, and 26.

Q. Of March?

A. Of March, 1944.

Q. Will you state how you conducted those investigations?

A. We observed the movements the switch engine made, of all switch movements, and we followed the engine at all times it was performing switching at the plant.

Q. Did you make notes of your personal observations at the time these investigations were made?

A. We made notes of the car movements that were handled, where they were taken from and where they were left.

Q. And did you observe the switching of cars from various points within the plant?

A. I did.

Q. Will you state whether or not you prepared a report from the notes that you made of your observations of the switching operations?

A. I made a typewritten report from my notes of all the switching performance done by the engine that I worked with.

Mr. WILLIAMS: I would like this exhibit, consisting of 15 pages, marked for identification Exhibit No. 6.

(Marked for identification "Commission's Exhibit No. 6, Witness McCormick.")

348 Mr. WILLIAMS: Off the record.

(Discussion off the record.)

Q. (By Mr. WILLIAMS) Mr. McCormick, I hand you exhibit marked for identification No. 6 and ask you if that is

a report you prepared from your observations of the switching operations?

A. This is the report, yes.

Q. Is that report accurately made from your notes?

A. Yes, it follows my notes taken, and I have the individual notes that I took.

Mr. WILLIAMS: I offer this in evidence as Exhibit No. 6.

Exam. WAY: Without objection, it is received.

(Commission's identification Exhibit No. 6, Witness McCormick, received in evidence.)

Q. (By Mr. WILLIAMS) Mr. McCormick, do you have anything to add to that report?

A. I do not.

Mr. WILLIAMS: You may cross-examine.

Exam. WAY: One thing, Mr. Williams, I wish you would clear up, if you can. We have some identification of these tracks, and I don't know that they can be identified. In connection with the big knife, for instance, we have the whiskers track and the middle track.

Mr. MORIARTY: Mr. Examiner, those tracks are shown on that print that I gave you; the whiskers track is so marked.

Exam. WAY: Off the record.

1349 (Discussion off the record.)

Mr. WILLIAMS: Mr. Examiner, I propose to have Mr. McDonald, who will soon be called, to identify these different tracks by name.

Exam. WAY: All right, that will be satisfactory.

Mr. WILLIAMS: Cross-examine.

Mr. CAMPBELL: We haven't had an opportunity to study these and know whether we wish to cross-examine or not. As far as I can see on the face of things, I don't think there are any questions. If anybody else wants to proceed, go ahead.

Mr. FINERTY: Mr. Examiner, subject to our right to examine Mr. McCormick later—it is rather hard to examine 15 pages in a few minutes—I would like to ask a few preliminary questions.

Cross Examination.

Q. (By Mr. FINERTY) What you have attempted, Mr. McCormick, and what you have done, is to take each individual move of the particular engine that you were riding?

A. Yes.

Q. Did you ride on the engine?

A. No, I was in a place where I could take the car numbers and where they were taken from and where they were moved to.

Q. What did you do, walk alongside the engine?

A. I stood on the lead tracks.

1350 Q. You stood on the lead tracks, and you observed the engine going to the particular spot shown on this exhibit and picking up a particular car shown on the exhibit?

A. For instance, if this engine went in on a track, I placed myself in position where I could take the numbers from the cars when they were pulled out of the track, and opposite the number of the cars I set the track they were switched to and the time that took place.

Q. Where you had loaded cars you made a note of what was in those cars?

A. No, it was not possible.

Q. And where you recorded the movements, you didn't know the purpose of the particular movement except that it moved a certain car?

A. That is all.

Q. And it might be a movement in connection with making up loaded cars into a train for one of the three railroads or it might be a movement in breaking up one of the three railroad trains coming in?

A. That is correct.

Q. I just happen to notice on Page 2 a lot of movements around the rip track where cars apparently—some were in and some were taken out of the rip track.

A. Yes.

Q. That rip track is the track used by the D. & R. G. for the repairs of cars, not only of the D. & R. G. but the U. P. and the B. & G., is that correct?

A. Yes, the two tracks.

Q. Those two rip tracks are used for that purpose?

A. Yes, sir.

Q. And cars are set out by the D. & R. G. engine, some of these cars were moved from other tracks to the rip track and left there?

A. Well, the—in handling the bad orders they are generally set on No. 9 track.

Q. Which is adjacent to the rip track?

A. Well, not exactly adjacent to the rip track. It is the second south track, and the lead that No. 9 leads off from is adjacent to the rip track. The bad-order cars are stored on this No. 9 track, and this engine that I was working with went to work; they performed switching on that rip track.

Q. And pulled the bad-order cars off No. 9 track down to the lead?

A. Yes, and from the rip track.

Mr. FINERTY: Without further examination at this time, I ask the right to ask Mr. McCormick some further questions afterwards.

Q. (By Mr. COLLINS) Does this entire 15 pages concern the movements of one of the switch locomotives?

A. One locomotive.

1352 Q. One locomotive, for how long a period?

A. From three-thirty in the afternoon until the time that they were through work at night, and from the 23rd day of the month until the 26th day, inclusive, of March.

Q. It is one locomotive for four days?

A. Yes, one locomotive for four days.

Q. Now, is there anything in this that would enable one to determine which of the movements, if any, or to distinguish between movements which might have been intra-plant switching within the meaning of the railroads' tariff under which it is charged and other movements for which it is not charged?

A. No, there is nothing in that report.

Q. There is nothing in that report? Is there anything on there which will physically enable us to know whether the car was going to the scales, to the sampler, and to final unloading point?

A. Yes, that describes all the moves of the cars.

Q. Does it mention unloading points as much?

A. It mentions them, yes. No, no, not that particular unloading point.

Q. Just mentions the track?

A. As the scale track or the bullion track.

Q. If we have in the record, or if we can place in the record the description of the tracks, the identification of the tracks as unloading tracks to which you have followed these cars here—

1353 A. Yes, you can determine.

Q. We might determine the type of movement that you show here?

A. Yes.

Mr. FINERTY: Now, I haven't heard the witness qualified as to what type of movements certain tariff provisions apply.

Mr. COLLINS: No, he hasn't been, but we were just trying to see how we could tie this in.

Exam. WAY: He simply said that he had not as yet had it tied up, that is with the tariffs.

Mr. FINERTY: I think Mr. Collins' last question and answer unintentionally misleading because it would imply, which I do not understand to be a fact, that you could, by taking this exhibit, determine the tariff application to each of the movements.

Mr. COLLINS: No, you just misunderstood.

Mr. FINERTY: Well, I am glad I misunderstood.

Mr. COLLINS: That is all.

Q. (By Mr. FINERTY) May I ask in that connection, there is nothing in this exhibit to show where a car was unloaded, it is just that a car moved to a certain point, and you don't know it was loaded or unloaded or what was done?

A. I specify this load.

Q. The loads pulled out here you show are loaded, correct.

A. Where a load is set in and where a load is taken out is shown on that report.

Q. That is only where the railroad hauled ore to a particular track, and not necessarily spotted for unloading at the Martin machines, or anything of that sort?

A. No.

Q. You have just faithfully reported here every move the engine made with the cars named?

A. As nearly as possible.

Q. Yes, and without saying what was in the cars or what the moves were made for?

A. Just specified whether they were loaded or empty.

Exam. WAY: Anything further?

(No response.)

Exam. WAY: You may stand aside until you are called again.

(Witness excused.)

C. B. HIGGINS was sworn and testified as follows:

Direct Examination.

Q. (By Mr. WILLIAMS) Please state your name and address.

A. C. B. Higgins, 1426 Logan Avenue, Salt Lake City.

Q. What is your present position, Mr. Higgins?

A. Service agent, Bureau of Service, Interstate Commerce Commission.

Q. How long have you held that position?

A. About eighteen months.

1355 Q. And what was your experience prior to that time?

A. I was a brakeman and conductor on the Union Pacific, and brakeman, conductor, dispatcher and chief dispatcher, train master, superintendent of transportation of the Utah-Idaho Central and the Salt Lake & Utah Railroads.

Q. About how many years did your railroad experience which you have just mentioned cover?

A. About twenty-nine years and a half.

Q. How long were you superintendent of this railroad that you just mentioned?

A. About three years.

Q. Were you assigned by the Commission to make an investigation of the switching operations at the plant of the American Smelting & Refining Company at Garfield, Utah?

A. Yes, sir.

Q. Under whose direction did you make that investigation?

A. Mr. F. C. McDonald.

Q. And upon what dates did you make the investigations?

A. March 23 to 26, inclusive, 1944.

Q. Will you state what you did during the course of these investigations, that is how did you conduct those investigations?

A. I took the movements of the engine that was assigned from seven-thirty to three p. m. and followed the movements and recorded the movements of each car that 1356 was pick up or set out at any particular point in the Garfield yards by this engine crew.

Q. You made notes of each switching movement which you observed?

A. I did.

Q. State, please, if you prepared from your notes a report covering the observations which you made on each of the days mentioned?

A. Yes, sir.

Q. Mr. Higgins, were you accompanied on any of these days by any other Commission representative?

A. Yes, sir.

Q. By whom?

A. Mr. J. J. Mallarey.

Q. On what day was that, if you recall?

A. All four days.

Q. All four days?

A. Yes, sir; 23 to 26, inclusive.

Q. Well, did you prepare these reports from your notes alone, or did you do it in conjunction with Mr. Mallaney?

A. In conjunction with Mr. Mallaney.

Q. That is each one of the reports, is that true?

A. Yes, sir.

Mr. WILLIAMS: May I have this exhibit, consisting of 17 pages, marked for identification as Exhibit No. 7?

1357. Exam. WAY: So marked.

(Marked for identification "Commission's Exhibit No. 7, Witness Higgins.")

Q. (By Mr. WILLIAMS) Mr. Mallaney is not present, is he?

A. No, sir.

Q. Mr. Higgins, does this report marked for identification as Exhibit No. 7 accurately reflect the results of your observations in the switching in this plant?

~~A. Yes, sir.~~

Q. And during each day, March 23 to March 26, inclusive?

A. I will have to look and see whether it is all there or not.

Q. Just take your time to examine it.

A. It does.

Mr. WILLIAMS: I offer this exhibit in evidence as Exhibit No. 7.

Exam. WAY: Without objection it is received.

("Commission's identification Exhibit No. 7, Witness Higgins," received in evidence.)

Q. (By Mr. WILLIAMS) Do you have anything to add to your report, Mr. Higgins?

A. I believe not.

Exam. WAY: Let me see it.

Mr. WILLIAMS: You may cross-examine.

Mr. CAMPBELL: I say, Mr. Examiner, we have not yet had an opportunity to examine thoroughly this long
1358 Exhibit 7, and we are hardly in a position to cross-examine until we make a study of it, and I would like to reserve the right to cross-examine later if we deem it necessary. Somebody else may proceed.

Mr. ROOT: Mr. Williams, would it be possible to get a copy of Exhibit 7 later on?

Mr. WILLIAMS: Yes, we could have those made. It will have to be mailed to you. I want to be sure to get the names and addresses of those who wish a copy so they can be mailed direct to you by the Washington office.

Exam. WAY: Mr. Finerty?

Mr. FINERTY: I also desire to reserve the right to further cross-examination, but I would like to ask Mr. Higgins this question.

Cross Examination.

Q. (By Mr. FINERTY) Would your answers be the same as to the general nature of this exhibit and the information shown thereon as made by Mr. McCormick?

A. I think so.

Q. In other words, you simply noted each and every movement of that engine and what cars are picked up and set out and where they were picked up and set out, but you didn't note what was in the cars, or why they were picked up or set out or anything except the purely physical movement?

A. That was all, just the physical movement.

1359 Exam. WAY: You are excused, subject to recall.
(Witness excused.)

F. C. MacDonald was sworn and testified as follows:

Direct Examination.

Q. (By Mr. WILLIAMS) Will you state your name and address?

A. F. C. MacDonald, M-a-c-D-o-n-a-l-d, I. C. C. Building, Washington, D. C.

Q. What is your present position?

A. Chief, Section of Safety Appliances, Bureau of Safety, Interstate Commerce Commission.

Q. How long have you held that position?

A. Oh, about six or seven years.

Q. And what is your experience prior to that time?

A. About seventeen years in the field as an inspector for the Bureau of Safety and seventeen years as locomotive fireman and engineer.

Q. During the course of your present employment, were you assigned by the Commission to supervise and investigate all switching operations at the plant of the American Smelting & Refining Company at Garfield, Utah?

A. I was.

Q. Are you the Mr. MacDonald previously referred to by the two witnesses who just preceded you?

A. I am.

Q. Did you supervise such an investigation?

1360 A. I did.

Q. Upon what dates, Mr. MacDonald?

A. The investigation was made March 23, March 24, March 25 and March 26 of 1944.

Q. In addition to your supervision of these investigations, did you personally visit the plant and observe the switching operations there?

A. I did.

Q. Did you make any notes on your investigations or your observations?

A. My notes treat more particularly of the track layout and various physical characteristics of the plant. I did, however, make some notes regarding one day's switching.

Q. How many tracks, Mr. MacDonald, did you observe were in the storage yard?

A. There were ten tracks in the storage yard.

Q. And do you recall the approximate length of those tracks?

A. Oh, I should say they should hold in the neighborhood of fifty cars of concentrates, a short car.

Mr. FINERTY: Mr. Williams, may I ask if you are referring to the tracks on the upper level, the ten tracks?

Q. (By Mr. WILLIAMS) I think that is what you refer to, is it not?

A. That is what I had in mind; yes.

Exam. Way: Are those the tracks that were referred to this morning as the receiving yard?

The WITNESS: Yes, sir.

Mr. FINERTY: And referred to by me as the joint railroad terminal?

The WITNESS: That is right; yes, sir.

Q. (By Mr. WILLIAMS) Mr. MacDonald, where is the Engles track?

A. The Engles track is a track next south of the pest house track. It is a track in the same building, and next north—

Mr. FINERTY: The top of the map is north?

The WITNESS: The Engles track would be next north of No. 1 of the train yard and is sometimes called the new pest house track.

Exam. Way: Now, just a minute—

Mr. FINERTY: They both, Mr. MacDonald, serve the Martin machine, don't they?

The WITNESS: They are in that building, yes.

Q. (By Mr. WILLIAMS) The Martin machine is designated on the map which is Exhibit No. 1, is it not?

Mr. FINERTY: That is right, and also designated under Moriarty's map.

Exam. WAY: Now, these tracks at the bottom of the map here, which you have just referred to, the ten storage tracks, those were the ones that were designated the receiving yard, and they are the storage tracks?

1362 The WITNESS: Been designated as a receiving yard, joint railroad terminal and the storage yard. That might possibly be referred to as the interchange yard somewhere in our reports.

Mr. FINERTY: But if so, Mr. MacDonald, it would be interchanged between the three railroads?

The WITNESS: That, of course, would be the reason for calling it interchange. We would refer to it possibly as interchange.

Exam. WAY: Now, the Engles track you referred to—

The WITNESS: On this map it is in the Martin building, is this track along here (indicating).

Exam. WAY: This one here?

The WITNESS: That is right.

Exam. WAY: That is it.

The WITNESS: Engles or new pest house track.

Q. (By Mr. WILLIAMS) Is the Engles track the same as the new pest house track?

A. Yes, it is.

Q. Where is the extension track?

A. The extension track runs parallel to the Union Pacific main track on the west side, west end of the plant.

Exam. WAY: What do you call that?

The WITNESS: Extension track.

Exam. WAY: This first one down to the bottom?

1363 The WITNESS: Yes, sir.

Q. (By Mr. WILLIAMS) You designated lower dock 4 track on the map.

A. Lower dock 4 is the eastern outlet of the tracks known as B Line, C Line, D Line and E Line, is this track by this north track?

Q. Where is the long house track?

A. The long house track is on the lower level. It is one of the tracks leading to the bullion loading house. This bullion loading house is known as the copper casting machine, and the long house track is the most northerly of three tracks they set empties, three tracks leading to that house.

Exam. WAY: What do you call that track?

The WITNESS: Long house track.

Q. (By Mr. WILLIAMS) Will you identify the middle rack?

A. The middle track is the next track south of the long house track.

Q. Now, the ping pong track?

A. The ping pong track is a track on the lower level. It skirts the north side of a building marked the warehouse, which is between the north and south coordinates 1000 and 500.

Q. Where is the whiskers track?

A. Whiskers track is a continuation of the ping pong track.

Exam. WAY: Which one?

The WITNESS: This one here (indicating).

1364 Q. (By Mr. WILLIAMS) The wall track.

A. There are two wall tracks, the wall track in the hole is down even below the lower level, and it is in that group of tracks marked just south of "A" Row, it is the most southerly of that group of tracks, is this one right here (indicating). The wall track on the upper level is at the eastern end of the plant adjacent to the D. & R. G. main track in here.

Q. What do you mean by this hole?

A. Well, that is a point where there are several stock piles of ore and there may be coal and coke in there, but that is a stock pile.

Mr. FINERTY: The hole, as a matter of fact, includes all these tracks at the lower level?

The WITNESS: No, I think not. My understanding is that hole is that group of tracks that is even submerged below the lower level.

Mr. FINERTY: That is not the way we use it. It may be the way you use it. The hole, as used by the smelting company and Mr. Moriarty, includes all the tracks in the lower level.

The WITNESS: That could well be.

Q. (By Mr. WILLIAMS) The names of the various tracks I have used, are those names commonly used by crews of switch engines in the plant?

A. Yes, sir.

1365 Q. And do those names appear in the reports of the Commission's representatives which have been introduced in evidence?

A. Yes, sir.

Q. Do you recall the names of any of the tracks commonly referred to by name?

A. No, I think all of the other tracks in there have been identified by Mr. Moriarty and properly located by him.

Q. Now, at the risk of possible duplication of testimony, will you tell me what is located on the top level?

A. On the top level is the yard? train yard and storage yard, receiving yard; the scale; the pest house; the thaw house; the repair tracks. I think that covers it.

Mr. FINERTY: By pest house you mean the Martin machine?

The WITNESS: Yes, sir.

Q. (By Mr. WILLIAMS) Now, what is on the second level?

A. On the second level are the trestles leading to, I suppose, the ore bins, at least where ore is delivered to trestles, is about all I can tell you about it.

Q. Now, do you recall what is on the lower level?

A. Yes, on the lower level there is the acid plant, the bullion loading, what is known as the copper casting building or something of that sort, any way, the bullion-loading tracks, warehouse, and these stock piles which I referred to as being in the hole.

Q. Is that lower level referred to also as the third level?

A. I don't know that. I don't think they refer to 1366 it as a third level.

Exam. WAY: Off the record.

(Discussion off the record.)

Exam. WAY: Will you show me, what do you mean, the top level?

The WITNESS: The top level extends from the bottom of the map to a point, or to a line drawn along the southern edge of the sulphide ore bins on this map.

Exam. WAY: All right. Now, what is the second level?

The WITNESS: The second level includes these trestles or Line B, Line D, Line C and Line F, and on the other end includes No. 1 Dock, No. 2 Dock, No. 3 Dock and No. 4 Dock tracks.

Mr. FINERTY: And extended out further, not shown on that map, there is a connection with the upper level at the east end?

The WITNESS: Yes, that is right, out here (indicating).

Exam. WAY: And now the third level.

The WITNESS: The third level includes everything north of the second level.

Mr. FINERTY: And that is the hole?

The WITNESS: That is what Mr. Finerty calls the hole.

Q. (By Mr. WILLIAMS) How many tracks switch the thaw house?

A. Four tracks at the thaw house proper. There is a spur to the south of this thaw house, but it is not covered.

Q. How many trestles lead to the ore bins from 1367 the west end of the plant, as well as the east end?

A. The ore bins, there is the C Line, the B Line, the D Line and the F Line, four tracks. They have a line, by the way, through the trestle, and the other end those tracks are known as Dock 1, Dock 2, Dock 3 and Dock 4.

Q. By the other end you mean the east end?

A. Yes.

Q. How many tracks serve the bullion house?

A. Three tracks, two for empties and one from which the loads are taken.

Q. Who handles the empties placed on the bullion storage track?

A. The D. & R. G. engines. Two of those engines that were assigned to do the work there at different times of the day handle cars to and from the bullion track.

Q. Does the industry engine do any work there?

A. They have all the cars, the empty cars are moved into the loading building by an industry locomotive.

Q. What building is that you are referring to?

A. Copper casting, copper casting building.

Q. Could the carrier's engine get in there?

A. I think so, yes.

Mr. FINERTY: Well, what you refer to as being moved in by the locomotive, you mean it is moved in by a cable boom?

The WITNESS: Well, they have a small dolly engine, it moves the cars in.

Mr. FINERTY: It does it by cable?

The WITNESS: I don't know how they do it. I know they do it.

Mr. FINERTY: Yes. You know anyway the D. & R. G. doesn't put them in the building.

The WITNESS: That is right; they don't put them in the building.

Q. (By Mr. WILLIAMS) Did you ascertain, Mr. MacDonald, whether or not the D. & R. G. W. performs the switching within the plant for the Union Pacific by a contract between them?

A. I understand there is a contract between the two carriers.

Q. Where did you observe most of the switching operations were conducted?

A. Where did I? You mean, where are they conducted?

Q. Yes, the principal point.

A. Well, one engine works practically entirely on the upper level. About all it does outside of working on the upper level is to go to Lower Dock 4, pull the empties off Lower Dock 4. That engine practically weighs cars all day. About the only other move, it is to set concentrates in the pest house. The other two engines work mostly in the west end of the plant and they work on all three levels, and one of those other engines switches the repair track at the east end of the receiving yard.

1369 Q. Was the thaw house in operation when your investigations were made?

A. No, sir; not as the thaw house. The tracks were being used occasionally for switching and storage purposes.

Mr. FINERTY: You mean by the D. & R. G.; they put cars in there?

The WITNESS: Yes, sir.

Q. (By Mr. WILLIAMS) Did you observe the movement from the lower level, upon which is located the bullion house and the acid tracks, to the concentration yard?

A. Yes, I have seen them make pulls out of the bullion track and from the acid track up to the receiving yard. It is a very difficult pull. The locomotives that operate in that plant, that is the D. & R. G. engines, I would say, have a maximum capacity of five cars of copper out of the bullion track to the concentration or classification track.

Q. You mean that appeared to be the maximum number of loads which those engines could pull?

A. Yes, sir.

Q. Is that a steep grade?

A. I think Mr. Moriarty said it was 3 percent grade. It is a very steep grade. It is not that way all the way up to the receiving yard. To the first switchback is a heavier grade than from the switchback to the receiving yard.

Q. Did you observe any sharp curves in the tracks
1370 within the plant area that were used by carrier's engines?

A. No, I did not. In fact, they couldn't make that run up to that switchback if there were any sharp curves in that track.

Q. Could you distinguish between the tracks that were used principally by the engines of the industry and those which the carrier's engines used?

A. Well, just from my own observation, I never did see that carrier's engine anywhere outside of some of the tracks that you might call the hole in the plant, but that does not mean they weren't out there.

Mr. FINERTY: You mean the industry engine?

The WITNESS: That is right.

Mr. FINERTY: You didn't see the industry engine outside the tracks.

Q. (By Mr. WILLIAMS) Now, Mr. MacDonald, did you make notes from your personal observation of those switching movements on one day?

A. I did, from three-thirty to whatever time the engine went to the house on the 23 of March.

Q. On the 23rd of March. What do you mean by the house?

A. Well, we say the house. I mean to the terminal the engine ties up, which is Garfield station.

Q. By the way, was that movement of empty cars or loads or both?

A. Well, I saw movements of both kinds. I saw 1371 deliveries to the trestle tracks on the second level; I saw deliveries to the bullion track, from the bullion track, and I saw some general switching done in the upper yard as a receiving yard, saw tanks set in the acid track, pulled from there. I think that about covers it. Well, they had set down in the wall track, down in the hole on the wall track.

Q. Using your notes to refresh your recollection if you like, will you state the result of your observations of this day's switching movement?

A. Well, I noticed that on that day, and I also noticed from the reports of the men, that among the moves they make in that yard are some in connection with the empty cars for bullion loading. They move those cars from the receiving yard, place them on what is known as Dock A, or the coal trestle first—not always, but in many cases. Later on they move them from the coal trestle and set them in either the middle track or the long-house track, and then for some reason or other, although they can be moved from either track, they are required to set them over from the long-house track to the middle track. It seems to me an unnecessary switch. Then in connection with concentrates,

they frequently fill the old pest house track and put the overflow into the new pest house track, and then later on remove the empties from the old pest house track and set the old pest house by removing the cars from the new 1372 pest house and placing them on the old pest house track.

Q. Any other movements which you wish to describe and haven't been covered?

A. I don't think so. I don't recall any that seem to be worthy of note.

Q. Now, Mr. MacDonald, was Mr. Gordon Morris, one of the Commission's representatives that observed the switch operations of this plant, under your direction?

A. Yes, sir.

Q. What is his position, what was it at that time?

A. He was inspector of—he is investigator for Bureau of Safety, Interstate Commerce Commission.

Q. He is not present, is he?

A. No, sir.

Q. Do you know of your own knowledge whether or not he made investigations in this plant under your direction?

A. Yes, sir; he did.

Q. Upon what dates?

A. March 23, 24, 25 and 26, 1944.

Q. Did he prepare a written report to your office, observations of the switching operations?

A. He did.

Mr. WILLIAMS: May I have this exhibit consisting of 15 pages marked for identification as Exhibit No. 8.

Exam. WAY: Let it be so marked.

1373 (Marked for identification "Commission's Exhibit No. 8, Witness MacDonald.")

Q. (By Mr. WILLIAMS) I hand you Exhibit No. 1 and ask you to state what that is.

A. This is a typewritten report compiled from the notes taken by Inspector Morris during his observations of the plant of the American Smelting & Refining Company at Garfield, Utah, March 23 to March 26, inclusive.

Q. Did you confer with Mr. Morris in respect to his investigations?

A. Yes, sir; I did.

Mr. WILLIAMS: I will offer this exhibit in evidence as Exhibit No. 8.

Mr. FINERTY: Just before it is offered in evidence may I ask two or three questions. Mr. Morris' instructions from you, Mr. MacDonald, were the same as the other gentlemen who have testified?

The WITNESS: Yes, sir.

Mr. FINERTY: And as far as you gained any knowledge of the way he carried out his instructions, he did them the same way they did?

The WITNESS: Yes, sir. And I want to point out in this report, he very frequently states what is in a car, and that, of course, that information, has to be had from the engine foreman in every case.

1374 Mr. FINERTY: Mr. Morris wasn't an expert on whether it is an ore or a concentrate?

The WITNESS: That is right.

Mr. FINERTY: So that is purely hearsay?

The WITNESS: Yes, he has to get that information.

Mr. FINERTY: And so far as you know he knew nothing of what was in the cars and why it was moved to one place or the other?

The WITNESS: That is right. Only as I say, without someone telling him.

Mr. FINERTY: I have no objection providing we strike the information as to the contents of the cars.

Exam. WAY: Well, I think that has been explained as to how he got it, that he had some first-hand information, something that was told to him. It is received.

Mr. WAY: I wish to offer that in evidence as Exhibit No. 8.

Exam. WAY: It is received.

(Commission's identification Exhibit No. 8, Witness MacDonald, received in evidence.)

Mr. WILLIAMS: I would like to have this exhibit, consisting of 28 pages, marked for identification.

(Marked for identification "Commission's Exhibit No. 9, Witness MacDonald.")

Q. (By Mr. WILLIAMS) Mr. MacDonald, I hand
1375 you exhibit marked for identification as No. 9 and ask you to state what that is.

A. This is a statement compiled from the notes taken by the observers at the Garfield plant of the American Smelting & Refining Company between March 23 and March 26, inclusive, and represents the number of and movement of cars through the plant.

Q. Did you select these movements?

A. Yes, sir.

Q. You included both intraplant switching, as well as other switching, did you not?

A. Yes, sir.

Q. Mr. MacDonald, what does the designation Assignment No. 1, 2 or 3, which appears on this exhibit marked for identification, as well as the three exhibits which just preceded it, stand for?

A. For our convenience, in order to be able to state without too much trouble who accompanied the engine, we assigned numbers to each one of the observers. These assignment numbers are the assignment number given to the observer during the period of this observation.

Q. They have no other significance, I believe?

A. No, sir.

Mr. WILLIAMS: I offer this in evidence as Exhibit No. 9.

Mr. FINERTY: Just one moment, Mr. Examiner. On page 1 of this exhibit and page 2 of this exhibit, it appears 1376 on other pages of the exhibit, 18, appears the designation, intra-plant switching, again on page 10, and possibly other pages of that exhibit. Are you using that term as used by the tariff, or is that a term as you use it for some purpose of your own. Do you know anything about the tariffs, Mr. MacDonald?

The WITNESS: I know what they call for. I am not an expert.

Mr. FINERTY: You are not an expert in tariffs?

The WITNESS: No, sir.

Mr. FINERTY: So you don't know a particular movement designated on here as intra-plant switching by the number of the tariff, for which there would be an intra-plant tariff?

The WITNESS: Since I am not an expert, I am not qualified to answer that. I can say this, for my own satisfaction, I believe I know an intra-plant movement.

Mr. FINERTY: You are better than I am.

The WITNESS: I say for my own satisfaction.

Q. (By Mr. WILLIAMS) Mr. MacDonald, where do you get this information regarding switch charge, intra-plant, \$2.70, page 2, for example?

A. That is taken from the bill that the Denver & Rio Grande Western Railroad Company presented to the A. S. & R. Company for this particular switch.

Mr. FINERTY: Yes, and what you mean by intra-plant switching then in this is the movements that now, 1377 under the tariff, published in 1938, take a switching charge for something that may or may not be intra-plant switching?

The WITNESS: Well, that is, of course, we are talking about the present status of things; yes, sir.

Mr. FINERTY: And you are not attempting to say whether or not the particular switch movement is in connection with line-haul or independent of line-haul, you don't know, do you?

The WITNESS: Well, I wouldn't know. I can't say positively, no.

Mr. FINERTY: And may I ask you one other question. Each of these movements did not require an engine just to move these cars. These movements were in conjunction with other cars, were they not?

The WITNESS: More than likely.

Mr. FINERTY: Yes, and more than likely in conjunction with movements of other cars to other places?

The WITNESS: Oh, yes, quite likely.

Mr. FINERTY: With that understanding, of the use of intra-plant switching, that it does not attempt to define the character of the movement, I have no objection to the exhibit.

Exam. WAY: Received.

Mr. WILLIAMS: I wish to offer this in evidence as Exhibit 9.

Exam. WAY: It is received.

1378 (Commission's identification Exhibit No. 9, Witness MacDonald, received in evidence.)

Mr. FINERTY: I suppose Mr. MacDonald will be here for any further questions.

Q. (By Mr. WILLIAMS:) I think, Mr. MacDonald, you may select any one of these pages at random and go through it in order to be sure that the meat of the various pages in this exhibit will be understood.

A. Well, we will take one.

Q. Is it a fact that these—each of these movements are in one of the prior reports that have gone into evidence here?

A. That is correct. By interlocking these reports and taking from each the information concerning the cars in the chronological order, this record will be the result.

Q. Well, go ahead with any shipment you might select.

A. I will take this one that I have marked intra-plant switching here. It is Union Pacific 63182 and appears on Page 10. This record shows that at 6:33 p. m. on March 23, 1944, as an empty, that car was handled by one of the engines, by the engine which goes to work at 3:30 in the

afternoon, from Track 3, that would be in the receiving yard, to the wall track. The next day at 1:20 p. m., as a load, it was moved by one of the 7:30 o'clock engines from the wall track to Track 3, back in the yard. At 2:24 p. m.

the same day it was taken by the other engine going 1379 to work at 7:30 a. m. from Track 3 to the scales and weighed, and then it was returned to Track 2 in the receiving yard. At 6:14 p. m. the same day the same car-load was taken by the 3:30 p. m. engine, was taken from Track 2 to Track 8.

On the next day at 4:59 p. m. it was taken by the 3:30 engine from Track 8 to the B Line, and then it was moved by the A. S. & R. car mover, but it was taken to Lower Dock 4, and that is the seventh move on the car.

On March 26 at 10 a. m. it was taken from Lower Dock 4 to Track 2, at which time it was empty. The same day at 10:51 a. m., again empty, it was taken from Track 2 to Track 8, and the same day at 5:57 p. m., still empty, it was taken from Track 8 to the wall track.

Mr. FINERTY: All within the plant?

The WITNESS: All within the plant.

Mr. FINERTY: And by luck or design you stumbled on a real, genuine intraplant switch.

The WITNESS: I am glad to hear that.

Q. (By Mr. WILLIAMS) Mr. MacDonald, you paid one switch charge only for these movements, is that correct?

A. That is all that appeared.

Exam. WAY: Do you know how many charges there should have been? I assume you don't. You haven't qualified as a tariff man.

The WITNESS: No, sir.

Mr. FINERTY: Or do you know whether all of these 1380 movements from one track to the other after loading were asked by the industry or were purely for the convenience of the D. & R. G. engine that was doing the switching?

The WITNESS: That I don't know.

Mr. FINERTY: In other words, a lot of these moves were just exactly as I said before, are in connection with handling of shipments by the D. & R. G., other car movements. In other words, an engine did not go down and make all the movements for this car alone?

The WITNESS: This car alone?

Mr. FINERTY: Yes.

The WITNESS: No, I don't know so.

Mr. FINERTY: And for all you know intra-plant switching charges may be made on those other cars?

The WITNESS: That is right, sir.

Q. (By Mr. WILLIAMS) In your judgment the selection of these shipments is representative of the various movements that were observed by the Commission's representatives?

A. I think it covers most of the different kinds of moves that are made in the plant, or were made in the plant while we were there.

Q. Do you have anything to add to your testimony?

A. No, I don't think of anything.

Mr. WILLIAMS: You may cross examine.

Cross Examination.

1381 Q. (By Mr. CAMPBELL) Mr. MacDonald, as I understand it, as far as the lay-out and the purpose of all the tracks in the plant, your observation simply is the same as what is shown on Exhibit 1, the big map here, isn't it?

A. Yes, sir.

Mr. CAMPBELL: There is no difference there. We reserve the right to cross examine Mr. MacDonald on Exhibits 7, 8 and 9 if we deem it necessary later when we have an opportunity to study these exhibits a little more.

Q. (By Mr. FINERTY) Mr. MacDonald, on further examining your Exhibit No. 9, apparently you have used the term intra-plant switching to designate movements of a car which is empty in the plant to a point within the plant for loading and which is unloaded in the plant, is that correct?

A. Let me get that again.

Exam. WAY: Read it.

Q. (By Mr. FINERTY) Of all the cars that I see headed intraplant switching, they were cars that within the plant were empty when you first observed them, were loaded within the plant and subsequently unloaded within the plant?

A. That is right.

Q. So those are all purely intra-plant switching under any designation?

A. That is what I thought, yes.

Q. And, of course, all of those, a charge was paid?

1382 A. Yes, sir.

Mr. FINERTY: That is all of the cross examination.

Exam. WAY: You are excused subject to recall for further questioning.

Mr. WILLIAMS: Off the record.

(Discussion off the record.)

Mr. FINERTY: May I ask Mr. MacDonald one question?

Q. (By Mr. FINERTY) On the whole it seems the D. & R. G. operation with the handling of shipments to and from the smelter at Garfield was efficient?

A. If you speak of the switching in the yard I think it is quite orderly, as well done as it may be.

Q. Not you think, but it is orderly.

A. Yes.

Mr. FINERTY: That is all.

Mr. WILLIAMS: The Commission has no further testimony on the Garfield plant.

Exam. WAY: Does that conclude the testimony with respect to the Murray plant? If it does I want to ask Mr. MacDonald a few general questions.

Mr. CAMPBELL: At Garfield?

Exam. WAY: The Garfield plant.

Q. (By Exam. WAY) With respect to these intra-plant moves, do they result in any manner in interference or interruption to interstate movements, did you observe 1383 anything of that character?

A. No, I can't say that I did. The great majority or greater part of the material that comes into the plant, their loads, is intrastate, and as I take it from your question, any time you mix an intrastate shipment with an interstate it might be considered as interference or something of that sort?

Q. The thing I am trying to get at, if it is necessary to pull out interstate cars to place intrastate cars.

A. It probably would be, yes.

Q. Does it occur to any great extent?

A. Well, I don't know. Concentrates are set practically in blocks.

Q. Have you any idea, do you know how the intrastate and interstate traffic how it is divided as to proportions?

A. Well, I would say that it is certainly—60 percent of the inbound must be intrastate.

Q. Intrastate?

A. Yes, sir. I think that those concentrates are altogether intrastate. Some of the ore is intrastate. Sand is intrastate. I think the lime rock is intrastate. I am not sure about it.

Mr. FINERTY: About 90 percent, we will show, was intrastate inbound. In other words, Mr. Examiner, it might be a question of interference with intrastate commerce by interstate commerce.

1384 EXAM. WAY: That is what I am asking about, only the other way around.

Q. (By EXAM. WAY) Now, is this plant so laid out that there are certain definite commodities moved to these particular locations?

A. Yes, sir; I think that you can say that definitely, and it is not a case where the shipments are confused, or put in the yard or confused so it requires a number of switches to place cars and pull them out. I think in a few words you could tell what each engine does during the whole day. That is, to say the switching is done the same way every day, consists of certain things going certain places, setting certain cars in at certain places, and taking the empties out and weighing them. I think it is an orderly procedure.

Q. Have you observed any additional switches on interstate traffic, that is any moves beyond the placing of a car?

A. Well, as I said previously in the number of empties for loading bullion, it seems to me that in many cases there is at least one additional move made that isn't required or shouldn't be required. Sometimes, I am speaking, of concentrates, that is intrastate, speaking of that, then again, too, in pulling the bullion up, the loads, it is necessary frequently to make two trips down there because of the inability of the engine to handle part of the traffic up the hill, and that is because of the very heavy grade.

1385 MR. FINERTY: Well, on those two trips the engine may still take empties down for loading, or it may take miscellaneous commodities for deliveries?

THE WITNESS: That is right; yes, sir.

Q. (By EXAM. WAY) Practically everything you have shown here is intraplant?

A. No, I don't think so.

MR. FINERTY: No, only a few.

THE WITNESS: Here is the third one, page 3. Of course, that is intrastate, that is a load of sand. No. 4 in interstate, a load of copper from Nevada. No. 5 in outbound interstate bullion.

Q. (By EXAM. WAY) Let's take your No. 4. That car at 2:24 p. m. as a load, that moved from Track No. 3 to the scales and was weighed?

A. Yes, sir.

Q. And in perhaps a continuous movement it went from the scales to Track No. 2?

A. That is right.

Q. Why did it go to Track 2, do you know?

A. Well, it was evidently placed there awaiting orders from the plant for its disposition. I can't say positively that is what it was put there for.

Q. Then at 6:12 it moved from Track No. 2 to Track No. 8?

A. No knowledge at all as to why that move was made.

1386 Q. Then at 11:15 the next day it was taken from Track 8 and placed in Dock D?

A. That is for unloading.

Mr. FINERTY: You assume it is for unloading?

The WITNESS: Since it came off that dock empty I assume that is what they put it down there for.

Q. (By Exam. Way) Now, it appears that that car had four moves after it was moved from Track No. 3.

A. Yes, four moves to Dock D.

Mr. FINERTY: Well, Mr. Examiner, may I ask him a question?

Exam. Way: Yes.

Q. (By Mr. FINERTY) One of those moves was over a scale?

A. Yes, sir.

Q. And the track that it unloaded on was Track 3?

A. I presume so. It came in on the 24th, and it is to be presumed it was on Track 3.

Q. Then it was weighed over the scale?

A. Yes, sir.

Q. Then you presume it was put back on Track 2 for spotting orders?

A. I presume so. It had to be put on some track.

Q. You don't know why it was put on Track 8?

A. No, sir.

1387 Q. It might be because it was mixed up with some other cars and put in on Track 8?

A. It might be.

Q. It was finally put on Dock D for unloading?

A. Yes, sir.

Q. It was then moved out of the lower end to the east and brought back over the scales?

A. Yes, sir.

Q. Now, all those movements were for the purpose, so far as they moved, for hauling ore, for sealing, and were for the purpose of determining the light and empty weight of that car on unloading?

A. I suppose.

Q. (By Exam. Way) Well, do you know that?

A. No, I don't know that.

Exam Way: You weren't testifying; you were just asking him the question?

Mr. FINERTY: That is correct.

Q. (By Exam. Way) Now, about the tracks—

A. Yes, sir.

Q. What are the condition of the tracks in this plant?

A. The tracks are maintained in quite good condition. I don't know of any—

Q. Are the rails heavy enough to accommodate the carrier's locomotives?

A. Yes, sir. I think right now of one curve that is a bad curve, and that is acid spur. It is down on the lower level, but that is a right sharp curve. I don't know what the degree of curvature is, but I should say around 20 degrees.

Q. Is there any impairment of the tracks, that is as to distances from buildings, etc.?

A. Well, of course, I don't know what the state laws may be, and there are some places where the clearances are not what they should be for absolute safety, but so far as operating cars and engines on those tracks, there is nothing to be said against them.

Q. Well now, getting back to that switching for just a minute more, rather to the weighing, have you observed such a situation where cars are loaded and they are brought down to the scales and found they weighed either too much or too little and it was necessary to switch them back to the point of beginning to either unload or finish loading?

A. We had no case of that kind while we were there in this plant.

Q. How about empty cars in that plant, do they keep the plant cleaned out of empty cars, or are the tracks full of empty cars?

A. No, the tracks are not full of empty cars. I think that any time I was up there there were always three or four clear tracks in the yard.

Q. So that it did not appear to be necessary to move empty cars in order to switch in other cars?

A. No, sir. I presume some of these moves would show the speed with which they moved some of those cars through the plant. For instance, concentrates, they go in one day and out probably a day or two later.

Exam. WAY: Well, that is all the questions I have at this time. There might be some general questions later on. You are excused.

(Witness excused.)

Exam. WAY: That concludes the Garfield plant. Then which is the next plant to be taken up?

Mr. WILLIAMS: Mr. Examiner, does the industry wish to proceed with the Garfield plant?

Exam. WAY: Just a minute, strike what I said before there. Is the industry ready to proceed with the Garfield plant?

Mr. COLLINS: Mr. Examiner, I thought the industry was going to submit its testimony with respect to the Garfield plant, which we have had in discussion all day.

Exam. WAY: I am just asking him now if he is ready to proceed.

Mr. FINERTY: Yes; we can.

Exam. WAY: We will recess five minutes.

(A short recess was taken.)

Mr. FINERTY: I will call Mr. Tuckwood.

1390 O. W. TUCKWOOD was sworn and testified as follows:

Direct Examination.

Q. (By Mr. FINERTY) Will you give your name, address and occupation?

A. O. W. Tuckwood, 120 Broadway, New York, General Traffic Manager, American Smelting & Refining Company.

Q. And how long have you occupied that position?

A. I have been in that particular position since October 1, 1942.

Q. And prior to that what position did you occupy?

A. I was general traffic manager and later vice-president of the Chilean Nitrate Sales Corporation, in charge of all domestic and foreign transportation for a period of seven years.

Q. And prior to that, Mr. Tuckwood?

A. For five years I was traffic manager of Johns-Manville International Corporation, and prior to that, from 1919 through 1929, I worked for the Tona Railway Company, a Class II carrier, California, starting in the yard and working through various departments, occupying the position at various times of auditor, traffic manager, and later as general manager. During that same period I was traffic manager of the American Potash & Chemical Cor-

poration, the parent company.

Q. During all those periods you were required, in the performance of your duty, to familiarize yourself with railroad tariffs?

A. I was.

Q. Have you made a study of the tariffs applicable to interstate and intrastate traffic in the movements of commodities in and out of the Garfield smelter?

A. Yes, sir; insofar as the terminal services, switching, etc., is concerned in this proceeding.

Q. Have you prepared certain exhibits in that connection?

A. Yes, I have, I think in order to get a composite picture, I would like to introduce four exhibits, one after the other, with respect to the history of the switching.

Exam. Way: All right, let's mark them up.

The WITNESS: Mark all four of them. One is the history of switching of the Garfield smelter from 1908 up to present date.

Exam. Way: That will be No. 10.

(Marked for identification "Intervener's Exhibit No. 10, Witness Tuckwood.")

The WITNESS: That is as published by the Rio Grande. The next is the history of switching at the Murray smelter as published by the Rio Grande.

Exam. Way: Just a minute, that will be No. 11.

(Marked for identification "Intervener's Exhibit No. 11, Witness Tuckwood.")

The WITNESS: The next is the history of switching at the Murray plant as published by the Union Pacific.

Exam. Way: No. 12.

(Marked for identification "Intervener's Exhibit No. 12, Witness Tuckwood.")

The WITNESS: The next is the history of switching at the Leadville plant as published by the Rio Grande.

Exam. Way: No. 13.

(Marked for identification "Intervener's Exhibit No. 13, Witness Tuckwood.")

Exam. Way: Mr. Finerty, do these exhibits, the printing of these exhibits come within the requirements of the rules of practice?

Mr. FINERTY: I understand that at present they receive any type of reproduction if it is legible, due largely, I imagine, to war conditions.

Exam. Way: All right.

The WITNESS: These exhibits are practically the same as the exhibit introduced, Exhibit No. 7 introduced by Mr. Carey this morning. The only comment that I have to make—Strike that from the record. The only difference is that these reproduce the tariff publication effective April 16, 1908, which I understand was the first date that the freight switching was published in tariff form.

Mr. CAMPBELL: May I interrupt there? You don't mean Exhibit No. 7 introduced by Mr. Carey, do you?

1393 The WITNESS: Through 1920, this is identical to what Mr. Carey shows.

Mr. CAMPBELL: Yes, but it isn't Exhibit 7.

The WITNESS: I am sorry. I made a mistake there, it is

4.

Mr. CAMPBELL: It is No. 4, 3 or 4, somewhere along there.

Mr. COLLINS: May I ask a question right here? Do these four exhibits, 10 to 13 consist entirely of excerpts from tariffs or tariff rules?

The WITNESS: Yes.

Mr. COLLINS: And references to tariffs?

The WITNESS: Yes.

Mr. COLLINS: No statements of your own individually?

The WITNESS: No, no.

Q. (By Mr. FINERTY) They merely supplement Mr. Carey's exhibit in that they carry the tariff rules back approximately four years before?

A. That is correct.

Q. And so far as you know reflect the publication of these rules from the first publication with the Interstate Commerce Commission?

A. That is correct.

Q. And between 1908 and 1920 all of these tariffs allowed under the line-haul rate and provided under the line-
1394 haul rate, not only have switching in connection with road hauls such as weighing, thaw house, sampler, and final spotting, but they also provided for switching without charge between tracks in the plant itself?

A. They did.

Q. Purely intra-plant switching?

A. They did.

Q. And in 1920 intra-plant, purely intra-plant moves were taken out of the provision of the tariff, or the switching of such moves without charge?

A. That is right, they were. The terminal services performed by the railroads serving Utah and Colorado

smelters were brought to the attention of the courts when on November 20, 1916, the Oregon Short Line filed complaint in the United States District Court for the District of Utah, against the American Smelting & Refining Company, for a sum of \$60,378.71 for switching services performed at the Murray, Utah smelter for the period December 1, 1912, to October 31, 1916. A second complaint was later filed to cover the period, November 1, 1916, to December 31, 1917, for the amount of \$23,830.81. On August 9, 1919 District Judge Johnson handed down his decision, a copy of which I would like to now offer in evidence.

Exam. WAY: What does that suit involve, alleged undercharges?

The WITNESS: On switching services. No alleged rebating in connection with freight switching service.

Mr. FINERTY: The Examiner is correct technically. They alleged undercharges in that the railroad contended that they should pay for the switching services under the tariff.

Mr. COLLINS: Have you the citation of the case?

Mr. FINERTY: Yes, the case is 256 Federal, 737.

Mr. COLLINS: The title?

The WITNESS: And American Smelting & Refining Company versus Union Pacific Railway Company, and the second case was Oregon Short Line Railroad Company versus American Smelting & Refining Company, 269 Federal, 898.

Exam. WAY: It will be marked Exhibit 14.

(Marked for identification "Intervener's Exhibit No. 14, Witness Tuckwood.")

The WITNESS: While this decision involved only the Murray, Utah, smelter, it was, nevertheless, a test case for all Colorado and Utah smelters. The assignor named by Judge Johnson in his opinion was the D. & R. G. W. Railroad, which road also served the Murray smelter, although the actual plant switching was done by the Oregon Short Line. I would like to direct specific attention to the remarks made by Judge Johnson.

Exam. WAY: I don't think that is necessary. It speaks for itself and the rest of it is a matter of argument.

Mr. FINERTY: It is not a matter of argument to direct attention to the part that we think is relevant.

Exam. WAY: You can do that in your brief.

Mr. COLLINS: Mr. Tuckwood, before you go on, may I ask a question about your Exhibit No. 10 which makes reference to tariffs of the D. & R. G. W. covering switching,

etc., at Garfield, I see nothing in either of the four exhibits that has to do with any tariff publication of the Union Pacific.

The WITNESS: Yes. At Garfield, I didn't have the records so I couldn't make it up, but I am assuming—I believe I am correct—that being competitive they would be the same as the D. & R. G. I have also prepared a statement consisting of seven pages showing representative tariff items covering procedure for determining destination weights, waybilling, a determination of values and also certain sampling in transit privileges applicable to ores and concentrates, which I would like to offer in evidence.

Mr. FINERTY: It will be Exhibit 15.

Exam. WAY: Yes, marked Exhibit 15.

(Marked for identification "Intervenor's Exhibit No. 15, Witness Tuckwood.")

The WITNESS: Item No 349-30 of Union Pacific tariff No. 7020, I. C. C. 606, reproduced on page 1 of this exhibit, clearly shows that for ores and concentrates and mill or smelter products, the destination weights must be 1397 used for the purpose of computing freight charges.

It is true that an exception is provided in that the Union Pacific Railroad Company will also accept weight obtained at a sampler if shipment is stopped for sampling in transit. Other railroads follow the same practice. However—

Q. (By Mr. FINERTY) That is of an independent sampler?

Exam. WAY: Let me ask you right there before I forget it, is there any contention that any of these movements through this plant consists of shipments in transit?

The WITNESS: Very definitely.

Exam. WAY: There is?

The WITNESS: Very definitely. However, it is very important to point out here, that the railroad will only accept such sampler weights on the condition that the smelter uses the same weight, and that the same weight is used as the basis of settlement with shippers. Ores, concentrates, mill and smelter products all contain varying percentages of moisture, and since the smelter pays shipper on the basis of metal values on a dry weight basis the carriers cannot compute their freight charges until the moisture determination has been secured and the assay run on the dry weight basis. The carrier can then learn how much per ton, on a dry weight basis, the smelter pays the shipper. Using

this smelter value the carrier can then convert the figure to a wet weight basis for the assessment of freight charges. For example, a shipment arrives at a sampler or smelter and when weighed there the net is 100,000 pounds, but there is 10 percent moisture in the material which means that the smelter will pay the shipper for 90,000 pounds of dry weight based on the metal values contained in that dry weight. Assume the assay shows the metal values to be \$50 per dry weight ton, or \$2,250 for the entire carload, and which is the basis of settlement with the shipper. The railroad will then compute its freight charges by converting the value to a wet ton basis of \$2,250 for the 100,000 pounds of wet material transported, which would give the railroad a value for freight purposes of \$45 per ton and the rate applicable to that value would be applied to the net wet destination weight to determine the freight charges due. An accurate destination tare weight is of as great importance to the carrier as is a correct net wet weight in all cases where freight rates are based on smelter values.

Q. (By Mr. FISHERY) Before you go into that, in other words, the railroad company receives the same rate on 10,000 pounds of water that it carries in that shipment which you mention as it receives on the ore?

A. Correct.

Q. But it receives in place of the value of the dry sample, it receives a slightly lower value based on the wet weight of the car?

A. That is correct.

1399 Q. Therefore, it is essential for the railroad, in order to know what freight charges it can legally charge the industry to have the dry weight first determined and then translate that back to a wet basis?

A. Absolutely. A metallurgical engineer will later testify that no smelter settlement with shipper can reflect the correct values of the metals contained in a shipment unless, among other things, an actual tare weight of the car is obtained. Carriers would be compelled to revise their entire rate structure on ores, concentrates and mill and smelter products if they discontinue securing actual tare weights. The railroads in their tariffs specifically say that the rate used for waybilling, and I quote, "and rate shall be revised in accordance with such certified value." The railroads further reserve for themselves the right to verify the smelter valuation by special assay or otherwise. When a

railroad publishes its rate based on destination weights and values it must be assumed that it implies correct value and no value based on weight is correct unless all weights, gross, tare and net, are actual and accurate, and not inflated or deflated, which would happen in the case of practically each and every shipment if the stencilled tare of the car was used.

Exam. WAY: And that is, you mean by that, if the stencilled weight of the car was used?

1400 Mr. FINERTY: If the weather were dry it might be the actual weight of the car would be less than the stencilled weight; if the weather were wet it would be greater than the stencilled weight.

The WITNESS: It would fluctuate greatly, especially with materials that contain considerable quantities of moisture.

Q. (By Mr. FINERTY) And couldn't get your dry weight basis for assay?

A. You wouldn't have a correct dry weight unless you had actual weight. Therefore, the car is still in transit until all these determinations have been made.

As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course. The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built. Solid and convincing confirmation of those agreements have been carried down through the years in the tariff publica-

1401 tion of the carriers and is today explained in the tariff quoted in these exhibit 10, 11, 12 and 13 introduced in evidence.

The unusual nature of the non-ferrous mining, smelting and refining business requires these traditional transit privileges, and where they are provided in the line-haul rate there can be no interruptions in movement not already provided for in the orderly process of moisturing weighing, sampling and thawing when necessary and final spotting at the end of the line-haul at the stockpile or receiving bin. As a matter of fact the metals shipped out of these non-ferrous smelters move under transit privileges through the refineries to final destination and in those cases

where line-haul rates do not include the service, a specific charge is made for the transit services through the refinery and the weight losses between smelter and refinery are specifically provided for my railroad tariff provision, and which again illustrates the great importance that carriers place on accurate destination weight at each point of transit in connection with the movement of non-ferrous metals, whether they are transported in the shape of ore, concentrates, or mill products to the smelter, or smelter products from one smelter to another or in the form of bullion to a refinery.

Page 2 of Exhibit No. 15 reproduces two representative tariff items, one Union Pacific and one D. & R. G. W., which shows that when rates on ores and concentrates are based on values they are billed from origin points at a valuation of \$100 per ton, and that then final settlement value with a shipper is determined on a dry weight basis, the waybilling rate is revised on the basis of such settlement but on a wet weight basis. For the convenience of carriers in securing their valuation for freight purposes, our smelter converts their settlement value with shippers to a wet weight basis, even though the certification of value as outlined in the tariff is on a dry weight basis, and which is the basis of settlement with the shipper.

Q. In other words, Mr. Tuckwood, the Garfield smelter furnishes the carrier with a certified dry weight basis of value?

A. Yes.

Q. Showing the assay?

A. Shows the settlement with the shipper.

Q. The settlement with the shipper? Then it also furnishes the carrier with a translation of that dry weight basis into a wet rate basis of values?

A. Yes, we do that for the carriers.

Q. And the carriers then assess their charge on a translation of that wet weight basis?

A. Yes, it always assesses bills on the basis of that wet weight value.

Mr. COLLINS: They do haul the water?

The WITNESS: Yes, and they are entitled to be paid for it. Sampling in transit privileges are most intimately related at destination smelters. This is sampling en route, and inasmuch as these transit privileges also apply at smelters for shipment beyond it is pertinent to the matters here being investigated that brief comment be made concerning published sampling in transit rules.

Q. (By Mr. FINERTY) Mr. Tuckwood, just before we pass to that matter, Mr. Collins remarked the carriers haul the water, they get paid for it. They get their \$50 a ton as if it were ore valued at \$48 or \$49 a ton.

A. I don't quite understand that question.

Q. When you pay the carrier in your example, 100,000 pounds of wet weight—

A. Wet weight.

Q. The carrier has in that gross wet weight 10,000 pounds of water?

A. Correct.

Q. And on that 10,000 pounds of water he gets paid the same amount per pound or per ton as he gets on the dry weight of the ore that is hauled in that shipment.

A. Oh, yes, and furthermore—

Q. It is an expensive form of transporting water?

A. In the wintertime when snow and ice accumulates on these cars he is paid on the gross weight before it goes through the thaw house.

1404 Mr. COLLINS: What is the use to have a recasting of the weight after you get the dry weight figure?

The WITNESS: I don't understand.

Mr. COLLINS: What is the use of relating the dry weight back to the wet weight?

The WITNESS: I explained that, your settlement with the shipper is on a dry weight basis.

Q. (By Mr. FINERTY) That is the smelter settlement with the shipper?

A. Yes, the smelter settlement with the shipper is on a dry weight; the smelter settlement with the carrier is on a wet-dry basis.

Mr. COLLINS: The ascertaining of the dry weight is not of interest to the railroad?

The WITNESS: Oh, it is very vital because without the dry weight you could not secure a correct settlement value.

Mr. COLLINS: Settlement value?

The WITNESS: That is correct. You could not secure a correct settlement.

Mr. COLLINS: In other words, you take the value as it is ascertained on the dry weight, is that it?

The WITNESS: The settlement, I stated it roughly as the tariffs express it. The freight settlement is based on the settlement made by the smelter with the shipper,
1405 and which settlement is on a dry weight basis and, therefore, it must be converted to a wet weight basis

y the carriers to secure an accurate computation of the freight charge.

Pages 3 to 7, inclusive, of Exhibit No. 15 reproduce representative transit privileges available to shippers of ores and concentrates sending shipments to Utah and Colorado smelters as well as smelters in other states. Union Pacific Tariff No. 7020 I. C. C. 606, provides in Item 349-25-B for sampling in transit of ores.

Mr. CAMPBELL: What page are you on?

The WITNESS: That isn't on there. It is an item I inadvertently omitted, of ores and concentrates at Salt Lake City, Garfield, Midvale, Murray or International, Utah. This item was inadvertently omitted from my Exhibit No. 5, and I wanted the tariff authority in the record. I do not believe it is necessary to analyze each item on page 3 to 7 in detail.

Mr. COLLINS: What exhibit are you talking about?

The WITNESS: No. 15. But the published tariff items reproduced on those pages furnish the evidence in support of what I now say.

Sampling in transit privileges are applicable at independent samplers as well as at smelters without any extra railroad charge for the transit service for the first sampling. These sampling in transit services at times 406 apply even though sampling, en route to a smelter, requires an out-of-line-haul with no extra railroad charge for either the out-of-line haul or for the extra railroad service to and from the sampler. There is no diversion charge if a shipment is sent to one smelter, sampled here, and later diverted to another smelter. The omission of the diversion charge, as well as the provisions for sampling, either en route or at destination, clearly expresses the intent of the tariffs that the line-haul does not and cannot end until the delivery at final unloading point, either stock pile or receiving bin, has been made.

In other words, the carload is entitled to one spotting service after sampling has been completed. A shipment may move into the Garfield, Utah, sampler or smelter—

Q. (By Mr. FINERTY) Wait a second, are you getting these correct?

A. A shipment may move into the Garfield, Utah, smelter for sampling, and then be reforwarded to Murray or other smelters without any charge for the transportation service into and out of the Garfield smelter, including the weighing and other transportation services incident to sampling

while at the Garfield smelter. Such a shipment may either be consigned to the Garfield smelter and reforwarded to other destination smelter, or it may be sampled at some other smelter or independent sampler and forwarded 1407 to the Garfield smelter without extra charge.

For the twelve months ending with March 31, 1944, a total of 31 carloads of ore moved to the Garfield smelter where it was sampled and later moved to another smelter, and all without extra railroad charges for the weighing and transportation services performed at the Garfield smelter.

Q. Now, Mr. Tuckwood, what you mean is that, that taking one of those cars billed into the Garfield smelter, they came in on the road-haul train of some carrier, it was switched out of that train into a hold yard, a joint railroad terminal?

A. Correct.

Q. Before it was switched into the joint railroad terminal yard it was moved over the scales and weighed?

A. It was moistured, moistured in the terminal yard.

Q. Moistured in the terminal yard, weighed. That is a movement over the scales. It was moved from the scales, if it was ore, to the unloading docks?

A. Yes, this was all ore.

Q. That car went through the sampler and came out of the sampler and was reloaded into either the same car or another car and moved on to Murray or some other smelter?

A. Correct.

Q. And there was no charge whatever for all those movements within the Garfield smelter tracks on that car?

A. It was all provided for by the tariffs free.

1408 Q. By the transit tariff free?

A. Yes.

Q. In spite of the fact since 1938 if that car had ended at the Garfield smelter there would have been a charge for the handling of that car out of the sampler?

A. Correct. I am coming to that. Tariff rules which permit a further line-haul and a final destination terminal service after sampling in transit has taken place en route to final destination and without any additional charge for the transit services, but which would impose additional charges if the sampling point actually becomes the final destination point, are, in my opinion, unsound. This provision that a shipment is entitled to lower transportation charges if it moves to a destination smelter via an inter-

mediate or in some instances an out-of-line sampling smelter or independent sampler than if the sampling smelter becomes the destination smelter is, in my opinion, a violation of the spirit, if not an actual legal violation, of Section 4 of the Interstate Commerce Act.

What I have just said illustrates, I believe, the lack of comprehension that existed on the part of all concerned when the 1938 agreement was reached with respect to additional terminal charges on our Utah smelters as now expressed in the published terminal tariffs.

In concluding this part of my testimony—

1409 Q. And I assume in that connection, as to the applicability of the general rules or observations expressed by the Commission at that time they were under misapprehension as to the meaning of those rules that applied to the Utah and Colorado smelters?

A. That would be my opinion, and hindsight is better than foresight. That would be my opinion.

In concluding this part of my testimony, I think it is important to point out that these transit services, whether performed at intermediate points or the destination smelter, have an important bearing on the final valuation on which freight charges will be assessed after settlement with the shipper has been determined by the destination smelter. Shippers of complex ores do not always know whether a copper smelter or lead smelter should be selected as the destination smelter as such shippers are generally unfamiliar with smelting practices. It might be that a copper smelter would pay more for the ore—

Exam. WAY: What has that got to do with it?

The WITNESS: It ties in with the freight valuation.

Mr. FINERTY: If you will just wait one moment, the material smeltered at Garfield is copper and the material smeltered at Murray is lead.

The WITNESS: It ties in with the valuation of freight rates.

1410 Mr. FINERTY: Will you proceed?

The WITNESS: It might be that a copper smelter would pay more for the ore than would a lead smelter, or vice versa. As a result of such uncertainty such a shipper would send the shipment to a sampler, either smelter-owned or independently-owned, with instructions to hold pending sampling determinations, and based on these determinations the destination smelter giving the highest rate would be selected. This, of course, means that carriers receive freight based on the highest smelter rate obtainable, and

since the rates are generally based on value, the carriers would receive the maximum rate from freight charges.

Q. (By Mr. FINERTY) In other words, if a shipper would send a car of complex ores to the Garfield smelter and it should turn out the ore was a greater proportion or greater percentage of lead, that shipper would get a better price for that ore at the Murray smelter?

A. It might be the Midvale.

Q. Or the Midvale smelter, and the railroad would get a higher valuation on the basis of the freight charges.

A. Yes, I understand the shipper has an interest in securing the maximum rate, as has also the railroad under these valuation rates.

The demurrage tariffs also tie in with this transit feature, and they very definitely recognize that additional time is required to unload commodities requiring thawing before unloading takes place, and to illustrate the general operation of these rules, I wish to introduce in evidence a statement containing various excerpts from the governing demurrage tariff.

Mr. FINERTY: That will be Exhibit 16.

(Marked for identification "Intervener's Exhibit No. 16, Witness Tuckwood.")

The WITNESS: Page 1 shows that as a general rule 48 hours free time is allowed to load or unload carload shipments. Page 2 shows that an additional 48 hours is allowed for carload shipments which must be thawed at point of actual placement before unloading can commence. Pages 2 and 3 show that a number of railroads suspend entirely the application of demurrage rules on ores and concentrates during the winter months; certain railroads exempt at all times their own cars from the demurrage rules when cars are used for ores and concentrates at smelters and mines located on such railroads.

I wish to call particular attention to the fact that there is absolutely no provision in the demurrage tariff to cover movement through thaw houses before a car is spotted at point of actual placement where unloading can be done. Cars requiring thawing at our smelters cannot be unloaded at such thaw houses; in fact, such cars are in transit during the time of movement to, from and while within the thaw house, and the demurrage tariff clearly recognizes this transit arrangement by confining its application to cars thawed at the same point where unloading actually takes place.

Our Utah and Colorado smelters are entitled to the extra 48 hours free time only when thawing, heating or loosening is done at point of actual placement—

Q. (By Mr. FINERTY) Actual what?

A. Actual placement where unloading can be done; but time does not commence to run until car is so spotted and ends when unloading is completed and carrier is so notified.

I have learned that at Garfield the plant has been accepting demurrage based on a time calculated which includes the period of time cars spend moving to, from and while within the thaw house, also for the period of time all loaded cars spend in the joint railroad train yard. This practice has been ordered discontinued.

The demurrage tariff as now set-up recognizes the unusual nature of the fundamentals underlying the entire rate structure and transit privileges so necessary to properly determine railroad freight charges on our ores, concentrates and mill and smelter products. If the railroads had decided to charge against thaw free time, the time cars

1413 spend while actually in the in transit thawing location, the demurrage tariff would have contained an exception specifically provided that such time should be deducted from the total 96 hours free time allowed.

Q. In other words, Mr. Tuckwood, there is no demurrage provision, which permits the assessment of demurrage at Garfield or any of the other smelters of the American Smelting & Refining Company while the car is held in the thaw house for thawing prior to sampling and unloading?

A. There is none that I can locate.

Q. And that is the only means that those cars are not subject to demurrage, which, in your opinion, as I understand it, is a recognition of the fact that those cars are in transit until thawed, sampled and unloaded?

A. Yes. I think that covers about the extent of the rate history insofar as this movement affects the published tariff, line-haul as well as terminal demurrage tariff.

Mr. FINERTY: You may cross-examine.

Mr. COLLINS: Do you have anything?

Mr. CAMPBELL: I was just studying. I thought I was a pretty good student of Greek once, but I find out now I don't know anything about it. I don't believe I have anything, Mr. Collins.

Mr. COLLINS: I don't have any questions.

Exam. WAY: Mr. Williams?

Mr. WILLIAMS: No questions.

1414 Exam. WAY: You are excused.

(Witness excused.)

Mr. FINERTY: I offer in evidence exhibits numbered 10 to 16, inclusive.

Exam. WAY: Any objection?

(No response.)

Exam. WAY: They are received.

(Intervener's identification Exhibits Nos. 10 to 16, both inclusive. Witness Tuckwood, received in evidence.)

Exam. WAY: Call your next witness.

Mr. FINERTY: I am somewhat embarrassed. I have to send over to the hotel and get some more exhibits.

Exam. WAY: If we take too many recesses we won't get through in the allotted time.

Mr. FINERTY: It won't take over ten minutes.

Exam. WAY: Do you have any testimony, Mr. Collins, anything to offer?

Mr. CAMPBELL: We have this in respect to Garfield, if we study these exhibits we may want to ask some questions.

Exam. WAY: That is understood, but we are ready to proceed with the next plant.

Mr. COLLINS: I wonder why you couldn't finish the D. & R. G.?

Exam. WAY: We are ready to go ahead, but Mr. Finerty has to send out and get some more exhibits, but in 1415 order to save time we are going ahead with some other part of the case.

Mr. COLLINS: I am just suggesting the D. & R. G. finish concerning the two plants it has before the Union Pacific submits testimony with respect to the two plants it has.

Mr. CAMPBELL: Well, it doesn't come in the same way the Examiner said he would like to have them this morning.

Exam. WAY: We would like to finish each one of these plants as we go along. It is apparently necessary to have a little deviation in that plan to save time.

Mr. COLLINS: I am suggesting the next one you take up would be the other D. & R. G. plant.

Mr. CAMPBELL: I don't agree with Mr. Collins on that. I think you had better take up the Utah situation as far as Murray is concerned any way.

Exam. WAY: All right. It seems then that Mr. Finerty will have to send out and get his exhibits. We will take a recess for ten minutes.

(A short recess was taken.)

Exam. WAY: We will now take up the Murray plant.

Mr. FINERTY: Mr. Examiner, by agreement with counsel for respondents, the American Smelting & Refining Company introduces Exhibit No. 17, being a map of the American Smelting & Refining Company smelter at Murray,

Utah. That map shows the tracks involved in this investigation and is drawn to scale as shown in the legend on the map. The coordinates are also shown by which the various points on the tracks can be located.

Exam. WY: It will be received.

(Intervener's Exhibit No. 17, Counsel Finerty, received in evidence.)

JOHN F. KELLEY WAS SWORN AND TESTIFIED AS FOLLOWS:

Direct Examination.

Q. (By Mr. COLLINS) Will you state your name?

A. John F. Kelley.

Q. Where do you live?

A. Salt Lake City, Utah.

Q. By whom are you employed?

A. The Union Pacific Railroad.

Q. In what capacity?

A. Yardmaster.

Q. At what point?

A. Salt Lake City and Salt Lake City Switching District.

Q. Previous to your present employment, what employment had you?

A. I was employed as a conductor and switchman and yardmaster on C. B. & Q. Railroad for a period of 19 years. I came to the Union Pacific 22 years ago, and since that time I have been employed as switchman, yardmaster, and general yardmaster.

Mr. FINERTY: I think we will admit his qualifications.

1417 Q. (By Mr. COLLINS) Have any of your experiences involved work at the Murray plant which is involved in this investigation?

A. Yes, sir.

Q. What experience have you had in the Murray plant?

A. The work done at that plant was under my supervision as general yardmaster.

Q. That is the switching?

A. Yes, sir.

Q. Where is the Murray plant located?

A. It is located at a point eight miles west of Salt Lake by time table direction on the Union Pacific Railroad.

Q. And on any other railroad?

A. Yes, sir. It is located about an equal distance on the D. & R. G. which indicates it is east by time table direction at that point.

Q. Who performs the switching service in the plant?

A. The Union Pacific Railroad.

Q. For both itself and the D. & R. G. W.?

A. Yes, sir.

Q. Under what arrangement, if you know?

A. It is a joint arrangement whereby we have a regularly designated engine and crew which starts and ties up at that point to perform and meet the requirements of the American Smelting & Refining Company at the Murray plant.

1418 Q. Who owns it?

A. The Union Pacific.

Q. And who furnishes the crew?

A. The Union Pacific.

Q. Just one engine?

A. Just one engine, yes.

Q. And how many shifts, crew shifts are worked at that point?

A. At this particular time we have one crew employed from 7 a. m. until 3 p. m. As business increases we sometimes add a second crew which connects up with this first starting crew.

Q. Now, you have before you Exhibit No. 17 representing to be a map of the American Smelting & Refining Company, the Murray plant. Will you look at that map and indicate by reference to some mark on the map at what point the Union Pacific Railroad entrance to the plant is located?

A. Yes, sir. We have two entries into this plant.

Q. The Union Pacific has?

A. Yes, sir; one of which is at the scale track and the other is right directly west of Fifth-Third Street.

Q. Now, the scale track to which you refer is located on what part of the map?

A. It shows under the heading of O. S. E. property line.

Q. The lower left-hand corner?

1419 A. Yes, sir.

Q. (By Exam. WAX) Now, is that scale track—I don't identify that.

A. It is right up in this corner here, sir (indicating).

Q. The one that is marked 1919 scale house?

A. Yes, sir.

Q. And then how about the 1904 scale house?

A. Well, there is a new scale. That is the one on the outer track, the first track, and the other scale is the scale that was formerly used, which is now out of service and has been for a long period.

Q. (By Mr. COLLINS) Now, the 1919 scale is the entrance of the Union Pacific to the plant?

A. Yes, sir; one of the entrances.

Q. Now, the other one is the Oregon Short Line?

A. Where the Oregon Short Line joins up with the A. S. & R. trackage, right at this point, the center point (indicating).

Q. And how is it marked there?

A. Marked A. S. & R. with an arrow towards O. S. L.

Q. Mr. Kelley, while this map is marked O. S. L., that means Union Pacific as far as operation?

A. Yes, sir; that means Union Pacific Railroad.

Q. So that when we say Union Pacific, this O. S. L. will mean Union Pacific?

A. Yes, sir.

1420 Q. And did you locate the second Union Pacific?

A. Yes, sir; right in the vicinity, right here is the point they came in, at this point right here, shown in the map, as indicated by the arrow (indicating).

Mr. COLLINS: Will you locate that, Mr. Examiner?

The WITNESS: You see, this track here rides into—

Exam. WAY: I have located it, but it is not sufficiently identified on the record for somebody else to follow it who does not know a thing about it. I think it is sufficient for him to say there are two entrances which are shown on the left-hand corner of the map, lower left-hand corner.

Q. (By Mr. COLLINS) Both of these entries, are they not, are on those tracks just above the point marked pond, p-o-n-d?

A. Yes, sir.

Q. At the lower left-hand corner of the map?

A. Yes, sir.

Q. Now, can you show us where the D. & R. G. W. entry is?

A. Yes, sir. It is right in here (indicating). It is just about the same location, it comes over. It is not very plain on this map.

Q. Well, it is just to the right-hand on what would be northwest—northeast on this map, of the two Union Pacific entries which you explained here, located near the point marked p-o-n-d, is that right?

A. Yes, sir.

1421 EXAM. WAY: But the D. & R. G. tracks are not marked, are they?

THE WITNESS: No, sir. The D. & R. G. tracks parallel the passing track which is located between the main track of the Union Pacific and the transfer track of the D. & R. G.

Q. (By Mr. COLLINS) None of those tracks are identified as such on this map?

A. No, they are not.

Q. Now, will you mark the letter "X" on this map where the D. & R. G. W. has its entry to the plant?

A. We cross over there to the Rio Grande.

MR. FINERTY: Mr. Collins, I don't understand that the D. & R. G. W. gets into the plant at all. It interchanges with your company outside the plant.

Q. (By Mr. COLLINS) Where is the interchange point then? Wait, strike that. What is the fact as to whether or not the D. & R. G. W. gets into this plant?

A. The D. & R. G. W. does not get into this plant.

Q. Where is the track at which those cars are cut off the road haul and left for switching?

A. It does not show on this map. This is the approximate point right in here (indicating).

Q. None of their trackage is shown on this map?

A. No, sir.

1422 EXAM. WAY: Well, I think it is sufficient for him to say that the D. & R. G. and Union Pacific interchanges traffic with the Oregon Short Line in the same vicinity as the old 1919 scale.

THE WITNESS: I say near the second entry.

Q. (By Mr. COLLINS) Near the second entry of the Union Pacific?

A. Yes, sir.

MR. COLLINS: Well, I should think that might identify it sufficiently.

MR. FINERTY: The D. & R. G. tracks run parallel with your tracks by a lead to the northwest?

THE WITNESS: Yes, sir.

MR. FINERTY: And are not shown on this map?

THE WITNESS: No, sir.

MR. FINERTY: And you have an interchange track between your tracks shown on the map and the D. & R. G. tracks at point marked "X"?

THE WITNESS: Yes, sir.

Q. (By Mr. COLLINS) Now, do you know the number of

tracks, know how many tracks there are within the Murray plant?

A. There are 33 tracks within the Murray plant.

Q. Do you know who owns the tracks?

A. The American Smelting & Refining Company.

Q. Do you know who maintains them?

A. The American Smelting & Refining Company.

1423 Q. Do you know how many points or places within the plant there are at which spotting of cars is done for unloading?

A. Yes, sir.

Q. Well, could you locate them one by one?

A. Yes, sir.

Q. Indicating by some marking where they are.

A. Well, this No. 3 track is marked Track No. 4, leads to two trestle tracks.

Q. Why do you call it Track No. 3 when it is marked Track No. 4?

A. Because No. 4 joins into No. 3 at this point.

Q. At what point?

A. At this point right here (indicating).

Q. Can you identify the point by reference to something on here?

A. Yes, sir. It shows it as 37 plus 238 P. C.

Q. Well, the points you have indicated, it is just below and to the right of the block there which is marked as arsenic storage bins?

Exam. Way: Off the record.

(Discussion off the record.)

Q. (By Mr. COLLINS) Would it be correct to say that the juncture of those two tracks, 3 and 4, is on the second track below and to the right of the block marked arsenic storage bin, would that be correct?

A. Yes, sir.

1424 Mr. COLLINS: Do you think that will mark it?

Exam. Way: Yes, I think so. He has given the number of the track. It comes up to the lead, to No. 4.

The WITNESS: It is No. 3 at the bottom, and as it comes up it crosses over, it is No. 4.

Exam. Way: All right, I think that is probably identified.

Q. (By Mr. COLLINS) What I asked you was if there are a number of points at which spotting for unloading is performed.

A. Well, these two tracks, 3 and 4, and the next track to that is the north trestle track.

Q. The next track below No. 3?

A. Is shown here as north trestle track.

Exam. Way: Wait just a minute, you haven't answered his question. He asked you what was the unloading spots on the two tracks we were talking about, Nos. 3 and 4. Apparently on Track No. 4 you have got a scrap iron storage plant and a remelting plant and also soda ash bin.

The Witness: Yes, sir.

Exam. Way: And also coal bins?

The Witness: Yes, sir.

Exam. Way: You come into Track No. 3 and has scrap iron bins 7, 8, 9 and 10?

The Witness: Yes, sir.

Exam. Way: Coke bin A, coke bin B and coke bin 1425 C, each one of those are unloading points?

The Witness: Yes, sir.

Exam. Way: All right. Then down to the next track which comes up over what you call the north trestle track, now you have bins 18, 17, 16, 15 and 14?

The Witness: Yes, sir.

Exam. Way: And there are ore hoppers in each one of them?

The Witness: Yes, sir.

Exam. Way: You can go on from there.

Q. (By Mr. COLLINS) Are there any other unloading points other than those indicated on those tracks?

A. Not until we go over—

Q. I mean on those tracks we have just been talking about.

A. No, there isn't.

Q. Take the next track on which there are unloading points, give us the number of the track and indicate the unloading points.

Exam. Way: Mr. Collins, just a minute, please. Perhaps it would suffice if we would have the witness say whether or not there are any unloading points other than those that are clearly indicated on this map, because apparently this map is well marked, and it is quite plain as to what the tracks are.

Q. (By Mr. COLLINS) Well, you heard the Examiner's question?

1426 A. Yes, sir.

Q. What is your answer?

A. Everything is plainly marked and those are the unloading points.

Q. Those that are marked?

A. Yes, sir.

Exam. WAY: And there are no others?

The WITNESS: No, sir.

Mr. FINERTY: Mr. Kelly, can you say by that that every place on the track shown by name is an unloading point?

The WITNESS: Those that are marked here, these various different parts of the track, are unloading tracks.

Mr. FINERTY: I think the Examiner's question is, and Mr. Collins' question is, where do you actually unload on those tracks?

The WITNESS: In the hoppers.

Mr. FINERTY: That is ore?

The WITNESS: Yes, sir.

Mr. FINERTY: Other commodities come in there besides ore.

The WITNESS: Well; the other points are marked with the other commodities as we come to them here. This one here (indicating) is an L. C. L. track. That is further back on the house track.

1427 Q. (By Mr. COLLINS) What is its name?

A. That is on the north end of the house.

Q. Well, isn't there any way that you can indicate how loading points are marked on the tracks on which unloading is performed?

A. Yes, sir. They are marked in these characters here, bins, hoppers, mills.

Q. Ore storage, is that one?

A. Ore storage, powerhouse, and that is where cars for the carpenter shop are spotted.

Q. How is it marked?

A. Carpenter shop. And this low line here is where we have our storage for the low line spur, cars going to this mixing bin are shoved in on this track.

Q. What track are you talking about now?

A. This low line spur.

Q. Low line spur, low line track is its name?

A. Yes, sir.

55 Mr. COLLINS: The spur off of it. Off the record a moment.

(Discussion off the record.)

Mr. COLLINS: May we have it on the record then that generally speaking the points along the various tracks which points are generally blocks and are marked bins and other markings to indicate particular activities are
1428 unloading points.

Mr. FINERTY: That will be a correct general statement.

Exam. WAY: And those markings which you referred to are cross-hatched as well as the naming of the commodity?

The WITNESS: Yes, sir.

Exam. WAY: All right.

Q. (By Mr. COLLINS) Now, will you show at what point, indicate at what point cars are—at what point the Union Pacific road-haul engines cut loose from the line-haul shipments?

A. Right at this point here (indicating).

Q. Lower left-hand corner of the map?

A. Track No. 9.

Q. Just to the left of the 1904 scale?

A. Yes, sir.

Q. Are those tracks, four as indicated on the map, used for the purpose of hauling the cars or interchanging them between the road-haul engine and the yard switch—the plant switch engine?

A. Yes.

Q. Rather, I mean the railroad's plant switch engine?

A. Yes, sir.

Q. Is that the only place where the road-haul engine cuts loose for shipments with the Union Pacific?

A. We have one other point that we might set out cars at times. We call it Track No. 2.

1429 Q. That is the upper left-hand track?

A. Yes.

Q. On the map it shows the figures T. R. 12 27 plus 50 P. T. At those two places cars coming in from a line-haul are left by the road engine?

A. Yes, sir.

Q. Are the D. & R. G. cars picked up at one of those points too by the switch engine after a line-haul?

A. No, sir. The D. & R. G. cars are picked off the D. & R. G. transfer.

Q. Which is not shown on the map?

A. Which is not shown on the map.

Q. But is in the vicinity of this marking here, lower left-hand corner again?

A. Yes, sir.

Q. To the upper left-hand of the point marked "pond"?

A. Yes, sir.

Q. Now, will you undertake to trace a switch movement on this map beginning at the—we will take a Union Pacific delivery and from the point which we will call interchange tracks, where the switch engine picks up the cars, will you trace it through, first to its first stop within the plant?

A. When cars are picked up from the line-haul they are handled through the scale track.

Q. The scale track indicated on the map?

1430 A. Yes, sir.

Q. Lower left-hand corner?

A. Yes, sir.

Q. Marked 1919 scale?

A. Yes, sir.

Q. Go ahead.

A. Then the cars are usually scaled, and after this is completed, moved down the scale track and into the yard and held either on north or south coke, and they are held there for metallurgical reasons.

Q. North coke track is marked?

A. Yes.

Q. Or South coke track?

A. Yes, sir. There are two tracks, one of which is north and one south.

Q. You say they are held there for metallurgical reasons?

A. Yes, sir; pipe sampling and other reasons.

Q. That is where the sampling of the ore is?

A. They do some pipe sampling on these two tracks.

Q. All right. Then after that has been done, what is the next movement?

A. Then we receive regular switch-order on them about the placement of certain cars, and we place them wherever we are instructed to place them from that point.

Q. Just a moment, from whom does the railroad
1431 receive the switch orders?

A. From the supervisor of labor.

Q. Who is he?

A. Mr. Berger.

Q. By whom is he employed?

A. He is employed by the American Smelting & Refining Company at that point.

Q. By whose orders are the cars first moved from the interchange track?

A. The foreman shows us.

Q. Whose foreman is this?

A. The Union Pacific engine foreman goes up and confers with Mr. Berger. Mr. Berger gives him the number and initials of all cars released from the Union Pacific to the American Smelting & Refining Company off of the Rio Grande, and this foreman immediately goes to the point

of the interchange, where the road-haul switch is, gets these cars, and does as he is instructed to do with them according to the list by Mr. Berger.

Exam. WAY: What is it, a switch list?

The WITNESS: Yes, sir.

Q. (By Mr. COLLINS) That tells him at what point each of the cars on the list must be placed, is that correct?

A. Well, when we come in there with the cars first—

Q. No, wait a minute, this switch list—

1432 A. Yes.

Q. It is instructions as to what exact spot to place the cars, is it?

A. Well, it isn't instructions. It is to take the cars into the plant, the first instructions we receive, and then later the switch list carries the information as to the placement of cars.

Q. For the placement?

A. Yes, sir.

Q. The placement for unloading?

A. Yes, sir.

Q. Now, what happens after the movement beyond the sampler and the unloading, what happens to the car?

A. In most cases the cars are released at the sampler and discharged into the low line.

Q. It is released at the sampler?

A. Yes, and then—

Q. You mean the track on the map indicating low line?

A. Well, on this No. 2 mill here it shows two places that the cars are loaded from that mill, the coarse and fine.

Q. The coarse house track?

A. Yes, sir; and are loaded on those cars that are shoved up on this high line. The coarse is on one side and the fine is on the other.

Q. The fine house track?

1433 A. No, that is a commodity. When the ore is run through this sampler it is ground up into two different sizes, coarse and fine.

Q. Yes.

A. And after this is accomplished why the cars are emptied, pulled off the trestles and disposed of, either turned back—

Q. Turned back where?

A. To the lines they are received from.

Q. Is that all done in one movement, back to the interchange tracks ordinarily?

A. Ordinarily we hold these empties until such a time as we have a number of them and make it one switch delivery.

Q. Are any of them ever loaded out, I mean held within the plant for loading out?

A. There are times when we have orders for either road, Union Pacific or D. & R. G., and we hold cars to protect ourselves.

Q. Hold cars within the plant?

A. Yes, sir.

Q. You have special tracks for that?

A. We usually hold such cars on Track No. 6.

Q. At what point indicated on the map?

A. It is plainly marked on the map as the west smelter track.

Q. Just up above that arsenic storage bin again?

A. Yes, sir.

1434 Q. Otherwise, as it shows here, you come down to this interchange point in order to pick them up and take them away?

A. Yes, sir.

Q. I am not clear as to your statement there. I understood you to say ordinarily cars are released at the sampler.

A. Yes, sir.

Q. Does that mean they are unloaded there?

A. Those cars are released off these bins, and then you have bins or spouts that discharge into railroad tracks. You see the product is carried through the mill and into cars on the low line. You have got two tracks there, the coarse and the fine.

Q. Now, I am talking about the cars.

A. The cars are released from that point.

Q. Is there or is there not ordinarily a movement of the car beyond the sampler?

A. No.

Q. Ordinarily not?

A. Ordinarily not.

Q. There is ordinarily not a movement of the loaded car beyond the sampler?

A. No.

Q. Are the points at which sampling is done indicated by markings on the map?

A. Yes, sir. You say the mill numbers. You have 1435 got Mill No. 4 there.

Q. Are they so marked that one could, by looking at the map, know that the cars are stopped there for sampling?

A. I would say so; yes, sir.

Q. The marking indicates sampling?

A. The word "mill" indicates the cars are being sampled in the mill.

Q. The sampling, in other words, takes place at each of the points marked "mill" on the map?

A. Yes, sir.

Q. Now, the same switch operation you have described with respect to the Union Pacific would take place, wouldn't it, if we were switching D. & R. G. W. cars?

A. Yes, sir.

Q. Except, of course, they would be taken from their interchange tracks and switched back to them empty?

A. Yes, sir.

Q. Do you know whether or not there is any particular difference in the switching movements necessary in the handling of different commodities that come into this Murray plant?

A. No, I think they are about the same as at the Midvale. Various moves perform the same identical service or mean the same thing.

Mr. FINERTY: Well, I have to object to that and ask it be stricken. There is no evidence as to Midvale. I 1436 think the answer is unintelligible for that reason.

Mr. COLLINS: Yes, we don't have to go into Midvale yet.

The WITNESS: Well, we only have the two smelters on our railroad under my supervision.

Mr. COLLINS: Excuse me. I think we ought to talk about this and compare them.

Q. (By Mr. COLLINS) Is it still your answer that regardless of the commodity handled, from your personal knowledge and experience within this plant, the switch movements are generally the same?

A. Yes, sir.

Q. How about the movement, of separate moves of the cars from the time they leave the interchange tracks until the time they come back there empty or loaded?

A. Well, it will vary. It will be hard to determine that unless you talk about one car.

Q. Take a particular commodity and just give us an illustration.

Exam. WAY: Supposing we start up here to the top of this track and go straight through your yard and find out what you do. You take these cars when they come in here, they come in here at the interchange track, and they are pushed in here on one of these tracks inside the yard. Now, you have up here on the top track, which is marked 1437 the matte track and the bullion track, are those the two top tracks?

The WITNESS: No, sir; they are the bottom tracks.

Q. (By Exam. WAY) They are the bottom tracks, but they are the farthest tracks on this map, isn't that true?

A. Yes, sir.

Q. What do you do with these matte tracks, bring copper matte up on this track?

A. In the reverb furnaces, melted through those furnaces, they are the products of the furnaces, and we set cars in there that receive those products.

Q. In other words, you put in empties and load them on the matte track?

A. Yes, sir.

Q. And the bullion track?

A. The bullion is set out, possible cars for load movement.

Q. Do you use those cars for any other purposes?

A. No sir.

Q. Are those cars that are put in there at that point put in there empty?

A. Yes, sir.

Q. Is there any additional switch besides taking them in there and moving them out?

A. No, sir.

Mr. COLLINS: Mr. Examiner—

Q. (By Exam. WAY) What is this spur track that is marked No. 3?

1438 Mr. COLLINS: If our map was marked like yours, we wouldn't be floundering so.

Exam. WAY: I don't know; somebody gave me this map. This is the track I am talking about, I am talking about this Track 3 right there (indicating). That is the same thing.

Mr. FENERTY: I would like the record to show we all have the same map.

Q. (By Exam. WAY) Now, there is a spur that is marked, in the end of the spur it is marked 3. What do you do on that track?

A. We load that matte in there.

Q. That is also a loading track for matte?

A. Yes, sir.

Q. An when those cars are loaded they move to the interchange?

A. No, they move wherever they are ordered. It might be to Mill 4.

Q. They move to some other point within the plant?

A. Yes, sir.

Q. And that might be true also of these products loaded on the matte track and the bullion track?

A. No, the bullion tracks are cars loaded with bullion, and when they move off the bullion track they are always railroad shipments.

Q. Now then, the matte track immediately above 1439 that, does that move out of the plant?

A. No, that is milled within the plant, those three matte tracks.

Q. Now, where do those move to, do you know what other track?

A. Wherever ordered, sometimes Mill 4 and to other locations.

Q. What is the purpose of moving them to the other tracks?

A. They are not, some of them, ground up. They come out in large particles, this matter.

Q. Is that an intra-plant movement?

A. Yes, sir.

Q. The car is unloaded?

A. Yes, sir.

Q. Now, what is this scrap iron storage?

A. That is scrap shipped in by rail and unloaded there for smelter purposes.

Q. That is on Track No. 4?

A. Yes, sir.

Q. When that car is empty it moves out?

A. Yes, sir.

Q. Track No. 3, you have scrap iron bins on that track?

A. Yes, sir.

Q. And you have coke?

A. Yes, sir.

Q. In three bins?

1440 A. Yes, sir.

Q. They are unloaded and the empties move out?

A. Yes, sir.

Q. We come down to the next track, the north trestle track.

A. Yes, sir.

Q. Those are all loads in there?

A. Yes, sir. The cars that have been sintered, unloaded on that track, and when cars are unloaded they go back to the sinter plant.

Q. Sinter plant?

A. They move back to the sinter plant. We call it roast take in our plant.

Q. Down here in the lower end of the plant?

A. Yes. The cars are obtained at this D. & L. track. That is shown down here near the D. & L. bin. It is the building down here that your roast is run through. It is where those cars originate, the D. & L. roasters.

Q. That is another intra-plant movement?

A. Yes, sir.

Q. The cars are unloaded when they move down there?

A. Yes, sir. No, the cars are obtained from that source and the sintering plant and they are unloaded on the north trestle. It is where the cars originate.

Q. Maybe you had better indicate which one of these tracks are loading tracks and which one of these 1441 tracks are unloading.

A. The D. & L. roasters, where these cars originate, they run through the D. & L. bins marked here, and the cars are allowed to move down by gravity until they have a certain number of cars loaded, and it is usually the first thing in the morning, the engine goes on duty, to enter this roast track, pull the roast out, back up to the scale, scale the cars, and then spot them in the bins on the north trestle.

Q. Now, on the north coke track, what do you do there?

A. That is storage tracks.

Q. That is both loads and empties?

A. No, loads only.

Q. Why do you store them there?

A. Well, we have got to store them there in order to have a place to hold our cars, and when required pull them off this track and classify them where setting is required.

Q. Because the plant does not have sufficient capacity to hold the cars it requires extra switching?

A. We have got to have the cars on hand to protect the plant.

Q. Now, about the south coke track, is that also a storage track?

A. Used for the same purpose. These railroads hold a certain number of cars.

Q. Now, this ore hopper track, what happens there?

1442 Mr. FINERTY: Mr. Examiner, you asked a question about the cars being held because the plant did not have enough capacity.

Exam. WAY: Well, I am trying to ascertain the facts in this case, and I am having a hard time digging them out.

Mr. FINERTY: Yes. We just want to ask Mr. Kelley in connection with that whether they are held there for your operating convenience rather than pulling them out of the yard.

The WITNESS: Yes, sir.

Q. (By Exam. WAY) These tracks belong to the smelter, do they not?

A. Yes, sir.

Mr. FINERTY: You could hold the cars out in your Pallas yard, but you would have to make a switch to do so?

The WITNESS: Yes, sir.

Q. (By Exam. WAY) How far would you have to go to do it?

A. Approximately a half mile.

Q. And make one switch to move out?

✓ A. Yes, sir.

Q. (By Mr. COLLINS) And you couldn't spot them for final unloading until you got your directions from the plant foreman, could you?

A. No, sir.

Q. (By Exam. WAY) In other words, with the operation of this plant, you have to operate in connection with the plant?

1443 A. Yes, sir.

Q. And you have to operate in connection with, under their instructions?

A. Yes, sir.

Q. And it is not an uninterrupted switch?

A. No, sir.

Q. Now, we will take the concentrate storage. What happens there, or did we—pardon me, did we deal with the coke hoppers?

A. No, we didn't, this coke track.

Q. I think it is called the north trestle track.

A. The north trestle track is where we unload the roasts. After we leave the coke tracks, which is the storage tracks, we enter the coke track.

Q. It isn't designated here as the coke track.

A. Yes, it is. Right here is the coke track (indicating).

Q. Right here. What is that, an unloading track?

A. Yes, sir.

Q. The ore comes in and it is dumped there. Is that brought in from the outside of the plant?

A. Yes, sir; and also roasts are loaded on there at times, these different hoppers.

Q. Now, on track No. 2, the concentrate track and hopper, you have on that track coke and scrap iron storage.

A. Yes, sir.

1444 Q. Is that an unloading track?

A. Yes, sir.

Q. Now, the next track, Track No. 1, that is scrap iron storage and ore storage?

A. Yes, sir.

Q. That is an unloading track?

A. Yes, sir.

Q. That ore is brought in from the outside and stored, and also the scrap iron?

A. Yes, sir.

Q. What do you do on the coarse house track?

A. That is where we receive the discharge from Mill No. 2.

Q. Do you weigh anything on that track? I say, you have scales there?

A. No, sir; there are no scales; no track scales there.

Q. Just an off track?

A. Yes, sir.

Q. You have a boiler shop and a warehouse and machine shop?

A. Yes, sir.

Q. And a blacksmith shop?

A. Yes, sir.

Q. What do you do on that track?

A. Nothing to do. Practically everything that is handled in there is handled by their own, by trucks and by other means of transportation.

1445 Q. Now, you have a track in there, the track doesn't extend that far.

A. We have two house tracks there, if you will notice. We have a fine track and a coarse track, and we can set cars north of those hoppers.

Q. Is that an unloading track on those two tracks?

A. No, they receive the loads from this mill, Mill No. 2. This load is from the mill.

Q. And it moves outside of the plant?

A. No, this is milled at the plant, the products of that usually.

Q. (By Mr. COLLINS) You mean they are loaded at that point and moved to some other point in the plant?

A. Yes, to some other point. The fine is milled over the D. & L. roasters, sometimes set at stock, and the coarse is sometimes run a second time or set at stock, isn't that right?

Exam. WAY: Suppose, Mr. Collins, you take it from there and develop the rest of that about those tracks, except I think we should recess for dinner and come back. Is it convenient for everybody to get back here by seven o'clock?

Mr. FINERTY: It is hard to get served.

Exam. WAY: All right, seven-thirty.

The WITNESS: And then an extension of that track where the L. C. L. unloading is, might be for the blacksmith shop.

1446 Mr. COLLINS: You are referring now to the L. C. L. unloading track?

The WITNESS: Yes, sir.

Exam. WAY: All right, we will recess until seven-thirty. (Whereupon at 5:30 p. m. a recess was taken until 7:30 p. m. of the same day.)

EVENING SESSION

7:30 p. m.

Exam. WAY: We will proceed, gentlemen.

Q. (By Mr. COLLINS) Mr. Kelley, we were last discussing and had finished discussing, as I understand it, this trackage on the map labeled L. C. L. unloading. Now, will you take the next track below that on the map on which switching is performed and tell us what takes place there. Do you load cars coming in on that track?

A. On the low line?

Q. Track marked low line track.

A. Yes, sir.

Exam. WAY: Well, Mr. Collins, there are some tracks in there that are marked repair track and boiler track and brick track.

Mr. COLLINS: Well, would you like to know what goes on on those?

Exam. WAY: Yes, if you please.

Q. (By Mr. COLLINS) All right, will you explain 1447 what goes on there?

A. At the crane track?

Q. Yes.

A. The crane track is the track where they house their locomotive cranes.

Q. Where they house their locomotive cranes?

A. Yes.

Q. Who does that?

A. The Smelter people.

Q. They own the crane?

A. Yes, sir.

Exam. WAY: You have nothing to do with those cranes?

The WITNESS: No, sir.

Q. (By Mr. COLLINS) And what about the track marked car repair?

A. That is where they repair cars belonging to the smelter.

Q. And who does the repairing?

A. The smelter people.

Q. Are those cars used inside the plant?

A. Yes, sir.

Q. And used by the smelter people themselves?

A. Yes, sir.

Q. The fine house track, I believe you explained what that was for.

A. Yes, sir.

1448 Q. How about the track marked boiler track?

A. That was a track used at one time for the power plant. It is no longer in use.

Q. And the track marked brick track?

A. That was also used as the brick press, which is no longer in use.

Q. And no switching goes on on any of those tracks now?

A. No, sir.

Q. Now, will you take up the low line track again?

A. The low line is where cars are placed for unloading brick, lumber and storage.

Q. Storage of what, any one of those commodities?

A. Yes, sir; or storage for the low line spur.

Q. That track coming off from a point marked—

A. Low line spur.

Q. Near chrome ore?

A. Yes, sir.

Q. (By Exam. WAY) Why do you find it necessary to use that for storage, for whose benefit is that storage, partly of the plant?

A. For the smelter.

Q. For the smelter?

A. Yes, sir.

Q. In other words, what would you store on that track?

A. You store concentrates, flue dust, or anything
1449 that you might use later on the low line spur.

Q. What is the purpose of storing it?

A. Well, you can only set two cars on the low line spur, so when that track is filled it backs up to the low line.

Q. I see. And when you reach the capacity of the unloading track, why then you place them on the low line track until such time as you find room to put them on the other track?

A. Yes, sir.

Q. And it is necessary to switch them out and place them where they belong?

A. Yes, sir.

Mr. FINERTY: You could just as well hold those cars up somewhere else, but it is a matter of convenience for your operation?

The WITNESS: Yes, sir.

Q. (By Exam. WAY) A matter of convenience for your operation or that of the plant?

A. Well, it is a convenience for our operation.

Q. Where do those cars come from?

A. Well, they come in from the different points of the mill and ordered into the low line there when required.

Q. That is to say they come in under line-haul rates?

A. Yes, sir.

Q. And it is necessary to hold those cars some place?

A. Yes, sir.

1450 Q. So instead of holding them on your tracks you switch them in on the low line?

A. Yes, sir.

Q. And then when you have capacity for unloading, you switch them out of the low line and put them where they belong?

A. Yes, sir.

Q. (By Mr. COLLINS) Who directs that the cars be placed on that track for storage?

A. Well, it is within our own discretion to use that to the best advantage, and we do that of our own volition.

Q. Your own volition?

A. Yes, sir.

Exam. WAY: But the main reason for it is because there is not capacity enough on the unloading tracks to place the cars?

The WITNESS: Yes, sir.

Mr. FINERTY: The main reason is that it doesn't receive spotting orders?

The WITNESS: Yes, sir.

Mr. FINERTY: And you hold them there instead of hauling them out some place else?

The WITNESS: Yes, sir.

Exam. WAY: All right.

Q. (By Mr. COLLINS) By the time the cars have reached the storage point on that track have they been weighed?

1451 A. Yes, sir; they are ready for what purpose they might require them for.

Q. Ready for use in the smelter company's business?

A. Yes.

Q. Now, will you tell us what takes place on the track, the high line track?

A. The cars are set to the bin on this track for fine grinding.

Q. The ore is ground up?

A. Yes, sir.

Q. Now, that means then, does it, that cars, loaded cars come in there, and at the bins they are unloaded?

A. Yes, sir.

Q. And what happens then to the ore that is unloaded from a particular car?

A. Well, it is conveyed to parts of the plant by numerous devices according to the smelter people, the wedge bins and other places.

Q. To the wedge bins?

A. Or wherever they might require them.

Q. Are cars sometimes loaded, rather is ore sometimes unloaded from cars on this high line track into cars on the track below?

A. No, on this high line, no.

Q. That does take place somewhere in the plant?

1452 A. Yes, sir.

Q. I think I will interrupt, if you don't mind, going back and showing on what track that operation takes place.

A. Well, there are cars at this No. 2 mill.

Q. On what track is that?

A. It is on No. 1 track, where it is unloaded onto the house track. They go out in different—

Q. No. 1 track, further out called north trestle?

A. No, it is from this here mill here.

Q. Show me the figure No. 1. I don't see that.

Exam. WAY: It is over to the left.

Q. (By Mr. COLLINS) The ore comes in on loaded cars on this track marked No. 1?

A. Yes, sir.

Q. And then what?

A. Then there is a mill in there.

Q. Wait, we were talking about unloading from one car to another one on a lower track.

A. It is unloaded from this mill into the receiving car.

Q. How does it get into the mill? It was in the car. We are talking about unloading.

A. It is unloaded into the ore bins.

Exam. WAY: Into the hopper?

The WITNESS: Yes, sir.

Exam. WAY: Goes into the hopper?

1453 The WITNESS: Yes, sir.

Exam. WAY: Goes on down through to the car below, or what?

The WITNESS: Ground and goes into the car below.

Q. (By Mr. COLLINS) And then what is the movement of that car into which it is unloaded below?

A. Yes, sir.

Q. That moves to some other point within the plant?

A. Yes, sir; wherever it might be wanted.

Mr. COLLINS: All right.

Exam. WAY: Is that deemed to be an intra-plant switch?

The WITNESS: Yes, sir.

Exam. WAY: And that is paid for separately?

The WITNESS: Yes, sir.

Exam. WAY: All right.

Q. (By Mr. COLLINS) The car from which the ore is unloaded on this No. 1 track is released so far as that movement is concerned?

A. Yes, sir.

Q. And then it takes a separate movement of the car into which the ground ore is loaded on the lower track and then moved to some other part of the plant?

A. Yes, sir.

Q. All right, let's get back to the tracks down below. I don't know how far we got with this high line track,
1454 but I think you had better tell us about it even if we repeat a little.

A. On this high line track as that fine grinding is done they belt convey it to other parts of the mill for their further use.

Q. Cars come in there loaded with ore?

A. With ore which might be run at some other part of the mill.

Q. Where would that be unloaded, at what point on the lines?

A. At the hoppers.

Q. And how are they marked on this map?

A. Here is your high line here, Bin A to the north.

Q. Under the points marked Bin A and Bin B?

A. Yes, sir.

Q. What goes on at this wedge mixing building?

A. The stuff is run through and finely ground.

Q. Does unloading take place at that point?

A. That is handled by the smelter with its own energy.

Q. What form of energy?

A. Well, whatever might enter into the milling of the ore that is in there.

Q. The railroad cars then, I take it, don't go any further toward that stub end of that line that these bins here at which the unloading takes place?

A. That is right.

1455 Q. Then there is a movement of the cars empty?

A. Yes, sir.

A. Track No. 6 ordinarily.

Q. They come back, back down the high line track to some point where they could switch on to Track No. 6?

A. Yes, sir.

Q. And then move up to some point on there, for what purpose?

A. Well, as the empties are required for line loading, they use from Track No. 6, or if they are not required for line loading they are weighed out and delivered to the road from which they were received.

Q. (By Exam. Way) Well now, just beyond that mixing building there, the wedge mixing building, apparently you have got a track in there, Mill No. 1 Sulphides, does that track extend through?

A. Yes, sir; that track extends through.

Q. Does it go through that building?

A. No, it parallels the building.

Q. Well, but does it go through the mixing building?

A. Yes, sir; it goes right on, the track extends on west where you see the lines marked.

Q. Can the locomotive run through the building?

A. No, sir.

Q. How do you get traffic beyond there?

1456 A. We load it onto enough cars to clear all cars, clearance.

Q. How many?

A. We can set six cars up there without interference.

Q. How many buffer cars do you have to have?

A. Our operation only takes us to Bin A and B, and if we only have a two-car setting, we can spot them without any interference.

Q. That is at the bins?

A. Yes, sir.

Q. All right. Now then, could you go beyond that into Mill No. 1, to the sulphates—sulphides?

A. All the content is milled through those two bins.

Q. And then you do not operate beyond the wedge mixing building?

A. No, sir.

Q. (By Mr. COLLINS) Over to the left in among that trackage is a track marked Old Hand Track. Do you know what that was for?

A. Well, that is—at one time that was an old roaster, but at the present moment it is a storage track.

Q. For the storage of what?

A. It is a storage track for the D. & L. roasters.

Q. Are cars stored there?

A. Yes, sir.

Q. Loaded?

1457 A. Yes, sir.

Q. (By Exam. Way) And empties also?

A. No, sir.

Q. What kind of loads?

A. Fine ground ore.

Q. Why do you store on that track?

A. Well, we sent our next move to the roasters.

Q. (By Mr. COLLINS) And what does that depend on?

A. That depends on the release of the cars at the roaster.

Q. (By Exam. Way) It is another case of capacity?

A. Yes, sir. They can mill only a certain number of cars at one time.

Q. (By Mr. COLLINS) Do the cars stay there until you get a switching order from Mr. Berger?

A. Yes, sir.

Q. Now, you have another track down here called pug mill track.

A. Yes, sir.

Q. What is the purpose of that track?

A. We set empties in there to load fine dust.

Q. And what point indicated on the map does that loading take place?

A. Well, the full length of those marks in there.

Q. The full length of the marks along the track, I mean the marks outside?

1458 A. Yes, outside, right there (indicating).

Q. All the way up to the point just below—

A. Yes, sir.

Q. What is that?

A. Well, it shows cooling bins.

Q. (By Exam. Way) What do you do with those cars?

A. Well, we handle them on instructions from the smelting company and their requirements.

Q. The cars are placed in there. Did you say they are placed in there for loading or unloading?

A. Loading.

Q. After they are loaded, what happens?

A. Dust, flue dust.

Q. Where does the flue dust go?

A. Wherever wanted.

Q. I know that, but does it move in the plant or out of the plant?

A. In cases it moves out of the plant, shipped to other smelters.

Q. (By Mr. COLLINS) Some of it may be moved from this track to other points within the Murray plant?

A. Yes, sir.

Q. Now, what is this track called middle belt track?

A. We unloaded fine ores for the D. & L. roaster.

Q. Load or unload?

1459 A. Unload fine ores for the D. & L. roaster.

Q. Where is the D. & L. roaster, is it so marked on the map?

A. Right here (indicating) It is the Dwight and Lloyd Sintering Plant.

Exam. Way: What track is that on?

The Witness: That is right opposite the roast track.

Exam. Way: The wedge roaster?

Mr. COLLINS: It is below the wedge roaster building and to the right of the Dwight-Lloyd mixing building.

Q. (By Mr. COLLINS) Where is the trackage on which cars are placed either for loading or unloading at the Dwight-Lloyd Sintering Building?

A. Well, now, that is the middle belt track.

Q. Track to the north of the building?

A. Yes, sir.

Q. Now, what takes place?

Exam. WAY: Now, wait a minute, are you sure about that? Aren't they placed below? I don't see any track in there. Aren't they placed on the track below those two buildings?

The WITNESS: They are placed on that old belt track that shows on there.

Exam. WAY: On the old belt track?

The WITNESS: On the middle belt track.

Exam. WAY: All right.

Mr. FINERTY: As a matter of fact, Mr. Kelly, after 1460 that fine ground material is dumped on the middle belt track it drops down into conveyers of the smelter company and goes into the Dwight-Lloyd Sintering, the railroad does not handle it at all?

The WITNESS: No, sir.

Q. (By Mr. COLLINS) That is, we don't handle it from the car to the building?

A. No, sir.

Q. But they do handle it in the car to the point up to where the conveyor takes it?

A. Yes, sir.

Q. What place does the belt conveyor serve?

A. That is where the fine coke is unloaded.

Q. Unloaded?

A. Yes, sir.

Q. Is it unloaded into this place marked "Coke Hopper"?

A. Yes, sir.

Q. And then the empty car is moved out?

A. Yes, sir.

Q. Now then, what about the roast track?

A. The roast track is where we pull—we enter to pull the roasts, and other shipments are loaded on that track.

Q. That is a track on which cars are loaded?

A. Yes, sir.

Q. Loaded at what points?

1461 A. Loaded at this D. & L. Building.

Q. Dwight-Lloyd Sintering Building?

A. Yes, sir.

Q. Aren't they loaded elsewhere on that track?

A. Yes, sir.

Q. Where?

A. At the north end of the building there we have a short track.

Q. What building?

A. Right here (indicating).

Q. You mean this you marked?

A. Calcine.

Q. Calcine conveyor?

A. Yes, sir.

Q. And how about this one marked "H. & H. Pots"?

A. That is where we— Right at this point here is where we return the empties for the roaster. (Indicating).

Exam. Way: What point?

Mr. COLLINS: Right under the middle of the point marked "Calcine Conveyor."

Exam. Way: That seems to be a cross-over?

The WITNESS: Yes, sir. At the extreme west we set for the calcine, the empties for calcine, and at the straight-away there we return the roast empties.

Q. (By Mr. COLLINS) You do what?

1462 A. Return the roast empties for further loading.

Q. Return them where?

A. To this point here.

Q. To that point under the calcine conveyor?

A. Well, it is a track parallel to the calcine conveyor.

Q. All right. You mean you bring the empties in from out at some ore track some place and place them up there for loading, is that it?

A. We bring the empties out from the point where they are spotted previously and unloaded.

Mr. FINERTY: All that sinter, Mr. Kelley, moves from the D. & L. Building under an intra-plant switching charge, doesn't it?

The WITNESS: Yes, sir.

Mr. FINERTY: And up to the mill deliveries, or hoppers?

The WITNESS: Yes, sir.

Mr. FINERTY: And is dumped in?

The WITNESS: Yes, sir.

Mr. FINERTY: And you get an intra-plant switching charge for that?

The WITNESS: Yes, sir.

Q. (By Mr. COLLINS) Is there any loading taking place on this track-called roast track?

A. Yes, sir; the roast is loaded at this point here, this sintering building.

1463 Q. You just said you bring in the empties for loading?

A. Yes, sir.

Q. Does any unloading take place?

A. No, sir.

Q. I notice that track seems to extend on out a considerable distance. What, if anything, takes place on past the Dwight-Lloyd Sintering Building?

A. Yes, sir; we load arsenic at this spot here (indicating).

Q. How is it marked on the map?

A. Arsenic track.

Q. Is there anything set out?

A. Yes, sir; the bag house.

Q. What does that mean?

A. Well, we load products there.

Q. What products?

A. What comes through the bag house, whatever it might be.

Q. Some sort of by-product that comes out in the processing of the ore?

A. Yes, sir.

Q. Is that, after being loaded, moved on out of the plant in line-haul movement, or is it moved to other parts of the plant for use there?

A. It is moved out on line-haul movement.

Exam. WAY: Well, I think that pretty well takes care of the description of all of the tracks and probably
1464 the movement. I find some difficulty in trying to divide this movement as between intra-plant and road-haul traffic. Will you have a witness that can tell us something about that?

Mr. FINERTY: We will have exhibits showing this.

Exam. WAY: And will your exhibits also show what the traffic consists of and where it originates, etc.?

Mr. FINERTY: Yes. They will show where it is received or delivered within the plant.

Exam. WAY: All right. And will you also have anything to show what cars move under transit?

Mr. FINERTY: Under transit in the sense—

Exam. WAY: They are brought in the plant and sampled.

Mr. FINERTY: Or moved in from another smelter.

Exam. WAY: That is right.

Mr. FINERTY: Yes.

Exam. WAY: I hope you won't overlook that. Now, Mr. Collins, can you develop a plan which is used in switching these yards? There must be some particular system about the way in which it is done instead of being just a haphazard run over all the plant and switching here and there

and yonder. Can you develop the plan that is used? There must be in this plant specific places that are the principal points of loading or unloading.

Mr. COLLINS: Well, if you mean that the railroad can go in and switch pursuant to some program of its own—

1465 Exam. WAY: That is what I mean.

Q. (By Mr. COLLINS) Can the railroad do that, Mr. Kelley?

Exam. WAY: Pardon me, I didn't mean can they do it.

Q. (By Mr. COLLINS) Well do they do it?

Exam. WAY: Do they do it, yes.

A. All the switching that we do within the confines of the smelter is switch-listed to us by the smelter.

Q. (By Mr. COLLINS) Switch-listed to you?

A. Yes.

Mr. FINERTY: By that you mean all the switching you do in placing cars for loading or unloading—

The WITNESS: Yes, sir.

Mr. FINERTY: Is ordered by the smelter?

The WITNESS: Yes, sir.

Mr. FINERTY: You get orders for that?

The WITNESS: Yes, sir.

Mr. FINERTY: But they don't tell you how to get those cars or how to move them?

The WITNESS: No, sir.

Exam. WAY: No, I didn't anticipate they did, but you certainly have certain tracks in this yard that are principal unloading points, and I presume you have many other points where switching is only done occasionally. Do you have any plan, for instance, for bringing in concentrates, or whatever the products are?

1466 The WITNESS: We handle these cars in from the line haul into the smelter, and there we are instructed by the smelter orders.

Exam. WAY: Does your switching daily follow a fairly uniform pattern?

The WITNESS: Yes, sir.

Exam. WAY: That pattern is what I am asking you about.

The WITNESS: The cars are handled in line haul and held on the two storage tracks, the north and the south coke, and when we get the information from the smelter where the cars are to be milled, they are switched accordingly as the requirements demand.

Q. (By Mr. COLLINS) Do you have any particular time or hour to bring cars in from the outside to the points where you hold them awaiting instructions of the smelter?

A. Well, we get the ore as soon as it shows up and we set out the trains.

Q. As soon as it is set out on the interchange track?

A. Yes, sir; and released to us.

Q. Well, what causes you to take it off of the interchange tracks?

A. The smelter people give us the releases. They receive the billing of the same, give us the number and initials of the cars that belong to them.

Q. Do you have any set hour or time of the day to 1467 bring the cars in from the interchange tracks to hold points within the plant?

A. No, not necessarily.

Mr. FINERTY: Mr. Collins, are you speaking of the interchange track between the D. & R. G. and the U. P.?

Mr. COLLINS: No, I am speaking of the interchange track at which point the cars are turned over at the end of the road-haul movement, and the road-haul engine cuts loose, and the cars turned over for further pull into the plant by the switch engine.

Mr. FINERTY: Of course, it is different for both companies. The D. & R. G. does not come into the plant at all.

Mr. COLLINS: We go up to the D. & R. G. so we have the same movement except a longer one, where they come down to the point where they can cut loose from the cars.

Mr. FINERTY: What we mean by the interchange track—

Mr. COLLINS: I think it is fairly clear. If I can get along, the witness can tell us what he meant.

Mr. FINERTY: I don't understand what you mean, you mean the tracks upon which the U. P. switch engine brings in the road-haul shipments and holds them for orders of the smelter?

Mr. COLLINS: Well, did you hear any of the efforts we made in which we tried to locate points at which the D. &

R. G. and U. P. as well cut loose from the line-haul 1468 cars, the cars in the line-haul movement? That is what I mean by interchange tracks, the point at which the road-haul engine cuts loose from the cars, whether it is U. P. or D. & R. G., and the switch engine picks them up.

Mr. FINERTY: Of course, both are outside of the plant.

Mr. COLLINS: Sure. They may be all right.

Q. (By Mr. COLLINS) You don't have any set time to pull the cars off these interchange tracks?

A. We do that work at our own convenience and get them

in and weighed as quickly as possible, providing we don't delay any other part of the mill operations.

Exam. WAY: Let me ask you this. Are you at liberty to pick up these cars off of the interchange point and set them in the particular place where they are to be either loaded or unloaded unless you have an order from the plant?

The WITNESS: No, sir.

Q. (By Mr. COLLINS) Then so far as a pattern is concerned, Mr. Kelley, you really don't have a pattern or a set program for the actual placing of the cars at the final unloading point, that is, a pattern or program drawn up for the railroad, do you?

A. No, sir.

Q. I notice on this map that the course of the tracks within the plant all seem to be stub-end tracks, is that the fact?

A. Yes, sir; they are all stub tracks.

1469 Q. There is no chance for a movement on out to the east and past and beyond the east end of the plant. It takes a back movement of the car out of the plant for every loaded movement that there is into the plant, is that so?

A. Yes, sir.

Q. That is, unless the car is wheeled into the plant?

A. Yes, sir.

Exam. WAY: Well now, apparently you have two situations here. You bring in the loads, you unload them, and bring the empties out, or you load them, and another class where you bring in a car and place it on a particular track and something is done to that load and you take that car and move it to some other place.

The WITNESS: Yes, sir.

Exam. WAY: And maybe you move it again?

The WITNESS: Yes, sir.

Exam. WAY: I am having some difficulty in trying to divide up those further moves, to separate them into the line-haul and into the intra-plant. Do you know of any shipments which move to a final resting place in this plant that is one continuous uninterrupted move on interstate or road-haul traffic that is afterwards moved to some other point in the yard?

The WITNESS: No, sir.

Exam. WAY: You haven't any such movement?

1470 The WITNESS: No, sir.

Exam. WAY: Now, all of the second moves which are made then are moved on intra-plant switches?

The WITNESS: Yes, sir.

Exam. Way: And they are paid for?

The WITNESS: Well, all the ores that come in there, they are in connection with the line-haul, and we are instructed to move them to meet the requirements of the smelter.

Mr. FINERTY: Mr. Examiner, may I call your attention to the fact that the tariffs, if you are speaking of the tariff charges, we will show, what intra-plant switching charges are paid.

Exam. Way: Now, let me ask you this question, what kind of records do you keep with respect to this switching?

The WITNESS: The switch list is furnished the engine foreman of the work performed, is O. K.'d over his signature, and then given to the agent that takes care of this smelter work account.

Exam. Way: And it is through this switch list that the agent decides whether or not it is an intra-plant or a line-haul movement?

The WITNESS: Yes, sir.

Exam. Way: And he makes his charges accordingly?

The WITNESS: Yes, sir.

1471 **Exam. Way:** And that is all done through the switch list?

The WITNESS: Yes, sir.

Exam. Way: Do you have any specific orders from the plant?

The WITNESS: Yes, sir. We have regular switch list order. That is given to the engine foreman who acts as yardmaster and engine foreman together. It contains all these various moves, and he fulfills all the requirements of the switch list.

Exam. Way: Now, does this order that you are talking about, is it addressed to the yardmaster, and does it say, switch car, whatever it is, from here to there?

The WITNESS: Yes, sir.

Q. (By Mr. COLLINS) From the switch list is the agent able to determine which switch movements are what the Examiner has referred to as line-haul movements on the one hand, and which movements are intra-plant switch movements?

A. The smelter company furnishes an intra-plant list, and he checks one list against the other.

Q. Well, from the two and after his check, is it from the two after the check the agent decides?

A. Yes, sir.

Q. What will be billed against the smelter and what will not for switching services?

A. Yes, sir.

1472 Q. Every car that moves into the plant, Mr. Kelley, has at least this much movement, that is from these interchange tracks to scales, and does the car stop there, does the car stop, or do they just pass over the scales?

A. The cars are cut off one at a time.

Mr. FINERTY: As they come into the plant?

The WITNESS: Yes, sir.

Exam. WAY: They are all uncoupled?

The WITNESS: Yes, sir.

Q. (By Mr. COLLINS) Then are they coupled up again?

A. Yes, sir.

Q. And then a movement from there to what place?

A. Into the smelter yards.

Q. And at what point would they be likely ordinarily to stop there?

A. Well, if the cars were ordered into any point, he would switch them there.

Q. All right. As to the cars to be sampled, is there movement up from the scales direct to the point at which sampled?

A. All those cars, all such cars are ordered into the switch yard.

Q. I believe you said that most of the sampling here took place at the mill in which the unloading took place?

A. Well, in many cases it does. When the ore arrives in the smelter yards, it is pipe sampled there, the
1473 different ores, and there there is developed the necessary information to operate on.

Q. So that in a case such as I was taking you would have in that type of case only two movements. That is, your movement would end at the sampling point?

A. Yes, sir.

Q. There would be no charge made for movements in such cases?

A. No.

Q. That would be regarded as a line-haul movement?

A. Yes, sir.

A. As a matter of fact, are there very many—are there any cases that you know of in this plant where there are movements beyond the sampling point, the mill at which the sampling is taking place?

A. The cars are milled in the sampling mills and the hoppers from there on.

Q. So there would be no further movement of the ore

in the car from there, except maybe in a case like this down below here where it goes into a car on a lower line?

A. Yes, sir; the only case.

Q. Do you have any information showing the number of cars inbound and outbound to the Murray plant in any given period?

A. Yes, sir.

Q. Will you tell us for what period?

Exam. WAY: Off the record.

1474 (Discussion off the record.)

Q. (By Mr. COLLINS) Your statement shows for the month of April, 1944, is that correct?

A. Yes, sir; that is right.

Q. And how many Union Pacific cars were received inbound?

A. 90 cars.

Q. That is 90 carloads?

A. Yes, sir.

Q. You don't know what commodities these were?

A. No, they would include everything that we received.

Q. How many loaded outbound cars have the Union Pacific during April?

A. 22.

Q. How many inbound loads for the D. & R. G. W.?

A. There were 137 received from the D. & R. G.

Q. And how many outbound?

A. 40.

Q. The total of your Union Pacific, 112, and of your D. & R. G., 177, with a grand total of 289, is that it?

A. Yes, sir.

Q. Can you indicate what, or do you know what type of commodity generally moves outbound, or commodities?

A. Well, there are various commodities. There is lead shipped out, spikes, flue dust.

Q. You mean out into line-haul movement?

1475 A. Arsenic, calcine, various other.

Q. How about the inbound commodities, can you name those?

A. Well, the ore is in crude concentrate form. There is coke, coal, scrap iron, there are other ores, lime rock.

Q. What?

A. Lime rock.

Exam. WAY: Much of that traffic inbound would come from intrastate points?

The WITNESS: Yes, sir.

Exam. Way: What percentage, do you know approximately?

The Witness: Well, approximately, I would say, about 60 percent or better.

Exam. Way: I assume that the outbound movement is all interstate, or a large part of it at least?

The Witness: A large portion of it is, yes, sir.

Exam. Way: Do you know what percentage?

The Witness: Well, it would be possibly a great—It would be 60 percent outbound, line-haul interstate.

Q. (By Mr. COLLINS) Anything else you want to say, Mr. Kelley?

A. I haven't any approximate knowledge of just exactly what moves interstate and what moves intrastate. We handle this stuff under a billing to different points in line-haul, and we don't develop that other than we get the billing. We can't always tell.

1476 Q. You haven't made any check to ascertain the percentage?

A. No, sir.

Mr. COLLINS: That is all I have, Mr. Kelley.

Exam. Way: Cross examine. I don't know it is cross examination either. It is probably direct.

Mr. CAMPBELL: I suppose it would be direct if I ask him, but I haven't any questions.

Exam. Way: What are your questions, cross or just questions?

Mr. CAMPBELL: Well, I guess it isn't really cross examination.

Exam. Way: I think Mr. Finerty should proceed.

Mr. FINERTY: I have no further questions.

Exam. Way: All right, Mr. Williams.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. Kelley, what is the significance of this track designated D. & R. G. W. spur track within the plant area?

A. That has no concern with the operation of the plant. That is a track operated by the railroad independently to load slag, railroad ballast.

Q. Operated by the Rio Grande?

A. The Union Pacific places the cars for loading, transfers to the Rio Grande at a cost.

Q. I see. Is all of this plant on one level?

1477 A. Practically.

Q. Are there any heavy grades over which the tracks are laid?

A. The only, you might say, grades that vary are out in the bullion hole and the matte tracks.

Q. And what grade do you estimate that to be?

A. Well, they are almost level track. One track is 1 per cent, something of that nature.

Q. Not a heavy grade?

A. No, not a heavy grade.

Q. Any sharp curves on the track?

A. Well, there is nothing that interferes with the operation. There are curves there. The tracks you see right on the map. I wouldn't say they are heavy curves, normal curves, easy operation.

Q. Can any of your engines switch the bag house track?

A. Yes, sir.

Q. Your road-haul engines?

A. No, sir.

Q. Just the switch engines?

A. Just the switch engines.

Q. You maintain a switch engine there at the plant then?

A. Yes, sir.

Q. And that does the switching and not the road-haul engine?

A. Yes, sir.

Q. Is this plant enclosed with a fence?

1478 A. Yes, sir.

Q. Does it have gates at the two entrances to which you have referred?

A. They only have them at the point of entry, but to pass through, as we enter the smelting properties, there is a pass and a gate right west of 53rd Street, shown on the map.

Q. Who opens that gate for the switching engines?

A. The watchman who is in the employment of the American Smelting & Refining Company.

Q. He is present there at the gate at all times, is he?

A. He usually opens the gate at the opening of the day's work and allows them to remain open under guard all during the period that we are switching the smelter.

Q. Mr. Kelley, you stated that all of these tracks over which the Union Pacific switches cars are stub and tracks. Is it or is it not a frequent occurrence that it is necessary to switch partially loaded cars and then return them for completion of loading?

A. When we spot the cars at some points it is necessary to withdraw them, weigh them, and return them.

Q. At what loading points does that occur?

A. Well, at times at the bag house or the arsenic.

Q. And is there a charge for that extra movement?

A. No, sir; that is included in the line-haul.

Q. I am not clear as to whether the industry operates locomotive cranes.

A. Yes, sir.

Q. And you have encountered no interference with the operation of those cranes?

A. No, the supervisor sees to that, that there is no interference with our engines.

Q. In your judgment would it be practical for both the D. & R. G. W. and the Union Pacific to switch this plant with their own engines?

A. No, sir; very impractical.

Q. Do you switch cars owned by the industry from points within the plant to the repair track for repair purposes?

A. Yes, sir.

Q. Is there any charge for that movement?

A. No, sir.

Mr. WILLIAMS: I have no further questions.

Exam. WAY: You are excused.

Mr. COLLINS, there has been reference made to the fact that there are certain existing contracts as between the Union Pacific and the Denver & Rio Grande in respect to the switching of the plants at Murray and at Garfield. Can you produce those contracts?

Mr. COLLINS: I will produce them if we have them. I am reasonably sure that we have a copy of the one at Murray. I should think we would have them at either place, wherever we have such an agreement, but I will produce them if we have them. I think we have them, and if I don't find them, I fail to find one of them, I will let you know.

Exam. WAY: And if you do have them, you will mail them to the Commission?

The WITNESS: Yes, sir; certainly.

Exam. WAY: And do that within ten days?

The WITNESS: Yes, sir.

Mr. FINERTY: And copies to parties?

Exam. WAY: Yes, and mail copies to the parties.

Mr. COLLINS: Mr. Examiner, I have a map here that has some of the points marked under a legend that would be much easier to identify than they were on the map which the witness was testifying from. It is a kind of a reduc-

tion of the same plant to smaller space with some additional marks, and if you care to have it, it could be introduced as merely supplementing the big map.

Exam. WAY: This is the same?

Mr. COLLINS: The same plant.

Exam. WAY: The same map we have here except—

Mr. COLLINS: It takes in a little more. It takes in, for instance, shows the point of interchange of the D. & R. G. W.

Exam. WAY: We will mark this map Exhibit No. 18 for identification.

1481 (Marked for identification "Respondent's Exhibit No. 18, Witness Kelley.")

Mr. COLLINS: If you notice, over on the right it has the tracks named and numbered, although that part of it is not as distinct as it is on the big map, but you have road track and north trestle and what not. The legend is the principal thing that would be helpful, I think.

Exam. WAY: I think that will be helpful as a supplement to the larger map, and you want to have someone explain the fact about the Pallas yard.

Re-direct Examination.

Q. (By Mr. COLLINS) Mr. Kelley, will you explain about the Pallas yard?

A. Yes, sir.

Q. (By Exam. WAY) The Pallas yard, as I understand it, Mr. Kelley, is the point in Murray at which the road-haul shipments are received or are forwarded?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And that is where the trains are made up?

A. Yes, sir.

Q. And all of the shipments that move into the plant or from the plant out over the Union Pacific, as well as the D. & R. G. move into the Pallas yard, is that right?

1482 A. Yes, sir.

Q. (By Mr. COLLINS) Is there a station called Pallas?

A. No. Pallas is handled by the station at Murray, from which it is about a mile distant, from where the plant is located.

Exam. WAY: Now, am I clear about the fact that both the D. & R. G. and the Union Pacific railroads come into and go out of the Pallas yard?

The Witness: Yes, sir.

Exam. WAY: Does anyone have any questions on this map?

Mr. FINERTY: Yes.

Re-cross Examination.

Q. (By Mr. FINERTY) On the legend I note this point "A" is shown on the legend as D. & R. G. entry. Now, what is intended, as the entry of what, Mr. Kelley?

A. Where our engines enter the D. & R. G. transfer.

Q. That is not any point that the D. & R. G. enters the smelter tracks?

A. No, sir.

Q. And B-1, point of Union Pacific entry is not the point where the Union Pacific enters the smelter property?

A. No, sir.

Q. It is the point in the Pallas yard?

A. Yes.

Q. Is that where your road-haul engine cuts off?

1483 A. Yes, sir.

Q. And B-2 is likewise not the point of entry into the property of the smelter company is it, or is it?

A. B-2 is where we go in with the D. & R. G. interchange cars.

Q. Where you take your interchange cars from the D. & R. G.?

A. Yes, sir.

Q. The point where the Union Pacific actually enters the smelter property is a little west of point "C", isn't it, where the scale is?

A. Yes, sir.

Q. (By Mr. WILLIAMS) By the way, Mr. Kelley, where is the billing covering this traffic inbound and outbound at this plant, where is that?

A. At Murray.

Mr. COLLINS: I offer the map as supplementary to Exhibit 17.

Exam. WAY: It will be received as Exhibit No. 18.

(Respondent's identification Exhibit No. 18, witness Kelley, received in evidence.)

Exam. WAY: You are excused.

(Witness excused.)

Exam. WAY: Have you any further witness, Mr. Collins?

Mr. COLLINS: Not particularly with respect to the Murray plant. I have a traffic witness that I would like
1484 to present later on.

Exam. WAY: All right, we will proceed with Mr. Finerty's testimony with respect to the Murray plant.

Mr. FINERTY: What about the Interstate Commerce Commission?

Mr. WILLIAMS: Murray or Garfield?

Exam. WAY: I am talking about Murray, the one we are on now.

F. C. MacDONALD, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. WILLIAMS) Mr. MacDonald, I believe you have been sworn previously in this same docket. Were you directed by the Commission to make an investigation of the switching operations at the plant of the American Smelting & Refining Company at Murray, Utah?

A. Yes, sir.

Q. Did you make such an investigation?

A. Yes, sir.

Q. Did you yourself make that investigation?

A. I did.

Q. Upon what dates?

A. April or March 28, 29 and 30.

Q. Did you prepare a statement based upon your personal observations of the switching operations at that plant?

1485 A. Yes, sir.

Q. Will you proceed to state what your observations were?

A. A plant of the American Smelting and Refining Company is located at Murray, Utah. It is situated close to the Pallas Yard of the Union Pacific Railroad, which is on that line of the carrier that extends between Salt Lake City and Linddyl, Utah.

The principal business of this plant is the processing of lead ores, and concentrates. The principal shipments into the plant consist of coal, coke, ore, concentrates, various kinds of Speiss, and lime sand. The principal commodities shipped from the plant are lead bullion, lead matte, arsenic, and various kinds of Speiss. Most inbound shipments are intrastate in character.

Trackage in the plant is all standard-gauge, which is used not only by the locomotives of the carrier but to a considerable extent by locomotive cranes belonging to the industry. This trackage consists of two leads which enter the plant at its southwest corner. From the west lead there are 25 diverging stub-end tracks serving various loading and unloading points. Three tracks which diverge from the

west lead and are known respectively, as track 6, track 5, and the slag track are used as storage tracks for outbound and inbound cars. One track leading from the east lead, and designated the Old Hand Track, is also used as 1486 a storage track for inbound cars.

In accordance with the terms of the contract entered into between the Oregon Short Line Railroad and the Denver and Rio Grande Western Railroad (Identified by the Union Pacific Railroad as A. C. E. No. 6568—Audit No. 13787—Contract Dept. No. C 720-A) switching at this plant for both carriers is performed by the Union Pacific Railroad using its own engines manned by its employees. D. & R. G. W. Railroad cars destined for the plant are placed on an interchange track at the entrance of the Pallas Yard of the Union Pacific Railroad, and are delivered to the plant by Union Pacific yard engines which work in the Pallas Yard. Cars of the Union Pacific Railroad destined to the plant are brought to Pallas Yard, and from that point are delivered to the Murray plant by Union Pacific switch engines which work in the Pallas Yard. All cars received by the plant are weighed on the plant scale, and unless there is immediate need for them ~~they are placed~~ in one of the storage tracks mentioned in a previous paragraph. One engine of the Union Pacific Railroad serves this plant. Its tour of duty is nominally 7 a. m. to 3 p. m., but overtime is necessary almost daily.

Moves made within the plant consist of handling American Smelting & Refining cars from the Roaster Track to unloading bins, the placement and removal of cars, 1487 to the arensic house for loading, moving of cars of ore, rock, coal, and coke to various unloading bins, placement of empty cars for loading of bullion, and the removal of the loaded cars. Movement of American Smelting & Refining cars or cars leased from the Union Pacific Railroad to stock-piles for loading and from the stock-piles to the unloading points, weighing of these cars in transit when loaded.

During approximately five months of each year, ore received at the plant, after being weighed, is placed in a thaw house, where it remains from two to four days. After removal from the thaw house, it is again weighed and placed in the sampling mill or at other unloading points. Moisture samples are taken while the cars are in transit within the plant area, but on some ore additional sampling is required and this is done during the crushing process. At

this plant, 3 loads and 1 empty are shoved to the east end of the sampling mill track, the one next to the empty is unloaded, crushed, sampled, and reloaded in the empty car. This process is continued until the loaded cars have all been transferred. The loads are then taken to the Roaster Plant.

Charges for switching service in this plant are contained in Union Pacific Railroad Terminal Tariff No. 7114, I. C. C. No. 565, effective March 9, 1939.

Demurrage is assessed in accordance with the terms of an average agreement.

1488 Tracks within the plant-area are owned and maintained by the industry. The condition of the track-age is poor.

All D. & R. G. W. Railroad Company cars to be used for loading arsenic are placed on the Brick track for conditioning of the dumping devices before being placed in the arsenic house.

Cars loaded with arsenic must be washed before leaving the plant. Washing can be done at several locations in the plant. One of these washing facilities is located near the slag track where outbound loads are held for billing, so that it is seldom necessary to make additional moves to spot these cars for washing.

The arsenic house has capacity for loading only one car at a time and there is no storage space on the loading track.

No means of weighing material being loaded into arsenic cars is provided and frequently loaded cars are found to be insufficiently loaded. Under such circumstances the car is returned for additional loading.

Whenever ore reaches the plant in cars having fixed floors or bottoms it is necessary to transfer the load to dump bottom cars. This is accomplished by spotting the load opposite an empty and using a locomotive crane.

At the time of this investigation Mill 2 was out of service because of some disability of the machinery. Cars containing ore to be used in this mill were stored in the 1489 thaw house. Mill No. 2 is served by Mill 2 track.

The thaw house has two tracks, designated the East Track and the West Track; each has capacity for six 40-foot cars.

In unloading cars of roasted ore the locomotive stays with the cut of cars being unloaded and spots each car at the bin.

The plant track scale is tested on six spots once each month; in making this test the test car is used. The car-

rier's locomotive switches the test car from the shed in which it is kept and returns it to the shed at the end of the test. A test requires five minutes. The scale is also tested on three spots once a week, but any available car is used for testing purpose.

A yard-master in the employ of the industry has charge of the carrier's crew while working in the plant and all orders relating to movement of cars in the plant area emanate from his office.

A car puller is used to move cars to and from the loading spot on the Roaster track.

From the several trestles in the plant cars may be permitted to move by gravity from the unloading or loading points.

Locomotives and box cars are not permitted to enter the shed over the bins on the North Trestle track consequently idlers must be used. A warning sign is located at 1490 the point of prohibition.

On the House (coarse) track idlers must be used to spot cars to the end of the track on account of interference by a permanently located spout.

Idlers must be used to pull and spot the Bag House track on account of interference by spout.

Idlers must be used to pull and spot the Godfrey track (or North track) because of interference by spouts. A warning sign is located at the point of prohibition.

Idlers must be used in spotting cars at the end of the Rock Track trestle in order to prevent damage to foot-boards and cylinder cocks of locomotives by material on or about the track at the bins.

Idlers must be used to reach into Mill 4 Hole track because of interference by a permanently located hoist.

Q. Mr. MacDonald, did you, during the course of your investigations at this plant, make notes of your observations of the movements of individual cars on the three days involved?

A. Yes, sir.

Q. And from your notes did you prepare a report setting out those individual movements?

A. Yes, sir.

Mr. WILLIAMS: We will have your report, consisting of 22 pages, marked for identification as Exhibit No. 19.

(Marked for identification "Commission's Exhibit 1491 No. 19, Witness MacDonald.")

Q. (By Mr. WILLIAMS) I hand you a report mark-

ed for identification as Exhibit No. 19 and ask you if that is the report that you have just referred to?

A. Yes, sir.

Q. Did you prepare that report yourself from your notes or your observations?

A. Yes, sir.

Exam. Way: How many pages?

Mr. WILLIAMS: 22 pages, so I counted, 22 pages consisting of the observations of switch movements over a period of three days, March 28, March 29 and March 30, 1944.

Q. (By Mr. WILLIAMS) Now, Mr. MacDonald, from your investigations, did you also select what you considered to be representative movements from your observations covering a period of the three days?

A. Yes, sir.

Mr. WILLIAMS: May I have this exhibit consisting of 27 pages marked for identification as No. 20.

(Marked for identification, "Commission's Exhibit No. 20, Witness MacDonald.")

Mr. WILLIAMS: In distributing this exhibit marked Exhibit No. 20, it states Murray, Ohio, on the fly leaf. It should be Murray, Utah. Will you make the change accordingly?

1492 Q. (By Mr. WILLIAMS) Mr. MacDonald, I hand you exhibit marked for identification as Exhibit No. 20 and ask you if that is the statement of representative shipments which you selected and prepared?

A. Yes, sir; it is.

Q. Now, what method did you use in selecting these shipments from the considerable number, the movement of which you observed?

A. Well, they represent different kinds of movements that are made in the plant daily.

Q. Will you select a movement of one shipper, one shipment, and explain just what it is, what it contains, just any page?

A. Well, here is one that I have called intra-plant movement, Page 5, Car No. L. A. & S. L. Gondola 201051. On the 28th of March, 1944, 3:25 p. m., this car, an empty, was taken from the high line to Track 4. The next day at 9:05 a. m. it was taken from Track 4, loaded, to the scale and weighed, and I was informed that it was some material called U. S. Middlings. It was returned from the scale at 9:10 and placed on the north trestle in preparation of get-

ting a run ready for the high line. At 10:35 a. m. it was taken—

Mr. FINERTY: What do you mean by that, getting a run ready?

The WITNESS: Most of the switching at the plant 1493 is done to prepare runs for different unloading points. That is, they get three or four cars together and shove them up into the high line or the middle belt, and this move at 9:10, placing it on the north trestle, was in preparation for such a run. At 10:35 a. m. it was taken from the north trestle and shoved to the high line as a load. The next day, empty, at 11:45 a. m. it was taken from the high line and placed on the coke track. That was listed on Form 887, Report of Intra-Plant switches, No. 3324, dated 3-29-44, and was listed on Form 890, which is the report that is made to the Union Pacific Railroad with respect to intra-plant movements. It was reported as Stock to Bin 2, \$2.70.

Q. (By Mr. WILLIAMS) From whom did you obtain information in respect to the two forms and the intra-plant switching charge of \$2.70?

A. Mr. Berger. I have copies of those.

Q. Who is Mr. Berger?

A. Mr. Berger is supervisor of labor, I believe they call him. He acts as yardmaster for the plant.

Q. An employee of the plant?

A. Yes, sir.

Q. And this information on Page 5, by lease car, what does that mean?

A. Well, that particular plant of the A. S. & R. has a number of Union Pacific cars in there, which I have 1494 been told are leased from the Union Pacific for use in the plant, exclusive use in the plant, and I don't believe they leave the plant.

Q. I believe you have explained in respect to a previous exhibit that the assignment number appearing on these pages merely means a symbol with reference to your particular investigation?

A. Yes, sir. In this particular case it could be well left off. In fact, I have left the assignment number off of this typewritten report.

Q. Is there any testimony you wish to add to that which has already been covered by you in your statements and reports?

A. I don't think of any myself that I would like to

volunteer. I would be willing to answer any questions anybody wants to ask.

Exam. WAY: I want to ask you a question about this Page 5 we have just talked about.

The WITNESS: Yes, sir.

Q. (By Exam. WAY) What particular significance do you attach to this specific page?

A. A great many moves in this plant consist in taking an L. A. & S. L. car, placing it on a track adjacent to the stock pile, loading it, and then returning it to some other point in the plant. There are any number of these moves made, and that was just simply one of those moves.

Q. Just simply an intra-plant move?

1495 A. Yes, sir.

Q. Well now, I don't know whether you know anything about this particular matter, but I find that on a good many of these sheets we have a charge of \$2.70.

A. Yes, sir.

Q. Now, what does \$2.70 include, how many switches?

A. Well, I wouldn't know that.

Exam. WAY: I suppose that is a matter you can tell us about, Mr. Finerty, when you get around to it?

Mr. FINERTY: Our witnesses will endeavor to.

Exam. WAY: Were you through?

Mr. WILLIAMS: Yes.

Q. (By Exam. WAY) I would like to refer your attention to Page—

Mr. FINERTY: Before we leave that Page No. 5, may I ask one question?

Exam. WAY: Yes.

Mr. FINERTY: That represents not only an intra-plant switch, but a strictly intra-state movement, doesn't it?

The WITNESS: Well now, I wouldn't know about that either. I suppose that any intra-plant move is an intra-state move. I don't know about that.

Q. (By Exam. WAY) Now, look at Page 10.

A. Yes, sir.

Q. On that page there are eleven moves recorded
1496 of D. & R. G. dump car 41843?

A. Yes, sir.

Q. Now, apparently the charges on that particular car were \$2.70 plus 50 cents for a light weighing?

A. That is right. That represents an inbound movement of a load of what they call arsenic or arsenical pyrites, the unloading of that car, the use of that car for the transfer of some other material that was loaded in the yard, and

the car made empty again at an unloading spot in the yard or the plant.

Q. Well now, can you say, or is it your judgment that some of these movements were simply switches to a particular track in the make-up of a cut of cars?

A. I have indicated those there by a symbol X. The car was returned from the scale after being weighed upon receipt from Pallas Yard. It was returned from the scale to Track 5, and it was placed on Track 5 while a run was in preparation for the high line. When the run was complete the cars were placed on the high line.

The one down below there, it shows that at 5:10 p. m. on 3-29 this car was placed on the north cylinder track to the middle belt. By the way, I might say the low belt track is not shown on this map, but is the same track as is marked here pug mill track. It wasn't moved until the next day at

11:25, but all of those cars that were placed on the 1497 middle belt track at 5:10 p. m. were placed in there in anticipation of a move to what is known as the middle belt track, the D. & L. bins.

Q. Have you any information or anything that would show us the movement, or ordered moves of that car?

A. I have copies of the orders that were given by Mr. Berger, and on his order then we would take the car from one point, put it at another point.

Mr. FINERTY: Certainly Mr. Berger wouldn't take the car from one track to another and make eleven moves.

The WITNESS: My recollection is it just says from so and so to so and so.

Mr. FINERTY: And these moves are made for operating reasons of the D. & B. G. switching crew, the Union Pacific switching crew?

The WITNESS: Well, some of them are.

Q. (By Exam. WAY) Well, what would that indicate to your mind, such moves as that?

A. There are three that to my notion are made, would have been made under any circumstances in preparing a run of this kind.

Q. Well, would you say that it is necessary to make as many moves as that just as a matter of convenience, or would it be a case of necessity because of lack of capacity of the tracks or the arrangement of the tracks, or 1498 something of that character?

A. I think if we analyze this, maybe there aren't so many moves there. In the first place, of course, the car

came from Pallas yard to Track 4. That puts the car from the Union Pacific Yard into the yard of the plant. The next move, it was taken to the scale and weighed, and then moved, the third movement, to Track 5. That movement to Track 5 is the only movement in between the movement from the scale to the high line. The high line is the point at which it was unloaded. It came empty from the high line and it was placed on the house track.

Mr. FINERTY: Now, just in that connection, Mr. MacDonald—

The WITNESS: Yes, sir.

Mr. FINERTY: When that car was unloaded on the high line, that ended the road-haul movement, didn't it?

The WITNESS: That ended the movement in connection with the road-haul, yes, sir.

Mr. FINERTY: Yes.

The WITNESS: Now, this move to the house track has no road-haul reason for making that move, but in a very few minutes the car was sent to the north trestle for loading. Within, well, forty minutes afterward, it was sent to the north trestle for loading, and then from the north trestle it took practically the same course, went to the scale 1499 and was weighed and went to the north cylinder track on the return from the scale. Now, that move, there doesn't seem to be any particular reason for that move unless it was that he hadn't received the order to place the car in the middle belt, or to prepare the run for the middle belt, but the next move, as I say, was in anticipation of the move the next day of the run of cars to the middle belt.

Exam. WAY: All right, thank you. Are you finished?

Mr. WILLIAMS: Yes.

The WITNESS: I would like to say a word or two before we get through here. In this report there are two points on this map that if they were not designated in some way, it would be hard to say what happened to the cars. There are two leads.

Mr. FINERTY: You are referring to exhibit what?

Exam. WAY: 17, the big map.

The WITNESS: 17. At the point where ore—that is, the tracks of the plant enter the gates, rather the enclosure, there are two tracks enter the plant. They have no name that I could find or learn from anyone so I gave them the name the east lead and the west lead myself for use in this report and for use in my notes.

Exam. WAY: You mean Exhibit No. 19 marked for identification?

THE WITNESS: Yes. And the track down here 1500 which is sometimes known as the Godfrey track or the calcine track alongside this building marked H. & H. pots, I have referred to that as the north track. Those are the only tracks that I think needed—And another track that is shown differently on the map to what it is in Exhibit 19 is this track called the D. & R. G. W. spur track. That track is designated by the switchman as the slag track, and that is the term I have used in describing it.

Exam. Way: Cross-examine, Mr. Finerty?

Mr. FINERTY: Well, if I may, can I defer any cross-examination that we think necessary until after we have an opportunity to examine these exhibits, Mr. Examiner?

Exam. Way: Mr. Campbell?

Mr. CAMPBELL: No, I have no examination on it at all.

Mr. WILLIAMS: Mr. Examiner, I wish to offer in evidence exhibits marked for identification as No. 19 and No. 20 as Exhibits 19 and 20.

Exam. Way: They are received.

(Commission's identification Exhibits Nos. 19 and 20, Witness MacDonald, received in evidence.)

Q. (By Exam. Way) Now, I want to ask you, in your statement you referred to the poor condition of the tracks within this plant.

A. Yes, sir.

Q. In what way are they poor?

1501 **A.** Well, we were delayed twice while I was there because of repairs being made to the track. In one case it was a broken rail right in the—close to the switch point leading to the D. & R. G. W. spur track. That is, leading from that spur track to Tracks 5 and 6. On another occasion we went on to the high line track to do some work up there and were not permitted to go up there on account of some trouble with the track. The track generally is not in good shape. That is my judgment.

Q. What class of locomotive is used in this plant?

A. It is a small six-wheel shifter of about 70 tons.

Q. Could a heavy locomotive operate in the plant?

A. Probably get around, but there would be more danger of derailment.

Q. What is the weight of the rail?

A. I should say around 70 pounds.

Q. It is old rail?

A. It is old rail; yes, sir.

Q. How are the ties?

A. The ties are not too good.

Q. Is the track ballasted?

A. Not very well, and in making the repairs, they salvage pretty near everything they use, even spikes.

Mr. FINERTY: Is that a criticism?

The WITNESS: Not altogether, but some of them
1502 aren't in the best of shape, even the spikes.

Exam. WAY: Well, I will also reserve any questioning I may have about that until further cross-examination. You are excused temporarily, Mr. MacDonald.

(Witness excused.)

Colloquy between Examiner and Counsel

Mr. ROOT: Mr. Examiner, may I at this time enter my appearance?

Exam. WAY: Yes, Mr. Root. You have filed your written appearance?

Mr. ROOT: I have filed my written appearance, but I just did not want to be overlooked. My name is Charles A. Root, and I represent the Public Service Commission of the state of Utah, address, 314 State Capitol Building, Salt Lake City, Utah.

Exam. WAY: What position do you take in this case, Mr. Root?

Mr. ROOT: Well, frankly, I have been rather surprised at some of the information contained in these exhibits wherein it appears that the Commission representatives have been checking up on the intrastate business and operations at these smelters. I didn't know the intrastate business was under investigation in this docket.

Exam. WAY: I don't know that it is, other than the plant was under investigation, the switching in the plant, and no separation, as I understand it, was made between
1503 interstate and intrastate. It just happened so in making the record, some shipments were bound to be intrastate and other interstate.

Mr. ROOT: Of course, the Interstate Commerce Commission will not, of course, enter any orders in this case with respect to intrastate business.

Exam. WAY: The Interstate Commerce Commission?

Mr. ROOT: Yes.

Exam. WAY: I hardly think they will. I wish to say this is not a Section 13 case.

Mr. ROOT: Well, that is my understanding, it is not a Section 13 case.

Exam. WAY: No, it is not a Section 13 case.

Mr. Root: And whatever is done will be confined to interstate business.

Exam. WAY: That is my understanding.

Mr. Root: And in that respect this evidence that is going into the record here on purely intrastate matters will have to be disregarded likely in making any report of this case.

Exam. WAY: Well, of course, I can't debate that with you here, but in some sense that may be right. In another sense it is not. It will not have to be disregarded. If we find that the intrastate traffic constitutes an interference, why then, that is something else.

Mr. FINERTY: Let me understand that, Mr. Examiner, what do you mean by the intrastate traffic constituting an interference?

Exam. WAY: If it should be so found in determining whether or not these switches are beyond the duty of the carrier to switch the tracks because of interference, why then I think the matter will be given consideration.

Mr. FINERTY: As I understand the record up to date, it shows that the vast majority of this tonnage is intrastate, and do I understand there is some suggestion here that the Interstate Commerce Commission has a right to require the ceasing of service on 90 per cent of the intrastate traffic to protect the 10 percent interstate?

Exam. WAY: I am making no such suggestion whatever about it.

Mr. Root: As far as I am concerned, I just want to understand what is going on.

Exam. WAY: You may be assured as far as this record is concerned this is not a Section 13 case.

Mr. Root: Thank you.

Exam. WAY: Do you have another witness?

Mr. WILLIAMS: The Commission has no additional testimony in regard to the Murray plant.

Exam. WAY: This winds up the Murray plant except for the industry?

Mr. FINERTY: I understand that Mr. Collins has 1505 a witness.

Mr. COLLINS: I haven't a witness that I want to put on now in respect to the Murray plant. I have a witness I want to call later to speak in general.

Mr. FINERTY: I will call no witness until Mr. Collins finishes with his witnesses.

Mr. COLLINS: There is no reason why you should have your preference about everything.

Mr. FINERTY: I understood, and it was clearly understood at the beginning of this hearing that the Interstate Commerce Commission will proceed and the carriers will proceed with their evidence before the industry proceed with its evidence. I also understood that we would proceed plant by plant, which is being done. The only plant in which the Union Pacific is directly interested is the Murray plant.

Mr. COLLINS: No.

Mr. FINERTY: I am speaking of the hearing started on May 26. The Midvale—that is a hearing set for May 29. I would like to ask that if Mr. Collins has any testimony with respect to the Murray plant it be produced before I put on any witnesses with reference to that plant.

Exam. WAY: Is your witness here, Mr. Collins?

Mr. COLLINS: I have got a traffic witness here. He isn't going to speak any more about the Murray plant than he is any other plant.

1506 Mr. CAMPBELL: Mr. Examiner, if I failed to offer any of my exhibits in evidence, I would like to ask they be offered in evidence now.

Exam. WAY: They will all be received.

(Respondent's identification Exhibits Nos. 4 and 5, Witness Carey, received in evidence.)

Exam. WAY: Off the record.

(Discussion off the record.)

Exam. WAY: We will adjourn until nine o'clock in the morning.

(Whereupon at 9:30 p. m. Friday, May 26, a recess was taken until 9 o'clock a. m. of the following day.)

1508

Before

The Interstate Commerce Commission

AMERICAN SMELTING & REFINING COMPANY

EX PARTE No. 104

PRACTICES OF CARRIERS AFFECTING OPERATING REVENUES
AND EXPENSES

PART II. TERMINAL SERVICES

Denver, Colo., May 27, 1944.

9 o'clock a. m.

Before: LEONARD WAY, Examiner, Bureau of Rail Carriers, Interstate Commerce Commission.

Met pursuant to adjournment.

APPEARANCES:

No additional appearances.

1511

Proceedings

Exam. Way: We are still on the Murray plant, and I will ask that the respondent rail carriers proceed.

Mr. COLLINS: Mr. Examiner, I would like to introduce in evidence the effective tariff sheets covering the switching charges at Power, Garfield, Midvale and Murray, Utah, with particular reference, as far as the Union Pacific is concerned, to Garfield, Midvale and Murray. That is 7th Revised Page 22 of Union Pacific Railroad Company Terminal Tariff No. 7114. I. C. C. No. 565. In the item, which is 520-E, reference is made to Item 790, 900 and 920 C, and those are contained in Union Pacific Terminal Tariff No. 7114. I have here copies of Revised Page 32, which publishes Item 790-D and Revised Page 34, which publishes Items 900-D, Revised Sheet 35, which publishes Item 920-C, and that will complete, I think, the entire reference as far as rates are concerned in respect to the three plants served by the Union Pacific. I don't have copies enough of these sheets, so I would like to make an introduction by reference and would be glad to give you the sheets if you like them.

Exam. Way: All right, that may be done. It may be incorporated by reference.

Mr. COLLINS: I would like to say, Mr. Examiner, that insofar as rate testimony is concerned, Mr. Carey, in his testimony yesterday sufficiently covered the historical statement of the rates, and I see no necessity to put on another witness. As far as the Union Pacific is concerned we will adopt Mr. Carey's testimony down to and including the 1938 change, except that insofar as the Union Pacific is concerned, we feel that we are right in making the change to conform to the Commission's principles laid down in its *Ex Parte* 104 decision and 209 I. C. C. 11, and we still think we are right.

Exam. Way: Well, regardless of the reason for it, the tariffs are on file, and the changes have all been specified and indicated in his testimony. That is what you mean to say.

Mr. FINERTY: I take it, Mr. Collins, that this exhibit you have introduced is simply—

Exam. Way: No, he hasn't introduced it. He has merely handed me a copy of it, and he has introduced the tariffs

by reference, referring to the tariff by L. C. C. number and item.

Mr. FINERTY: As I understand, you don't differ from the tariffs referred to by Mr. Carey and Mr. Tuckwood?

Mr. COLLINS: Not in substance.

Exam. WAY: That is merely handed you for your reference. You can have it if you want it.

Mr. COLLINS: Then that completes our testimony as to Murray and also our late testimony as to Midvale.

Exam. WAY: All right, and are you ready to proceed now with the Murray plant?

Mr. FINERTY: I am, sir. May we go ahead with Garfield first, because I think that is in order.

Exam. WAY: We will now take up the Garfield plant.

Mr. FINERTY: I will call Mr. Dangerfield as a witness.

Mr. EXAMINER: I desire to offer for identification Exhibit 21, a statement showing incoming shipments for the twelve-month period ending with March 31, 1944, consisting of three sheets.

Exam. WAY: It will be marked for identification.

(Marked for identification "Intervener's Exhibit No. 21, Witness Dangerfield.")

Mr. FINERTY: I offer for identification as Exhibit 22 a statement showing outgoing shipments for the twelve-month period ending with March 31, 1944.

(Marked for identification "Intervener's Exhibit No. 22, Witness Dangerfield.")

Mr. FINERTY: I offer as Exhibit 23 an analysis of switching and weighing charges incurred for work performed by railroad during twelve-month period ending March 31, 1944.

(Marked for identification "Intervener's Exhibit No. 23, Witness Dangerfield.")

Mr. FINERTY: I offer as Exhibit 24 an analysis of switching and weighing charges incurred for work performed by railroad during twelve-month period ending March 1944 31, 1944, intrastate only.

(Marked for identification "Intervener's Exhibit No. 24, Witness Dangerfield.")

Mr. FINERTY: I offer as Exhibit 25, a statement showing total number of original carloads received at Garfield smelter for years as there listed, which are the last ten months of 1909 to and including the first four months of 1944.

(Marked for identification "Intervener's Exhibit No. 25, Witness Dangerfield.")

Mr. FINERTY: I offer for identification as Exhibit 26 a photograph of the smelter and tracks of the American Smelting & Refining Company at Garfield, Utah.

Exam. Way: It will be so marked.

(Marked for identification "Intervener's Exhibit No. 26, Witness Dangerfield.")

A. E. DANGERFIELD WAS SWORN and testified as follows:

Direct Examination:

Q. (By Mr. FINERTY) Mr. Dangerfield, will you state your name and address?

A. My name is A. E. Dangerfield. I live at 924 Third Avenue, Salt Lake City, Utah, and my work is weighmaster and smelter yardmaster.

Q. Where?

A. At Garfield, Utah.

1515 Q. How long have you occupied that position?

A. As weighmaster and smelter yardmaster, for twelve years.

Q. Prior to that what did you do?

A. I worked as metallurgical clerk for sixteen years.

Q. Where?

A. At the Garfield plant of the American Smelting & Refining Company.

Q. So for approximately twenty-eight years you have been familiar with the Garfield plant of the American Smelting & Refining Company?

A. For four years prior to that I was messenger and timekeeper.

Q. Then we will make it thirty-two.

A. Thirty-two.

Q. Are you familiar with the lay-out of the smelter and of the trackage owned by the American Smelting & Refining Company serving the smelter?

A. Yes, sir.

Q. Are you familiar with the manner in which the three railroads serving the smelter handle shipments to and from the smelter?

A. Yes, sir.

Q. Referring to Exhibit 3, does that correctly show the lay-out of the tracks within the smelter property used by the D. & R. G. Railroad in serving the smelter?

1516 A. Yes, sir.

Q. Now, that exhibit does not, however, show the tracks, additional tracks within the smelter property used by the smelter itself to serve various buildings in the

smelter and various points in the smelter but over which the D. & R. G. engines do not operate?

A. Yes, sir; that is right.

Q. And those tracks are correctly shown on Exhibit 1?

A. Yes, sir.

Mr. FINERTY: Mr. Examiner, I am using this exhibit because it is more easily referred to for identification of points in the smelter.

Q. (By Mr. FINERTY) Were certain exhibits which I have introduced for identification as Exhibits Nos. 21 to 25, inclusive, prepared under your direction?

A. Yes, sir.

Q. Now, generally speaking, how many levels are there in the smelter?

A. I would say three.

Q. And the first level and highest level consists of the tracks numbered 1 to 10 and those tracks shown adjacent to those ten on Exhibit 3?

A. That is right.

Q. The second level consists, generally speaking, of the tracks known as the ore dock tracks and numbered 1517 on the Exhibits B, C, D, and F at the west end and numbers 4, 3, 2 and 1 dock tracks at the east end?

A. That is right.

Q. And the tracks below those, generally speaking, are what you term tracks in the hole?

A. Hole tracks.

Q. Or the lowest level.

Exam. WAY: When you say "below them," you mean on the low level, but they are shown on the map as above.

Q. (By Mr. FINERTY) The highest level on this map starts at the bottom of the map?

A. That is right.

Q. And the lower level is shown at the top of the map?

A. That is true.

Q. While the three railroads, the D. & R. G., the Bingham & Garfield, and the Union Pacific all handle cars to and from the smelter, the switching within the smelter property is done by the D. & R. G. after the road-haul engines of the three companies are cut off?

A. Yes, sir.

Q. Now, will you briefly state how a D. & R. G. train enters the smelter with the road-haul engine, where that train is stopped and the road engine cut off?

A. The D. & R. G. enters the smelter from the east.

Q. That is from the right-hand side of the map?

1518 A. Right-hand side of the map. They pull their loads in. They stop at one of these, I would say usually No. 5 track, right opposite what is designated on the map as the scale house.

Mr. TUCKWOOD: Is that scale No. 1?

The WITNESS: Scale No. 1; yes, sir. The Union Pacific enters the smelter from the west. Their loads are pushed in. They are stopped, the engine cuts off at one of the tracks, usually No. 3 or No. 4, adjacent to the scalehouse No. 1. The Bingham & Garfield enter from the east, which is the right-hand side of the map, and they push their loads in, and their loads, they stop right in the track, one of the tracks, either 3 or 4 adjacent to scale house No. 1, and uncouple their cars.

Q. (By Mr. FIXERTY) They are all points the line-haul engines can cut-off from inbound shipments?

A. Yes, sir.

Q. Now, does the D. & R. G. push or pull their cars in?

A. The D. & R. G. pulls their cars in.

Q. The other two road-haul engines of the other two carriers push their cars in?

A. That is right.

Q. I call your attention to Exhibit No. 21. That exhibit shows, does it not, on the first page miscellaneous materials and supplies received at Garfield smelter for 1519 the year ending March 31, 1944, by carloads?

A. Yes, sir.

Q. And those carloads are divided between interstate and intrastate points of origin?

A. Yes, sir.

Q. It shows the total number of carloads, both inter and intrastate received?

A. Yes, sir.

Q. And it shows where each car is unloaded by a designation shown by name, of a point either on Map 3 or on Map 1?

A. That is right.

Q. Exhibit 3 or Exhibit 1?

A. That is right.

Q. And in addition those points are located by coordinate numbers to be found on Exhibit 1?

A. That is right.

Q. On Sheets 2 and 3 of Exhibit 21, at the head of Sheet 2 are shown additional miscellaneous materials and supplies received by carloads, and the same information?

A. Yes, sir.

Q. Then under the heading raw material received, about the middle of Exhibit 21, and continuing over on page 3 of that exhibit, are shown by carloads all raw materials received?

A: Yes, sir.

Q. And the names of the materials?

1520 A. Yes, sir.

Q. Showing the division of those materials by points of origin between intra and interstate points?

A. Yes, sir.

Q. And showing also the total number of carloads of each material received?

A. Yes, sir.

Q. And it then shows the final place where those shipments are unloaded by the name shown of the various points as indicated either on Exhibit 3 or Exhibit 1?

A. Yes, sir.

Q. And those names of the points of unloading are further identified by map coordinates to be found on Exhibit 1?

A. Yes, sir.

Q. That exhibit shows, does it not, that of the total number of loaded cars received, which is 22,982, 21,544 were intrastate shipments?

A. Yes, sir.

Q. Now, that includes both raw materials and miscellaneous supplies?

A. Yes, sir.

Q. Now, referring particularly to pages 2 and 3 of that exhibit, it shows that of the total number of carloads of raw materials received, as shown on page 3, 21, 333 carloads, 13,025 carloads are shown on page 2 as Utah
1521 Copper concentrates?

A. Yes, sir.

Q. Of the total number of carloads of raw materials received, Utah Copper concentrates, as shown by that exhibit, approximate 66 percent, do they not?

A. Yes, sir; that is right.

Q. Of the remaining number of carloads of raw materials containing metal, such as crude ore, tailings, precipitates and other things, that exhibit shows that there were approximately 6,084 cars received?

A. Yes, sir.

Q. Or 34 percent of the total number of shipments of raw materials?

A. That is right.

Q. Now, directing your attention to the 13,023 carloads of Utah concentrates received at the Garfield smelter, will you state from whom, from where those concentrates are shipped and by what railroad?

A. The Utah Copper concentrates are shipped by the Utah Copper Company over the Bingham & Garfield Railroad.

Q. From what point?

A. From Magna plant, one of the Utah Copper mills, and from the Arthur plant, one of the Utah Copper concentrating mills.

Q. When you speak of Magna and Arthur, your 1522 mean the concentrating plants?

A. The concentrating points.

Q. And the concentrating mills of the Utah Copper Company?

A. Yes, sir.

Q. Where are Magna and Arthur located?

A. Magna is approximately five and a half miles from the smelter, and I would say the Arthur plant—

Q. You mean five and a half miles from the Garfield smelter east?

A. East, and the Arthur plant, I would say was approximately three and a half miles from the Garfield smelter east.

Q. Those concentrates are pulled into the upper level tracks at the smelter by the road-haul engine of the Bingham & Garfield, as you have described?

A. Yes, sir.

Q. That is on tracks—

A. Three and four.

Q. Three and four? Rather, they are pushed in?

A. Pushed in.

Q. Now, incidentally, the tracks on the upper level of the smelter constitute the joint railroad terminal of these three line-haul engines, do they not?

A. Yes, sir.

Q. Will you describe how a trainload of Utah concentrates, having arrived on Tracks 3 and 4, pushed 1523 there by the Bingham & Garfield road engine are then handled by the D. & R. G. engine?

A. The D. & R. G. engine will come in from the east. They will pick up approximately 15 carloads of Utah Copper concentrates.

Q. How many will ordinarily come in on a train?

A. Usually 15, that is usually what they bring in 15 in a train. They will pull those cars from No. 3 or 4 track in the upper yard of the smelter, they will bring those cars to No. 1 scale.

Q. They will pull them how?

A. Pull them out from the east up over a switch and down the scale, down to the scale house.

Q. They will pull them from 3 or 4?

A. To Track No. 1.

Q. To the switch connecting those tracks with Track No. 1, which is the scale track?

A. That is right; yes, sir.

Q. And then the D. & R. G. engine, being on the east end of that trainload of Utah concentrates will push those cars down to the scale house?

A. That is right.

Q. What happens there?

A. The cars will be weighed.

Q. At scale house No. 1?

1524 A. They will place one car on the scales. After having been weighed, they will uncouple the car. The car will drift down No. 1 track to either the track designated on the map No. 1 track or pest house.

Q. Now, they will push the remaining cars onto the scale, uncouple them, and let them drift down in the same way?

A. The same manner.

Q. From the time the D. & R. G. engine uncouples those cars at No. 1 scale house, does that engine do anything more with those cars prior to their unloading?

A. No.

Q. When they drift down to either No. 1 track or the pest house track what becomes of the cars then?

A. The cars are unloaded by the Martin machine sampler. The cars are unloaded, the material going on a conveyor belt.

Q. Now, the Martin machine sampler is indicated on this map as sulphide ore bins, is it?

A. Now, the Martin machine sampler is indicated on the one map as Martin machines.

Q. But where is it?

A. It is adjacent to, it is south of your sulphide ore bins.

Q. It is just south of your sulphide ore bins?

A. The west end.

Q. Yes, the Martin machines are indicated adjacent, or not adjacent to the points on the map marked in red
1525 pest house and new pest house track.

A. They are just west of that.

Q. West of that?

A. Yes, sir; just west of that.

Q. Those cars having been unloaded into the Martin machines are never again handled by the railroad until they have passed through the smelter by conveyor belts and otherwise and come out of the smelter as bullion in the bullion house, or what is the other name?

A. Copper casting.

Q. Or copper casting house, so that of the total of 22,000 cars of all materials received at the smelter inbound, and of 21,333 of raw materials, 13,025 cars are handled, so far as the D. & R. G. switching engine is concerned, merely from Tracks Nos. 3 and 4 over the No. 1 scale and dropped there?

A. That is right.

Q. And those cars, the Utah concentrates in those cars are never rehandled by the railroad at all?

A. No, sir.

Q. And your Utah concentrates enter into all the other raw materials going finally to make up the bullion that is shipped out?

A. Yes, sir.

Q. Under road-haul rates?

A. Yes, sir.

Q. Now, I believe you stated that of the remaining cars of raw materials, constituting metal-bearing raw materials, approximately 34 percent were delivered on the dock tracks on the second level?

A. The second level; that is right.

Q. Will you, as an example of the delivery of the remaining 34 percent of such metal-bearing materials, or some 6,804 cars state how carloads of raw ore are handled coming into the plant either from the D. & R. G.—Does the Bingham & Garfield ship the raw ores?

A. Yes, sir.

Q. The Bingham & Garfield or the Union Pacific. Take first Union Pacific ore.

A. After the road-haul engine has placed a trainload of ore into the American Smelting & Refining plant—

Q. After it is placed in the joint railroad terminal yard?

A. Terminal yard; yes, sir. The D. & R. G. engine will couple onto these cars from either 3, 4 or 5 tracks, whichever they were placed on by the road haul engine. They will pull those cars to the east end over the switch that connects the No. 1 scale house. These cars will be pushed down to the scales. Each car will be weighed, uncoupled,

and will drift down to what we call No. 2 line. All these cars will be handled in the same manner.

1527 Q. Exam. WAT: How do you identify No. 2 line?

Mr. FINERTY: It is No. 2 track.

The WITNESS: No. 2 track, No. 2 line.

Q. (By Mr. FINERTY) That is the D. & R. G. east end engine?

A. D. & R. G. east end engine.

Q. Will push those cars down to the scale, at the scale they will be uncoupled, and will drift down by gravity, down No. 2 track?

A. Down No. 2 track.

Q. Now, to what point do they drift?

A. They will drift down almost to the end of the track there, as far as they will go without fouling a switch.

Q. Locate it on Map 3 by some point.

A. I would say right west of the Martin machines is an example.

Q. Those cars having drifted down to west of the Martin machines, what are done with them then?

A. The west end engine will pick those cars up from the west end of the track, No. 2. They will place those cars back on one of our tracks in the joint terminal yard for orders from the smelter.

Q. Now, when you speak of orders from the smelter, you mean spotting orders after those cars have been weighed?

A. After those cars have been weighed.

1528 Q. Those cars, unlike the concentrates, are taken back after weighing into the joint railroad terminal yard and held for spotting orders?

A. Yes, sir.

Q. Where are those cars ultimately spotted and unloaded?

A. Those cars are ultimately spotted and unloaded on the unloading docks at the west end of the yard designated on the map as either B, C or D line, and dumped, unloaded rather, in the receiving bins.

Q. Now, those cars of ore so unloaded, with the exception of a very small percentage, are never again handled by the railroad at the smelter until they come out in the form of bullion, having passed through the manufacturing process?

A. That is right.

Q. Of those 6,000 odd cars of such materials, about what percentage are really handled by the railroad after being unloaded on the dock tracks, B, C or D?

A. I would say roughly 4 percent.

Q. That is 4 percent of the 34 percent?

A. That is right, 4 percent of the 34 percent.

Q. And for what purpose are those cars, that 4 percent of the 34 percent, again loaded into railroad cars before completion of the manufacture of bullion?

The WITNESS: Will you repeat that?

Mr. FINERTY: Read it.

(The question referred to was read by the reporter.)

1529 A. Some of these cars are reloaded in cars and sent to stock piles. Some of the cars are held until a sample has been made for the shipper.

Mr. TUCKWOOD: Would some of those cars leave the smelter?

The WITNESS: Some of the cars.

Mr. FINERTY: I was just coming to that.

Q. (By Mr. FINERTY) Then there is a third class of cars, is there not, held. Having passed through the sampling process at the smelter, the shipper elects to reconsign those cars to another point?

A. That is right.

Q. Such as Murray, Midvale, any place he wants to send it?

A. That is right.

Q. And that is because at some other point, presumably he will get a better price for his ore than at Garfield?

A. That is right.

Q. That would be true if the ore turned out on sampling to be predominantly lead?

A. Lead.

Q. It would probably be reconsigned by the shipper to Murray?

A. Yes, sir.

Q. And the total number of cars so reconsigned in the period covered by Exhibit 21 after sampling at the Garfield smelter, reconsigned by the shipper to other points, was 31 cars, was it not?

1530 A. That is right: yes, sir.

Q. Will you indicate where those 31 cars are shown, if at all, on Exhibit 21?

A. They are shown on your outbound loadings.

Mr. FINERTY: They are shown on your outbound loads. Exhibit 22. Mr. Examiner, just as a matter of reference here, Exhibit 22 showing outbound loads, there in the first

column at the bottom of the first group of outbound loads, is shown an item of ore diversions, 31, and that is during the entire year. Shown by that Exhibit 31 cars were re-consigned after sampling at Garfield to other smelters.

The Witness: That is right.

Q. (By Mr. FINERTY) Then as I understand you, out of a total of 22,982 cars of all commodities, raw materials and otherwise, received at the Garfield smelter, 19,829 of those cars were delivered either at the Martin machine or on the ore dock tracks, and with the exception of this 4 percent of the ore cars were never again handled by the railroad until they moved out as bullion?

A. That is right.

Q. Under line-haul rates. Now, when your trains of concentrates come in, Utah Copper concentrates over the Bingham & Garfield Railroad, do you give any orders for the weighing of those cars and then placing them in the Martin bins, or is that a routine matter?

1531 A. That is a routine matter.

Q. As testified to yesterday by Mr. Moriarty?

A. That is right; yes, sir.

Q. And that is such a routine matter that no orders are necessary, spotting orders are necessary from you to the D. & R. G. engine crew or yard foreman?

A. That is right.

Q. On the ore you do give spotting orders, but all those spotting orders are for spotting on the tracks designated?

A. That is right.

Q. And on the dock?

A. Those orders, however, are given by our metallurgical clerk.

Q. Well, they are given by the American Smelting & Refining Company?

A. Yes.

Q. Have you had occasion to observe how much time the three engines of the D. & R. G. Railroad Company perform switching on shipments in and out of the plant or smelter, also in the various locations in the plant?

A. Well, I would say approximately that our east end engine—

Q. The D. & R. G. east end engine?

A. The D. & R. G. east end engine. I would say 95 percent of the time is spent in the joint railroad terminal.

Q. That 95 percent of the east end engine's time in the joint railroad terminal is spent either—and by that

1532 you mean Tracks Nos. 1 to 10?

A. Yes.

Q. Is spent either in making up or breaking up trains for the three railroads?

A. Yes, sir.

Q. On the appropriate tracks?

A. Yes, sir.

Q. Breaking up inbound trains and making up outbound trains?

A. Yes, sir.

Q. Or it is spent in pushing these concentrates down to the Martin house?

A. Yes, sir.

Q. Or it is spent in weighing ore?

A. Yes, sir.

Q. The remainder of that time is spent in switching bad-order cars from the bad-order hole track to and from the rip tracks, is it not?

A. You are still talking about the east end engine?

Q. East end engine.

A. The east end engine on day shift doesn't switch cars from the rip track.

Q. I see. So the east end engine performs the services I have enumerated but doesn't switch the rip track?

A. Yes, sir.

Exam. WAY: Now, can you break down the time so as to show how much time is spent pushing the cars down to the tracks that you mentioned?

Mr. FINERTY: No.

Q. (By Mr. FINERTY) Now, incidentally at Garfield, on the Garfield tracks used by the railroads as a joint terminal, that is tracks Nos. 1 to 10, what facilities, permanent facilities are maintained by the railroads on those tracks? Do they have rip tracks?

A. There are rip tracks in that terminal, joint railroad terminal, that are maintained and owned by the American Smelting & Refining Company.

Q. Yes, I used a bad word. What I want to ask you is what trackage and other facilities are located in the joint railroad terminal, consisting of the tracks on the upper level, are owned and used by the railroads?

A. All the tracks are owned and maintained.

Q. No.

A. Maybe I don't understand the question.

Q. Does the railroad have—Do the railroads have rip tracks on the upper level which they use as rip tracks?

A. Yes, sir.

Q. Those rip tracks are owned and maintained by the smelter?

A. Yes, sir.

Q. But they are used exclusively by the railroads, for the repair of railroad cars?

1534 A. Yes, sir.

Q. What are those tracks and how are they designated on Exhibit 3?

A. Those rip tracks are on the east end of the yard. They are the two extreme south tracks, designated as No. 1 rip track and No. 2 rip track.

Q. Designated on Exhibit 3 as rip track No. 1 and rip track No. 2?

A. Yes, sir.

Q. Is there a track adjacent to those tracks upon which the railroads hold bad-order cars for placement on the rip tracks?

A. Yes, sir.

Q. What is that track?

A. No. 9 track.

Q. And is that track usually full of bad-order cars stored by the railroad waiting placement on the rip track?

A. There are always cars on No. 9 track waiting to be placed on the rip track.

Q. And adjacent to the rip track do the railroads have any building for the repair of cars?

A. Yes, sir.

Q. What building do they have?

A. They have, it is the Union Pacific building and the Rio Grande building and B. & G.

Q. That is, each of the railroads has a repair shop located adjacent to their rip tracks, the rip tracks?

1535 A. Yes, sir.

Q. Nos. 1 and 2?

A. Yes, sir.

Q. And the cars which the railroads consider in bad order, their own cars in bad order, are first held by them on Track No. 9 until they have finished repair of cars already on the rip tracks. Then the cars are pulled from the rip tracks by the railroad switch engine, satisfactory to put into trains, and additional bad-order cars placed in on the rip track?

A. That is right.

Q. And about how much time of the railroad engine, would you say, is spent daily in switching the bad-order

cars and the rip track and putting those bad-order cars into trains?

A. I would say roughly one hour and a half.

Q. What engine performs that service?

A. The D. & R. G. afternoon engine.

Q. The afternoon engine of the D. & R. G.? And about how much time does the afternoon engine of the D. & R. G. spend in the joint railroad terminal yard as against all other points in these smelters?

A. I would say approximately 65 percent of the time.

Q. Now, in the morning the D. & R. G. also has a west end engine?

A. Yes, sir.

1536 Q. And how much time does that west end engine spend in the joint railroad yards?

A. I would say approximately 75 percent.

Q. Now, after the concentrate cars are unloaded, how are they pulled out of the smelter?

A. They are pulled from the west end of the Martin machines by the west end engine. They are placed there up to number, either 3, 4, 5 or 6 tracks.

Q. That is, they are pulled down over the tracks?

A. Over the tracks.

Q. Down to a switch?

A. Down to a switch.

Q. Where they are pushed back?

A. Pushed back.

Q. By the west end engine onto whatever tracks they decide?

A. Whatever tracks they feel they want to put them on.

Q. You don't tell them what tracks to put them on?

A. No, sir.

Q. And that engine crew decides for itself what tracks they will make those outbound cars into an outbound train for the B. & G. Railroad?

A. That is right.

Q. In fact, so far as the 13,025 cars are concerned, you never give any orders to the engine crew at all, do you?

A. No, sir.

1537 Q. On your ore cars, after unloading on the ore docks, how are those cars taken out of the plant?

A. Those cars are taken out of the plant by the D. & R. G. east end engine. They pick those cars up from No. 4 track, they are pulled back to the east end and switched.

Q. That is on No. 4 dock?

A. That is right.

Q. Shown on the right-hand side of the map?

A. That is right.

Q. They are pulled from that car, taken over that track down to a switch?

A. Down to a switch.

Q. Brought down and pushed back?

A. Pushed back and pushed down to the scale house No. 1, track scales for light weighing, approximately 85 percent of the cars. Cars are dropped down to the west end, picked up by the west end engine and switched to the various outgoing tracks.

Q. Now, that is, after light weighing at No. 1 scale house, those cars drift down again to the west end of the joint railroad yard, are picked up by the west end engine, and assembled by that engine into an outbound train for the B. & G. Railroad?

A. That is right.

Q. And if those ore cars were for the Union Pacific Railroad, this handling would be the same, except 1538 they would be assembled on another track into a train for the Union Pacific Railroad?

A. That is right.

Q. And for the D. & R. G. similarly, wouldn't it?

A. Yes, sir.

Q. And so far as that is concerned, you have nothing to do with what tracks those empties are assembled on by the switch crew for outbound movement?

A. No, sir.

Q. You give them no orders whatever?

A. No, sir.

Q. Now, when ore cars come into the yard and the road-engine cuts off, is there anything done to those cars before weighing, are they moistured?

A. Cars are moistured.

Q. And where are they moistured?

A. Right where the road-haul engine cuts off.

Exam. WAY: What do you mean by "moistured"?

Q. (By Mr. FINERTY) Moisturing is accomplished by taking buckets of ore out of the car to determine the moisture content of the ore?

A. That is right.

Q. And that is necessary in order to determine the dry weight ultimately?

A. That is right.

Q. Now, those buckets are thrown by D. & R. G. 1539 employees into that ore train as it moves into the yard with the road-haul engine, are they not?

A. They are thrown into the cars by American Smelting employees.

Q. That is what I mean, American Smelting employees, and that moisturing takes place while these cars here are still moving in under the road-haul engine, while the road-haul engine is cutting off or while the D. & R. G. engine is preparing to take those cars down to the weighing scales. You don't take any moisture sampling of your concentrates?

A. Yes, sir.

Q. You do? And that is taken as those trains are being handled down to the scales and before reaching the Martin machine?

A. Yes, sir.

Q. Now, your testimony up to date has generally covered the handling of all raw materials into the plant?

A. Yes, sir.

Q. And the movements involved in the handling of those raw materials?

A. Yes, sir.

Q. Generally speaking, they either go straight into the Martin machine and out in the form of bullion; straight into the ore docks and out in the form of bullion, or occasionally, after going through the ore docks, stock piled, or maybe held for sampling for a shipper who isn't satisfied with the original sample, or maybe reloaded into 1540 a railroad car for reconsignment to another smelter by the shipper.

A. There are a few cars that come in that go through your stock piles without being handled, without being reloaded again.

Q. That is, there are a few cars of ore that come in, and in place of going to the ore docks, would be sent to a stock pile?

A. That is right.

Q. Is that before or after sampling?

A. That is after sampling.

Q. And those cars, the cars held for confirmatory sampling and the cars reconsigned, constitute the 4 percent of the ore cars that don't go directly into the smelter and come out as bullion?

A. That is right.

Exam. WAY: Do I understand about that sampling, that that is done by your agent, of the milling department, or is that something else?

Mr. FINERTY: No, we will have a metallurgical witness on that will explain it, but I might say that the sampling is done in the process of crushing the ore through the mill, or in the Martin machine.

Exam. WAY: I see.

Mr. FINERTY: The sampling done by bucket is 1541 merely sampling individually for the moisture content before weighing. I think, as explained yesterday, the carriers pay their freight charges based on the wet weight, but they have to determine the dry weight in order to get the valuation, and in order to get the dry weight they have to have a moisture sample of that car as it comes in.

Q. (By Mr. FINERTY) Now, referring to the first sheet of Exhibit 21 and the top of the second sheet of Exhibit 21, covering the carloads of miscellaneous materials and supplies received, will you state generally where those materials are delivered? Do they generally move down into what is called the hole?

A. Yes, sir; I would say 99 percent of them do.

Q. 99 percent of the miscellaneous materials and supplies move down into the hole, which is the third level and the lowest level of trackage in the smelter?

A. That is right.

Q. The points, the exact points at which those shipments are unloaded are shown in the column headed, "Plant Location Where Unloaded," and may be located on Exhibit 1 by the coordinates shown in the last column?

A. That is right.

Q. Now, will you explain generally what is involved in handling shipments of miscellaneous materials after arrival in the Joint Railroad Terminal? What switch-
1542 ing is necessary by the D. & R. G. engine to get them down into the tracks in the hole where they may be spotted?

A. Well, these cars are all mixed up. These cars, they come into the plant mixed up with ore and all other commodities that the train brings in.

Q. Except Utah Copper concentrates?

A. Except Utah Copper concentrates. They are all brought over the scales, and they usually tell the switchman whether it is a car of material. That is, if it isn't a car of ore, we tell him what is in that car. We mark on the car what this car contains.

Q. That is, if it isn't ore or concentrates?

A. That is right.

Q. But miscellaneous material?

A. That is right.

Q. Going down to tracks in the hole?

A. That is right.

Q. You tell the D. & R. G. switchman what is in that car, and it is marked on the side of the car and he knows where to place it?

A. Well, he does not know where to place it. He knows where to place it, to take it down in the hole, but they receive orders just where to place that car, in what part of the hole.

Q. Where to spot it?

1543 A. That is right.

Q. Those cars, after they go down over the scales, are taken back and held by the switch engine, or placed by the switch engine on one of the hold tracks?

A. That is right.

Q. In the joint railroad terminal?

A. That is right.

Q. Then you give the spotting orders on that car, which is marked on the outside with its contents. You give them a written order telling them where that car is to be placed in the hole?

A. That is right.

Q. And after they get that written order, how do they get that car down to the hole, or to the tracks in the hole?

A. They take it from the joint railroad terminal, take it down to the extreme west end, go down to the switchback and place it to either what they call the ping pong or Track 2, 2½ or Track 3, or at the warehouse track.

Mr. FINERTY: I am sorry. Will you read that?

(The answer referred to was read by the reporter.)

Q. (By Mr. FINERTY) Which are all identified on Exhibit 3?

A. That is right.

Exam. WAY: I don't see where it says the ping pong and warehouse track.

The WITNESS: It is the extreme north track in the 1544 lower level.

Q. Now, when that D. & R. G. engine takes these loads down for delivery in the hole, does it come back empty or does it haul out outbound shipments of bullion?

A. When it goes down it will bring what loads are down there back up with them.

Q. And I think Mr. Moriarty testified yesterday that that grade was rather heavy and that the engine could only handle a certain number of cars out of the hole up.

A. That is right.

Q. I am coming to it later, but how many cars of bullion do you ship out on an average a day?

A. Approximately 16, an average.

Q. And that means that those 16 cars can be taken in either two or three pulls of the hole track?

A. Three, yes. I would say three.

Q. And generally speaking when the D. & R. G. engine goes down in the hole to pull out bullion cars, it, at the same time, takes down these loads for delivery, is that correct?

A. That is correct.

Q. Now, you have referred to certain cars being pipe sampled, I think, and sent direct to the stock pile?

A. Yes, sir.

Q. Are those the cars shown on Exhibit 21, Page 3, as miscellaneous tailings?

1545 A. Yes, sir.

Q. Where would those cars be stock piled?

A. They would be stocked in what we call either the coal hole—

Q. Where is that?

A. The coal hole is designated on the map on this—

Q. Exhibit 3?

A. Exhibit 3 as the old track. Center track and wall track. It could be either unloaded at that point, or it could be unloaded in what we call the new yard. Those are the tracks on the extreme lower dock east of the stack. It is designated on Exhibit 3 as center track and wall track.

Q. That is at almost the extreme right of Exhibit 3?

A. Yes, sir; that is right.

Q. And those are comparatively few cars as shown by Exhibit 21?

A. That is right.

Mr. FINERTY: Could I have just a few minutes with the witness please? Could we recess a few minutes?

Exam. WAY: Recess for five minutes.

(A short recess was taken.)

Q. (By Mr. FINERTY) Mr. Dangerfield, just before we took this brief recess, I think I referred to the stock pileage of miscellaneous tailings which were included in the 4 per cent of the stock pile material.

1546 A. Well, those tailings that are stocked are not included in that 4 percent.

Q. They are in addition to the four percent?

A. In addition.

Q. And they don't go any place except direct to the stock pile?

A. That is right.

Q. Now, I notice on Page 3 of Exhibit 21, miscellaneous tailings, the fifth item, 1,313 carloads, and those are shown as going direct to the unloading docks?

A. Yes, sir.

Q. Those 1,313 cars that went to the unloading docks are handled just the same as all other ore?

A. That is right.

Q. After reaching those docks?

A. Yes, sir.

Q. Referring to the Utah concentrates, I neglected to ask you what charge, if any, is made for the switching of those Utah concentrates to the Martin machine by the railroad?

A. \$2.25 for each car.

Q. That is, for that short move from the joint railroad terminal yard back over the scales and down to the Martin machines, you paid \$2.25 per car on the 13,025 cars?

A. Yes, sir.

1547 Q. Now, that is accounted for, I assume, by the fact that those cars are short-haul cars moving only a few miles from Magna and Arthur?

A. I presume that is it.

Q. Mr. Tuckwood yesterday referred to the necessity of getting accurate tare weight on cars handling commodities moving under rates based on valuation. It is necessary in order to obtain those tare weights, in place of using the stenciled tare, to light weigh the cars, the concentrate cars and ore cars and tailings cars after unloading, is it?

A. That is right.

Q. Now, prior to the installation of the Martin machines, was it necessary to handle the Utah concentrates, was it necessary for the railroad to handle the Utah concentrates in a more complicated manner?

A. Yes, sir.

Q. When were those Martin machines erected approximately?

A. Well, now, I would say approximately—I might be off—I would say around 1916 or 1917, 1917, somewhere around there.

Q. And prior to that time the railroads gave greater service on such concentrates than they now give in delivering them to the Martin machines?

A. That is right.

Exam. Way: What is the Martin machine?

The Witness: You are talking to me?

Exam. Way: Yes.

1548 The Witness: That is a sampler. It is a machine used to sample and unload the concentrates.

Mr. FINERTY: I think our metallurgical witness will be better qualified to speak, but as I understand it, the Martin machine is an automatic method of sampling concentrates after unloading by passing them through that machine instead of crushing them through the mill, as is necessary in the case of ores, and then getting the samples after they are crushed. Is that approximately correct, Mr. Tuckwood?

Mr. Tuckwood: That is correct. They might pipe sample concentrates.

Mr. FINERTY: The purpose of using Martin machines is to get an automatic sampling without crushing?

Mr. Tuckwood: That is correct.

Exam. Way: It hasn't anything to do with unloading the cars?

Mr. FINERTY: No, they are unloaded, Mr. Examiner. The railroad on these 13,025 cars, all it does is place these to the Martin machine. They are dumped on the conveyor belts of the Martin machine and go into the automatic sampler, and the railroads never touch those loads again until it comes out as cullion.

Q. (By Mr. FINERTY) Is there anything you want to add, Mr. Dangerfield, as to the handling of inbound materials?

A. Inbound materials?

1549 Q. Have we generally covered the operations involving the handling of the three railroads of inbound materials, including the line-haul into the plant, into the joint railroad terminal yard, and the handling out of that joint railroad terminal yard to ultimate delivery?

A. I think we have.

Mr. Tuckwood: I would like to ask one question, Mr. Dangerfield. Can the Martin machines be used for crude ores?

The Witness: No.

Mr. CAMPBELL: While you are on your Exhibit No. 21 there will you make this point clear? I don't mean to

cross-examine; but just make this point clear. I notice one column here is marked Utah origins and the other is marked interstate origins, and you mean by Utah origins, intrastate shipments, inbound shipments. You have no Utah origins in Utah, going to the smelter, that could be interstate?

Mr. FINERTY: That is, you mean not intermediate through Colorado or some other state.

The WITNESS: None that I know of.

Mr. CAMPBELL: We have a situation in Colorado where that is true. We can have a destination in Colorado and a point of origin in Colorado and the shipment be interstate due to the mountainous situation. You have no situation of that kind in Utah?

1550 The WITNESS: No.

Mr. TUCKWOOD: Our traffic man will straighten that out. That is true.

Mr. CAMPBELL: I know that is true, but I wanted to straighten it out.

Mr. FINERTY: Thank you, Mr. Campbell.

Q. (By Mr. FINERTY) Now, referring to Exhibit 22, that exhibit shows the ships outbound from the Garfield smelter, does it not?

A. That is right.

Q. And it shows them by commodities, the number of carloads of each commodity, whether state or interstate, the point at which the shipments are loaded, which is identified by name and coordinates on Exhibit 1?

A. Yes, sir.

Q. At the bottom of that exhibit it shows the total number of carloads delivered to the railroads, again divided between interstate and intrastate and as between the railroads?

A. Yes, sir.

Q. And there were in the period covered by that exhibit, the year ending March 31, 1944, 5,936 cars of outbound loads shipped by the Garfield smelter?

A. Yes, sir.

Exam. WAY: Five thousand?

1551 Mr. FINERTY: I beg your pardon, that is right down here. I beg your pardon, you were quite right.

Mr. Examiner, that was the total interstate. The total of all shipments out of Garfield smelter was 6,960, is that right?

A. Yes, sir.

Q. Of those 6,960 cars shipped outbound by the Garfield smelter, 5,855 were carloads of blister copper or bullion?

A. That is right.

Q. Now, will you describe the manner in which blister copper or bullion is handled outbound from the Garfield smelter?

A. It is pulled from the copper casting machine.

Q. Now, where is that located on Exhibit 3?

A. Right adjacent to the ping pong, south of, right opposite the carpenter shop, designated on Exhibit No. 3 as the carpenter shop.

Exam. WAY: I don't see it on there. I have the carpenter shop.

Q. (By Mr. FINERTY) Now, where is this bullion building, or what did you term it?

A. The copper casting.

Q. The copper casting machine, where is that in relation to the carpenter shop?

A. It is right south and east of the carpenter shop.

Q. There are three tracks shown?

A. Three tracks.

Q. Shown south of the carpenter shop, one long 1552 house, one center track and one bullion-loading track.

A. That is, they lead right into the copper casting machine, have the two tracks going in there, what they call the long house track and the center track.

Q. Lead into a building indicated by a long rectangle?

A. That is right.

Q. Into which the center track and the bullion-loading track, designated on Exhibit 3, lead?

A. That is right.

Q. Now, will you explain how the railroad places empties for loading for that building and how, after loading, those cars of bullion are hauled out?

A. The empty cars are taken from the joint railroad terminal and placed on these—they place all they can, all they have room for, on the center track. Then, they fill the long house track. The balance they usually place for their convenience, the railroad's convenience, on what we call the reverb coal trestle.

Q. Now, do you always tell them the number of cars you want for loading, or do they, at their convenience, haul cars, put them down there for ultimate loading?

A. Put them down there for ultimate loading.

Q. That is if the engine, the west end engine, is going down into the hole, it will take down, if it has them available, some empty cars for bullion loading and store 1553 them on one of the tracks you designated?

A. As a rule they usually spot, make their spots maybe twice each day. They will take the west engine on day shift, he will pull all these empties from the joint railroad terminal and he will place those cars out of the railroad terminal at these places, so he will have a clear track in the joint railroad terminal.

Exam. WAY: Can you show the route?

The WITNESS: Well, as a rule these empties are usually placed on No. 3, what we call our No. 3 track, in the joint railroad terminal, west of the scale house that is designated on this Exhibit 3 as scale house No. 1.

Q. (By Mr. FINEARTY) That is cars for bullion loading?

A. That is cars for bullion loading.

Q. Are brought into the plant and placed by the railroads, held by the railroads on the No. 3 track?

A. That is right.

Q. Until they are needed for bullion?

A. That is right.

Q. They could hold them as well some place outside of the plant, if they had a place?

A. They could if they had a place. They bring those cars, pull them to the west end down the switchback, and as I say, they usually use those three designated points, as I have pointed out, to place those bullion empties.

1554 Q. In other words, when they are going down to the hole, if they have any empties that are appropriate for bullion loading, they take them down there and hold them on those tracks until you give orders for loading?

A. Of course, in the morning, I always tell them, I always tell them the first thing in the morning which cars are to be loaded first, whether they are Union Pacific or Rio Grande.

Q. That is whether the cars, whether the empties are being sent down on these three tracks, you tell them in what order to place the cars in?

A. I tell them before they pull these down how they all go, that is, which cars ought to be loaded first.

Q. I see, you tell them the number of cars you have for each railroad?

A. Yes.

Exam. WAY: Those cars move in there on the No. 1 hole track?

The WITNESS: Yes, they would come in over No. 1 hole track; yes, sir, and if they were going on the bullion shed, or if they are going on the coal trestle, they would move on the track adjacent to No. 1 hole track designated on Exhibit 3 as reverb coal trestle.

Q. (By Mr. FINERTY) The cars which are for loading go down on the tracks you have indicated adjacent to 1555 the casting machine over No. 1 hole track?

A. Yes, sir; that is right. They all do that, that is true.

Q. Now, when you tell the railroad to place cars for loading in the casting machine, what does the railroad do?

A. The railroad, they suit themselves. They usually decide where they want the placement of these cars for their convenience, where it is convenient for them to get them, and they spot as many as they possibly can to avoid going in there so many times during the day.

Q. That is when they put them down there for loading?

A. That is right; yes, sir.

Q. But when you want those in the casting house or the casting machine, what does the railroad do with those cars?

A. The railroad, they don't do anything with those cars after they are placed on this track.

Q. After they are placed?

A. Yes, on the long house and center track.

Q. Yes.

A. Except they will in the morning, they will take cars occasionally from the long house track and place them on the center track so they could have that track empty, so they can put more empties on the house track.

Q. But now, the only two tracks leading into the casting building are the center track and the bullion loading track designated on the map, is that correct?

1556 A. No, the long house track leads in there.

Q. The map doesn't show that.

A. The map doesn't show that, but it does. It leads into the copper casting.

Q. So that those three tracks actually lead into the copper casting building?

A. Yes, sir.

Q. How does the mill or the smelter take those cars from those tracks into the building?

A. They have a car with a long cable that they pull these cars from the center track and the long house track into the bullion loading track.

Q. Well, they have an electric motor car?

A. They have an electric motor car with a cable on it.

Q. With a cable on it, and as far as the railroads are concerned, they don't handle the cars beyond the point they have placed them for loading?

A. That is right.

Q. But the smelter itself, by means of a motor car, an electric motor car and a cable, pull the cars from those tracks into the building for loading of bullion?

A. That is right.

Q. And after the bullion is loaded, how do you get the cars back to those tracks?

A. They drop down what is designated on Exhibit 1557 3 as the bullion loading track.

Q. They drop by gravity?

A. They drop by gravity. The west end engine and the afternoon engine both pull bullion loads.

Q. The west end engine in the morning and the afternoon engine at night?

A. That is true. They pull those down through the No. 1 hole track, up through the switchback and up and place those cars usually on any one of these designated tracks, whichever one they see fit.

Q. In the joint railroad terminal?

A. In the joint railroad terminal.

Q. Now, those cars before leaving the casting machine house are weighed, are they not?

A. They are weighed light and heavy, both.

Q. Yes.

A. Yes, sir.

Q. Are they weighed light in the casting machine house?

A. They are weighed light and heavy in the casting machine house.

Q. Yes, and after that those weights are used, under agreement with the railroads, as the billing weights of the bullion?

A. That is true; yes, sir.

1558 Mr. FIXERTY: Now, the other two items of out-bound shipments of any material amount, Mr. Examiner, are sulphuric acid and dust, converter dust.

Q. (By Mr. FIXERTY) Will you explain how sulphuric acid is shipped out of the plant?

A. Sulphuric acid is loaded. They have two loading places, at the acid plant designated on Exhibit 3, right opposite the sulphuric acid plant on the north, by the north track, acid plant, and at No. 2 track it is also loaded. They

also load a grade of acid on the south side of the acid, sulphuric acid plant designated as the acid spur. These cars are loaded at that point. They are brought up through there.

Q. What type of car are they?

A. They are tanks, tank cars.

Q. And they are loaded by hose or out of a spout?

A. They are loaded by a spout, I think. I am not positive as to that. They are loaded by a spout. I think it is a spout. Those cars are pulled up over the switchback, up to one of the designated tracks in the yard. Usually they will place them on the same track as they place the bullion loads.

Q. The D. & R. G.?

A. The D. & R. G. pulls those cars.

Q. The D. & R. G. engine crew will, if it is making up a train for the B. & G., will place them on a track here with the other outbound B. & G. cars. If they are making up a train for the U. P.—

1559 A. In practice they take each car, pulling them up from the hole, they put them on one track.

Q. All the tanks?

A. All the tanks and bullions.

Q. They assemble those on one track?

A. They assemble those on one track. They suit themselves.

Q. Then they are switched by the D. & R. G. engine from that track to an outbound train of the carrier over with their line-haul?

A. After being weighed.

Q. After being weighed?

A. Yes, sir.

Q. And where are those cars weighed?

A. At No. 1 scale.

Q. At No. 1 scale?

A. Yes, sir.

Q. The only thing at any place except No. 1 scale are the bullion cars which are weighed down at the casting house?

A. That is right.

Q. How is converter dust handled?

A. Converter dust is handled in a similar way, that is, pulled from the ping pong, anyone of these almost, from the point right opposite the warehouse on that ping pong track. That is handled the same way as your bullion. It is brought up to your No. 1 hole track up the switch-
1560 back, placed on one of the tracks in the joint railroad

terminal. It is set to either the Union Pacific or Rio Grande outgoing track.

Q. Now, the other miscellaneous commodities, the points of origin are shown, and generally speaking they all come out of the hole, and they are all hauled over No. 1 hole track to the switchback and from the switchback into the joint railroad terminal yard?

A. That is right.

Mr. FINERTY: There are so few of them, Mr. Examiner, I don't feel justified in lengthening the record.

Exam. WAY: All right. They are probably properly identified anyway.

Q. (By Mr. FINERTY) Referring to Exhibit 23, that shows the switching charges paid at the Garfield smelter for the year ending March 31, 1944, does it not?

A. That is right; yes, sir.

Q. And the switching charges are paid on all interstate shipments going to points outside the state of Utah?

A. Yes, sir.

Q. On Exhibit 24 there is similar reference for the switching charges paid within the state of Utah?

A. Yes, sir.

Q. And included in those items of switching charges paid within the state of Utah is the \$2.25 per car charge paid on Utah concentrates, which is the first item on Exhibit 24?

1561 A. Yes, sir.

Exam. WAY: I would like to have you elaborate a little bit on that. Is the switch movement in connection with the line-haul? Now, I understand from this exhibit, in addition to the line-haul there is paid certain switching charges.

Mr. TUCKWOOD: Mr. Examiner, may I call your attention to the fact that on Exhibit 24 there is a typographical error in the very last item on the exhibit showing total switch charges paid by the A. S. & R. and by the B. & O. Company. The total is obviously wrong and should be \$42,035.60.

Exam. WAY: Will you please change it on the original and on the copies?

Mr. TUCKWOOD: It appears some are correct.

Mr. FINERTY: Off the record.

(Discussion off the record.)

Q. (By Mr. FINERTY) Referring to exhibit introduced for identification as Exhibit 25, being a statement showing total number of original carloads received at the Garfield smelter

for the years listed, that exhibit was prepared under your direction?

A. Yes, sir.

Q. And is taken from the original records of the company showing the total number of carloads received in each of the periods specified?

A. Yes, sir.

1562 Mr. FINERTY: You may cross-examine.

Mr. CAMPBELL: I have no cross-examination.

Exam. WAY: Mr. Collins, any cross-examination?

Cross Examination.

Q. (By Mr. COLLINS) On your Exhibits 23 and 24, Mr. Dangerfield, how do you determine which switch movements were in connection with line-haul traffic?

A. Well, we keep, we have a record of all of our cars that we ship, all of our blister copper. In other words, we furnish a report showing the amount of bullion that we ship all switching that we perform, and we furnish a report to the D. & R. G.

Q. Yes, but how can you tell, or how do you tell or determine which of those switch movements performed in the plant are in connection with the line-haul movement, or, on the other hand are purely intra-plant?

A. Well, I don't make the charges myself.

Q. You don't make them?

A. No, sir.

Q. Who makes that determination, do you know?

A. Well, that is—I think the determination is made by probably the Rio Grande.

Mr. FINERTY: In other words, these are their charges.

Q. (By Mr. COLLINS) Just a minute, do they make out the billing, does the Rio Grande make out a statement of the charges?

1563 A. We furnish the D. & R. G.—I do know on say your Utah Copper concentrates, we furnish the Rio Grande, Union Pacific and the B. & G. with a list of all cars that we ship every month.

Mr. FINERTY: Well, you don't get the question, Mr. Dangerfield.

Q. (By Mr. COLLINS) All cars for outbound movement?

A. All cars for outbound movement would go out over the B. & G. We furnish the B. & G. Railroad, the B. & G. auditor, and the Rio Grande a copy of those cars that are switched by the Denver & Rio Grande to the B. & G. Railroad.

Q. Well, now, does that information include a list of all switch movements that have been performed in connection with the cars?

A. No, sir.

Q. I take it you don't know how the determination is made so as to distinguish between switches connected with line-haul movements and switches that are not?

Mr. FINERTY: Well, Mr. Collins, I think—

Mr. COLLINS: That is all right. He doesn't know.

Mr. FINERTY: That is quite correct, but it appears to me that the person you ought to ask how the tariffs are applied are the railroads who render the bills. It is your obligation to show the charges, and if you have any criticism on charges you had better show it.

1564 Mr. COLLINS: I am not criticizing anything. All I am asking the witness for is enlightenment.

Mr. FINERTY: This witness doesn't know how the charges are assessed.

Exam. Way: And also do you know how the division was made as to which particular shipments you assessed these charges as against all other movements?

Mr. FINERTY: This witness does not know anything about that.

Exam. Way: All right. We will assume you will have another witness. Any further cross-examination, Mr. Williams?

Q. (By Mr. WILLIAMS) Mr. Dangerfield, does the American Smelting & Refining Company own any of the cars in which is brought concentrates and crude ores?

A. Into the plant?

Q. Yes.

A. No, sir.

Q. They neither own nor lease them?

A. No, sir. They might lease a car occasionally and might have it for a day or two.

Q. How about the tank cars used for shipments of sulphuric acid?

A. That is by the Garfield Chemical Company. They do have a number of their acid tank cars. They do lease a number of those cars, the Garfield Chemical Company.

1565 Q. What is the connection between the American Smelting & Refining Company and the Garfield Chemical Company?

A. My understanding—I might be wrong, but the American Smelting & Refining Company has part of the controlling interest in it, my understanding.

Mr. FINERTY: It is an affiliated interest?

Mr. TUCKWOOD: I don't think Mr. Dangerfield is qualified to answer that question.

Mr. WILLIAMS: I am going to let Mr. Dangerfield say yes or no to any questions I ask him. I don't expect him to answer anything he doesn't know.

Mr. FINERTY: Mr. Dangerfield, say if you don't know.

Q. (By Mr. WILLIAMS) So you know if sometimes these tank cars are taken to the repair tracks for repair, switched there by the engines of the Rio Grande?

A. Switched by the Rio Grande to the—

Q. Repair tracks?

A. Yes, sir.

Q. The tank cars?

A. That is right.

Q. Do you know if there is any charge for that?

A. I do not.

Q. Are the empties which are spotted for the unloading of bullion, are they not spotted under written directions by the plant?

1566 A. They are not.

Q. The railroad just takes down a certain number of cars a day and spots them without any instructions?

A. That is right. They have instructions which cars are Union Pacific cars and which cars are Rio Grande cars; which cars are Union Pacific and which ones are Rio Grande.

Q. Well, either there are instructions issued following which the spotting is done or it is done by virtue of a mutual understanding.

A. That could be.

Mr. FINERTY: What is the fact, Mr. Dangerfield?

The WITNESS: The fact is, as I stated before, that when these bullion cars come into the yard, there are so many Union Pacific, so many Rio Grande. The switchman will say "Which cars shall we spot first?" I will say either the D. & R. G. or the Union Pacific, and he will ask them, "How will you spot these cars, which rotation?"

Q. (By Mr. WILLIAMS) Part of the instructions then are oral?

A. That is right; that is true.

Q. I suppose the billing, particularly that with reference to the outbound billing, is done at the Garfield station?

A. The billing on the bullion is made by a representative of the Bingham & Garfield Railroad. All other commodities, this acid, flue dust, especially the acid is made by the Garfield Chemical Company. The billing on that is 1567 made by them. The billing on flue dust and sulphur is made in our main office of the American Smelting & Refining Company.

Q. And you hand that to the representative of the railroad which has the outbound haul, is that it?

A. They get a copy; yes, sir.

Q. Where does the representative of the Bingham & Garfield operate?

A. At the smelter.

Q. Operates within the smelter?

A. Yes, sir.

Q. Do you know if there are any concentrates placed first on the new pest house track and then later placed on the old pest house track?

A. Yes, sir.

Q. Does that occur with some frequency?

A. That occurs at times; yes, sir.

Q. Well, now, if both the pest house tracks are full, if that ever happens, where are the remaining cars of concentrates placed?

A. They would be placed anywhere that the railroad sees fit to set them.

Q. And that would require at least another switch movement, would it not?

A. It would if that were true.

Mr. FINERTY: Is it true?

1568 The WITNESS: No, it does not happen, very, very seldom happen.

Q. (By Mr. WILLIAMS) That they are both full?

A. No, it very seldom happens they are both full.

Q. Does it ever happen?

A. Oh, it might happen once in a while. I would say yes, it has happened.

Q. Now, do cars drift from the scale and the pest house track and the through line in winter months?

A. Sometimes they do and sometimes they don't, depending on how cold it is. Sometimes they don't run as good as they do in the summer.

Q. If it is too cold for them to drift, how are they propelled?

A. Usually just by pushing them down.

Q. That is a switch engine of the Rio Grande pushing them down?

A. They will push them down over the switch; yes, sir.

Q. Would that be west from the scale?

A. West from the scale; yes, sir.

Q. How often, would you say, that you do issue written orders for switching movements?

A. Oh, I would say maybe three or four times a day.

Mr. FINERTY: Do you mean spotting, Mr. Williams?

The WITNESS: You mean spotting cars?

Mr. WILLIAMS: Yes, that and any other switching movement that may be required.

The WITNESS: I would say personally I never issue a switch order.

Q. (By Mr. WILLIAMS) Is that done by someone, under your direction?

A. It is done, as I say, by the metallurgical clerk on cars pertaining to ores and concentrates.

Q. He is a plant employee?

A. Yes, sir; that is right.

Q. Are concentrates weighted and moistured at night?

A. No, sir.

Q. If they come in at night they are held until the next day for the purpose?

A. Yes, sir.

Mr. FINERTY: Do they come in at night?

The WITNESS: Yes, sir.

Q. (By Mr. WILLIAMS) Let's see, I believe you stated that you are the weighmaster and yardmaster?

A. Plant and smelter yardmaster.

Q. And weighmaster also?

A. Yes, sir.

Q. What are your hours of duty?

A. I work from 7:15 to 3:45.

Q. Does anyone else assume your duties at hours other than those?

1570 A. We have a man there from 3:45 to 11:45.

Q. And he performs your duties, does he, during that period?

A. As far as weighing is concerned; yes, sir.

Q. But he doesn't act in any other capacity?

A. No.

Q. The written orders for switching, which you say may occur three or four times a day, are they issued on a prepared form of the plant?

A. They are issued on a form of the Rio Grande, Rio Grande switch list.

Q. You have those forms and fill them out?

A. Yes, sir.

Q. Now, how will the engine foreman know what cars to hold out if he didn't receive instructions?

A. Well, he holds them all out until he does receive instructions, and places them in the joint railroad terminal.

Q. Now, by what name or names is the joint railroad terminal commonly known in the plant?

A. Upper yard.

Q. Any other name?

A. That is all I know it by.

Q. Is that in fact the name commonly used to refer to these yards?

A. That is right.

Q. I might ask you, Mr. Dangerfield, are cars 1571 of bullion always shipped out the same day the loading is completed?

A. No, sir.

Q. I am not certain whether you have described how they would be handled in such cases. If you have, I will let the record stand for itself, but I don't recall.

Mr. FINERTY: May I hear the question?

(The question referred to was read by the reporter.)

Q. (By Mr. WILLIAMS) When the cars are not shipped out the same day the loading is completed, how are they taken care of then?

A. Well, we have— We usually ship them and have instructions that we have certain cars there that go definite places. As an example—might I cite an example?

Mr. FINERTY: Certainly.

The WITNESS: Say our west end engine may go down to the hole, down to the bullion scales later some morning than other mornings. If there are any cars loaded down there that they have loaded that same day, that same morning that he goes down, he will pull those up at his convenience. As long as there is a string of cars, he will pull these cars up, up to the joint railroad terminal.

Q. (By Mr. WILLIAMS) I understand which term you use.

A. All right. Rather than leave the cars there, they will pull them up, get them out of the way.

Mr. FINERTY: Is that before they are even billed?

1572 The WITNESS: Before they are billed, yes.

Q. (By Mr. WILLIAMS) And they will be held there waiting billing instructions?

A. That is right.

Q. And they pull, in any event, what loaded cars there are out? That would be necessary, would it not, to make room for the empties to be spotted?

A. Not necessarily. They wouldn't have to pull them at that particular time, no, but the loads do have to be pulled in order to dump more loads down.

Mr. FINERTY: More empties.

The WITNESS: More empties.

Mr. WILLIAMS: I think no further questions.

Exam. WAY: You are excused.

Mr. FINERTY: May I ask my witness another question? I completely forgot a very important move, and that is the move to the thaw house.

Re-direct Examination.

Q. (By Mr. FINERTY) Will you describe, Mr. Dangerfield, how cars are moved after arrival at the railroad train yard to the thaw house and when?

A. Well, during the winter months when ore is frozen, we give instructions to the Denver & Rio Grande certain cars that we want placed in the thaw house.

Exam. WAY: What are those cars?

1573 The WITNESS: They could be of any kind of concentrates, crude ore, tailings or sand. Those cars would be pulled from the joint railroad terminal, placed over the scales, the scale track, weighed, drift down to No. 2 track to the west end of the yard. The west end engine or afternoon engine, whichever the case might be, would pick those cars up and place them in either one of the four thaw house tracks during the winter months.

Exam. WAY: You said that includes sand?

The WITNESS: Yes, sir.

Q. (By Mr. FINERTY) It includes any commodity that before the railroad can deliver it has to be thawed?

A. That is right.

Q. And those cars before being placed in the thaw house are weighed in a frozen condition?

A. That is right.

Q. Then they are placed in the thaw house as you have described. After they have thawed, what is done with them?

A. After they are thawed, they have written instructions to place them at a point, designated point or unloading point.

Q. That is, as soon as they are thawed?

A. As soon as they are thawed.

Q. They have spotting orders awaiting them, and they are taken from the thaw house by the D. & R. G. engine to the unloading point?

1574 A. That is right.

Exam. Way: Now, if there in any charge for the placing of these cars in the thaw house, I would assume you will tell us about it in connection with Exhibits 23 and 24.

Mr. FINERTY: That is correct.

Exam. Way: All right. Any further questions?

Mr. WILLIAMS: None.

Exam. Way: You are excused.

(Witness excused.)

Mr. FINERTY: Off the record.

(Discussion off the record.)

Mr. FINERTY: Mr. Examiner, I will recall Mr. Tuckwood to state the manner in which the charges are arrived at as shown on Exhibits 23 and 24 for switching.

O. W. TUCKWOOD, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. FINERTY) Directing your attention to Exhibits 23 and 24, showing charges, switching charges paid at Garfield smelter. Will you explain the manner in which those charges are arrived at and the tariff reference for them?

A. The B. & G. Railroad—In connection with Exhibit No. 23 I wish to say that the B. & G. Railway absorbs out of their line, when they receive a line-haul movement
1575 outbound, the switching charge on interstate traffic of \$3.96 cents per car, which is the amount which is published by the D. & R. G. Railroad Company in Item 2310 of D. & R. G. Tariff 6600-C, I. C. C. 736, as reproduced on Page 15 of Exhibit 10. That accounts for the item of \$23,185.80 on blister copper, plus—accounts for all of the items in the first column of Exhibit 23.

Q. Totaling what?

A. \$23,787.72.

Q. Now, Mr. Tuckwood, that \$3.96 cents is paid by the B. & G. Railroad to the D. & R. G. Railroad for services performed by the D. & R. G. Railroad in pulling those cars from the loading points up to the joint railroad train yard and assembling them into trains at the smelter?

A. The purpose of that absorption is to place the D. & R. G. on a competitive basis with the B. & G., the D. & R. G. having access to the plant.

Q. In other words, the B. & G. and the U. P., in place of paying the D. & R. G. switching charges for service on the cars share in the expense?

A. I understand they pay them on a wheelage basis.

Exam. WAY: In other words, none of the charges are paid by the industry?

The WITNESS: Of that total \$23,787.72.

Exam. WAY: It is merely an absorption by one carrier?

The WITNESS: That is right. It is a figure to show 1576 what the total reveals.

Mr. FINERTY: It is a method of compensation between the carriers for the joint service.

Exam. WAY: I understand.

The WITNESS: The rate of \$1 per car shown in the second column is contained in Item 2320 of the same D. & R. G. tariff. That is in Paragraph A of that item and properly described. The rate of 50 cents per car—

Q. (By Mr. FINERTY) Wait, what does that \$1 apply to?

A. That \$1 per car covers the— Shall I read it.

Exam. WAY: Tell us what it is.

The WITNESS: It is for the— It reads here, I think I would have to read it to make a proper explanation. "The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement". The note gives the definition of uninterrupted movement, and that is what that \$1.00 a car involves, although we don't agree with the assessment.

Exam. WAY: This represents an interrupted movement?

The WITNESS: A so-called interrupted movement, Mr. Examiner.

1577 Q. (By Mr. FINERTY) In your opinion it does not represent an interrupted movement?

A. It does not.

Q. This charge has only been assessed since 1938, or publication of the switching charges of Utah smelters?

A. Yes, sir. The charge of 50 cents per car shown in the last column is contained in the same tariff, same item, and

represents the movement to and from thaw house and over track scales for subsequent weighing.

Q. Under Item what?

A. Under Item 2320, Paragraph B of the tariff.

Q. Of the tariff? And that also is a charge never assessed before 1938 and previously specifically published in the railroad tariffs as included in the line-haul charge?

A. That is correct.

Exam. WAY: What do you mean by subsequent weighing?

The WITNESS: After it comes out of the thaw house, so that the moisture sample can be secured immediately prior to weighing.

Exam. WAY: In other words, every car that goes through, that is originally weighed and goes to the thaw house, then when it comes out it is reweighed, there is a charge of 50 cents?

The WITNESS: That is what we are doing, to which we contend that was an improper charge, a hauling in 1578 transit charge.

Q. (By Mr. FINERTY) That is one of the charges Mr. Carey referred to in his opinion as being an improper charge and also a necessary service for the railroads to determine their own freight charge?

A. That is correct; yes, sir. On Exhibit 24, I think that gives the complete tariff charge, or Exhibit 23. Exhibit 24, tariff authority is the same as given for Exhibit 23. The \$3.60 per car switching charge of the Rio Grande absorbed by the B. & G. in its line-haul rate is an intrastate rate. I made a mistake at the beginning. I said the tariff authority is the same, with the exception of this \$3.60 per car charge. The other items are the same as Exhibit 23. The tariff authority for the \$3.60 per car charge is Item 2310, of the same tariff. The only difference is in the item.

Q. All the shipments on Exhibit 24 are outbound shipments to points in the state of Utah or shipments received from points in the state of Utah at Garfield?

A. Yes, and I would like to explain in that connection my files reveal that the 1938 agreement as far as A. S. & R. is concerned, did not contemplate the addition of *ex parte* increases which occurred later in that year, and the Utah Commission, or Public Utilities Commission of Utah, after hearing the facts as submitted by both parties, refused to allow the increase on intrastate traffic, and apparent-
1579 ly my predecessor—

Exam. Way: Since this is not a rate case, I don't think it is necessary to go into that.

The Witness: I think the reason should go in the record, Mr. Examiner.

Mr. FINERTY: Yes, it is very brief.

The Witness: The other items are the same as the preceding exhibit. Any further questions?

Q. (By Mr. FINERTY) In other words, Mr. Tuckwood, Exhibits 23 and 24 show the revenue which the D. & R. G. gets out of switching engines stationed at the Garfield plant, both from the Bingham & Garfield Railroad, as compensation for the joint switching performed by them, and as compensation from the smelting company for switching movements not now included in the line-haul rate as published by the carriers?

A. Well, that is a difficult question to answer. I will say the charges are paid, but I dispute the legality of some of them.

Q. I understand that, but they represent compensation earned by that engine in the performance of these services, on one hand, from the Bingham & Garfield, and on the other hand, from the smelter company?

A. Stated that way, yes.

Q. And that engine also receives a prorate, as you understand it, from the Union Pacific, of the remaining 1580 expenses on a wheelage basis of that engine?

A. That is my understanding.

Exam. Way: As far as the American Smelting & Refining Company is concerned, it does not pay any of the charges on either one of these?

Mr. FINERTY: Oh, yes.

The Witness: I disagree with you.

Mr. FINERTY: It pays the 50-cent charge to the thaw house. It pays the \$1 charge for what is called an interrupted movement. It pays direct.

The Witness: The amounts that are paid are included in the exhibit, Mr. Examiner.

Exam. Way: Yes, I was mistaken about that. I was looking at the first column. Now, in the first column here we have \$3.60 and \$3.96. That is strictly an absorption?

Mr. FINERTY: Yes, that is entirely a payment by the Bingham & Garfield to the D. & R. G.

Exam. Way: Yes, and the charges of \$2.25 per car?

Mr. FINERTY: Are paid by the American Smelting & Refining Company to the B. & G. on the 13,025 car loads of concentrate shown on Exhibit 21.

The WITNESS: The total paid both interstate and intrastate by the American Smelting & Refining Company was \$42,949.30.

Exam. Way: All right.

1581 Mr. FINERTY: That is all.

Cross Examination.

Q. (By Mr. COLLINS) I get more confused. Is that total you have just mentioned as paid by the smelting company shown on these exhibits?

A. No, I just made that up right now. That is a summary. \$1,032.50 on Exhibit 23 and \$41,916.80 on Exhibit 24, which makes the \$42,949.30.

Mr. ROOT: That is paid or borne by the smelting companies?

The WITNESS: Yes, sir.

Exam. Way: If that is all, you are excused.

(Witness excused.)

Exam. Way: How about your Exhibit No. 26?

Mr. FINERTY: I will recall Mr. Dangerfield for a moment.

A. E. DANGERFIELD, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. FINERTY) Mr. Dangerfield, I show you an exhibit marked for identification as Exhibit No. 26, being a photograph of the American Smelting & Refining Company trackage at the Garfield smelter. Do you know approximately when that photograph was taken?

A: I do not know the exact date that this photograph was taken.

1582 I would say within the last three or four years.

Q. In about the center of that photograph are a number of small buildings. Are those buildings any longer there?

A. No, sir.

Q. Otherwise, the photograph shows the trackage at the Garfield smelter and the buildings of the Garfield smelter as set out in Exhibits 1 and 3, does it?

A. It does except this flume, that isn't there. That has been torn down.

Q. The flume you refer to is in practically the exact center of the left-hand side of the photograph, extending out a short distance from the smoke stack?

A. That is right.

Q. And that is no longer there?

A. No.

Q. Now, the directions on the photograph, the right-hand side of the photograph in the upper corner is west, is it not?

A. That is right.

Q. The left-hand of the photograph represents east?

A. Yes, sir.

Q. The top of the photograph is south?

A. Yes, sir.

Q. And the bottom of the photograph is north?

A. That is true.

Q. Those are approximate directions, and those 1583 correspond with the directions you have used in testifying in connection with Exhibits 1 and 3 as to the movements of the so-called west and east and engines, and as to the entrance into the plant from the west of the Union Pacific and from the east of the Denver & Rio Grande and the Bingham & Garfield?

A. Yes, sir.

Mr. FINERTY: Is there anything more you want?

Exam. WAY: No.

Mr. WILLIAMS: No questions.

Exam. WAY: You are excused.

(Witness excused.)

Mr. FINERTY: I desire to offer Exhibits 21 to 26, inclusive.

Exam. WAY: Any objection?

Mr. WILLIAMS: No objection.

Exam. WAY: They are received.

(Intervener's identification Exhibits Nos. 21 to 26, both inclusive, Witness Dangerfield, received in evidence.)

Exam. WAY: Now, that completes the Garfield.

Mr. CAMPBELL: Mr. Examiner, there is one item perhaps we ought to bring out a little more clearly with reference to Garfield, and that is the matter of how these switching charges are assessed, and I would like to call Mr. Moriarty again so he can explain that.

Exam. WAY: All right.

1584 K. L. MORIARTY, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) You were on the stand yesterday and have been sworn?

A. Yes, sir.

Q. Mr. Moriarty, are you familiar as to how the charges mentioned on these last exhibits, 21 and including 25, were made?

A. Yes, sir.

Q. Will you explain to the Examiner, without my having to lead this, how those charges are assessed and by whom, etc.?

Mr. FINERTY: Just take the charges common to Exhibits 23 and 24.

Mr. CAMPBELL: Very well.

The WITNESS: Our agent at Garfield receives information from the Bingham & Garfield and from the smelter as to what inbound business they have.

Mr. CAMPBELL: A little louder.

The WITNESS: As to the inbound business that the Bingham & Garfield brings in. We also receive the same information from the Union Pacific, and the same information we have ourselves, of course. On the outbound business that information is secured from the same sources. Move-

1585 of Utah Copper concentrates, which is a routine matter, on instructions, written instructions. Of course, on these written instructions, there are a few moves that might be made verbally. However, any verbal moves are later added to the written instructions by the smelter people, are reported by our conductor to our agent at Garfield. The agent at Garfield having all this information, knowing from whence the cars came and to where they are going, is able to assess the charges as required by the tariff. In addition thereto in the Salt Lake territory we maintain a traveling auditor who spends considerable of his time investigating and checking all such bills. At the Garfield plant of the American Smelting & Refining Company, the Western Weighing & Inspection Bureau maintains an inspector whose duty it is to inspect demurrage and supervise to the extent necessary the preparation of these bills.

Mr. CAMPBELL: I think that covers it.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. Moriarty, you have an agency at Garfield, do you not?

A. Yes, sir.

Q. Do you have any other traffic through Garfield except that concerning the smelter?

A. No, sir. There might be a car once in a while, but this is its main purpose.

1586 Mr. WILLIAM: That is all.

Exam. WAY: You are excused.

(Witness excused.)

Exam. WAY: Off the record.

(Discussion off the record.)

Exam. WAY: We will recess until one o'clock.

(At 11:45 a. m. a recess was taken until 1 o'clock p. m. of the same day.)

AFTERNOON SESSION

1 o'clock p. m.

Exam. WAY: We will proceed, gentlemen.

Mr. FINERTY: Mr. Examiner, the evidence I will not offer is related to the Murray smelter of the American Smelting & Refining Company and I will call Mr. Perry.

R. A. PERRY was sworn and testified as follows:

Direct Examination.

Q. (By Mr. FINERTY) Mr. Perry, will you give your name, address and occupation?

A. R. A. Perry, Murray, Utah, general superintendent of the American Smelting & Refining Company, Murray Smelter.

Q. How long have you occupied that position, Mr. Perry?

A. About seven years.

Q. Prior to that what position did you occupy?

A. For eleven years prior to that I was metallurgist at the plant, operating the various departments of that plant.

1587 Q. And prior to that?

A. Graduated from school.

Q. What professional training have you had as metallurgist?

A. Well, I have operated each and every unit of the lead smelter at Murray.

Q. I mean, educational qualifications?

A. I am a graduate metallurgist engineer from the University of Utah.

Q. As metallurgist of the plant and general superintendent of the plant, have you been familiar with the manner in which inbound shipments are received and outbound shipments made from the Murray smelter?

A. Yes, sir.

Q. Mr. Kelley testified that the Murray smelter is served by two railroads, the Union Pacific and the Denver & Rio Grande, but that the smelter, the switching within the smelter or on the smelter tracks is performed by the Union Pacific, is that correct?

A. Yes, sir.

Q. Mr. Kelley also testified that the Denver & Rio Grande interchanged with the Union Pacific at a point outside the smelter property within the Pallas yards of the Union Pacific, is that correct?

A. That is correct, sir.

Q. And that point of interchange is approximately, the track at which D. & R. G. receives the cars from—I mean, the track on which the Union Pacific brings the cars from the D. & R. G. to the Union Pacific yards is about to the west of the middle of the pond marked on the map?

A. Approximately; yes, sir.

Q. Have certain exhibits been prepared under your direction at the Murray smelter?

A. Yes, sir. The immediate direction was by my shift clerk.

Q. Well, they were prepared under your direction, were they not?

A. Yes, sir.

Q. I show you a statement reading, "Statement showing incoming shipments for 12 month period ending with March 31, 1944," which I ask to be marked for identification as Exhibit 27.

(Marked for identification "Intervener's Exhibit No. 27. Witness Perry.")

Q. (By Mr. FINERTY) That was one of the statements prepared under your direction?

A. Yes, sir.

Q. I show you a statement marked, "Statement showing outgoing shipments 12 months period ending with March 31, 1944," and ask that be marked Exhibit 28 for identification.

(Marked for identification "Intervener's Exhibit No. 28, Witness Perry.")

Q. (By Mr. FINERTY) That was prepared under your supervision?

1589 A. Yes, sir.

Q. I show you a statement marked, "Analysis of Switching & Weighing Charges Incurred for Work Performed by Railroad During 12 Months Period Ending March 31, 1944," applying only on shipments originating outside of or shipped to points outside of the state of Utah. Was that prepared under your supervision?

A. Yes, sir.

Mr. FINERTY: I ask that be marked for identification No. 29.

(Marked for identification "Intervener's Exhibit No. 29, Witness Perry.")

Q. (By Mr. FINERTY) I show you a statement entitled, "Analysis of Switching & Weighing Charges Incurred for Work Performed by Railroad during 12 month Period Ending March 31, 1944," and applies only on shipments originating within or shipped to points within the state of Utah. I ask that be marked Exhibit 30.

(Marked for identification "Intervener's Exhibit No. 30, Witness Perry.")

Q. (By Mr. FINERTY) Was that prepared under your supervision?

A. Yes, sir.

Q. I show you a photograph of the Murray smelter and ask it be marked Exhibit 31 for identification.

(Marked for identification "Intervener's Exhibit 1590 No. 31, Witness Perry.")

Q. (By Mr. FINERTY) Will you state approximately when, if you know, that photograph was taken?

A. Approximately three years ago.

Q. And will you indicate what direction the top of the photograph is?

A. Northeast or east, or I would say north of east.

Q. Well, for the purposes of the photograph it is north?

A. No, it is hardly north. It is a little more easterly than north.

Q. And the right-hand side of the photograph is then what direction?

A. It would be approximately south, the right-hand side.

Q. And which direction is the bottom of the photograph?

A. For general purposes it is west.

Q. Then, if that is west, I assume the top of the photograph is east?

A. It is pretty much east. It isn't exactly that. The picture is not taken exactly east.

Q. And the left-hand side of the photograph is therefore north?

A. That is correct, in general.

Q. Now, that photograph shows in general the tracks represented on Exhibit No. 13 insofar as they converge at the west end of the smelter?

A. Yes, sir.

1591 Q. I want to direct your attention first to Sheet 2 of Exhibit 27. That sheet shows raw materials received at Garfield smelter—at the Murray smelter for the period indicated on the exhibit, does it?

A. Yes, sir.

Q. Now, numerically that sheet shows the number of cars received divided first between the two railroads, the D. & R. G. and the U. P., and also divided as between intra and interstate shipments?

A. That is correct.

Q. And then shows the point of origin of each shipment?

A. Yes, sir.

Q. And it shows the unloading point of each shipment within the smelter?

A. Yes, sir.

Q. And those unloading points are identified both by the name of the point at the smelter indicated on Exhibit 17 and by coordinates shown on Exhibit 17?

A. That is correct.

Q. Of the total raw materials received by the smelter, the exhibit shows that the greatest number of cars contain concentrates, does it not?

A. Approximately 40 percent; yes, sir.

Q. Approximately 40 percent of the total inbound raw materials are concentrates. Now, those concentrates are divided into two classes, are they?

1592

A. Yes, sir.

Q. What are those classes?

A. Lead concentrates and iron concentrates.

Q. How many lead concentrates does the exhibit show were received at the smelter intrastate?

A. 290 cars.

Q. And how many interstate?

A. 61 cars.

Exam. Way: Identify those.

Mr. FINERTY: I am just going to do it.

Q. (By Mr. FINERTY) Will you take the commodity that is shown on the left-hand column of that sheet of the exhibit, identify the lead concentrates includes in those totals?

A. Clayton Silver is a lead concentrate.

Q. Just give them. Just say Clayton Silver and read them down.

A. All right. Clayton Silver, Combined Metals, Silver King, Callahan Lead and Zinc, Rip Van Winkle.

Q. Are those all?

A. That is all the lead concentrates.

Q. Now, in addition to those lead concentrates which total 351 carloads, what are the iron concentrates as identified by the commodity name shown on the left-hand column?

A. Talache Mines, U. S. Iron Mide, Triumph Mining Company. I think that includes them. That includes the iron concentrates listed there.

Q. Those iron concentrates, both intra and interstate, total 421 cars, is that correct?

A. That is correct.

Q. Or a total of concentrate shipments, lead and iron, of 772 cars?

A. That is correct.

Q. Will you state in what manner the carloads of lead concentrates are received or delivered by the D. & R. G. at the smelter and what—how are they placed for unloading and intermediate handling before unloading?

A. Lead concentrates arriving in the Pallas yards over the Rio Grande are set out on their exchange track. The switch engine—

Q. Now, will you please refer to this map and will you please indicate the tracks? Those lead concentrates come into the smelter tracks where?

A. They enter the smelter tracks at the scale house, or just south of the scale house marked 1919.

Q. That is at the extreme left-hand lower corner of the map?

A. That is correct.

Q. When they reach the scale house, what happens?

A. Each car is individually weighed on the track scales and is allowed to roll down the track, the scale track, which is in a northerly direction.

Q. That is the D. & R. G. switch engine?

A. No, sir; Union Pacific.

Q. I mean Union Pacific switch engine pushes those cars over the scale where they are uncoupled and each car then drifts down to the scale track.

A. It is actually uncoupled after the placement of the car on the scale.

Q. Then it is allowed to drift down?

A. As the next car moves forward it pushes the car on the scales off the scales and gives it a certain amount of momentum that carries it on down the track.

Q. After all the cars are passed over the scales, what does the Union Pacific engine then do?

A. The Union Pacific engine backs up to the switch, which is a short distance south of the scale and passes by the scales and joins the loads.

Q. The U. P. engine isn't allowed to pass over the scale weighing track but has to pass over the scale dead track?

A. That is correct.

Q. And therefore after pushing the loaded cars over the scale it pulls back a short distance to a switch that puts it in on a dead scale track and it follows the cars down that track and couples onto them again?

A. Yes, sir.

1595 Q. After it is coupled onto those cars, what does it do with them?

A. A pushing action, takes them into the yard, in through the entrance of the plant just to the east of the Pallas yards and north of what is called Fifty-Third South on the map. There are two entrances.

Q. And then where are those cars taken having entered the yard?

A. At the discretion of the switch engine, either on the two coke tracks or on Tracks 5 and 6. Tracks 5 and 6 are on the upper side of the map, just beyond the thaw house.

Q. And are so marked, are they not?

A. Are so marked, 5 and 6.

Q. And the coke tracks to which you refer to the south and east of those tracks?

A. That is correct; yes, sir.

Q. And which of those tracks are used for holding of cars?

A. Both tracks.

Q. Both coke tracks?

A. Both coke tracks.

Q. And that depends entirely on the convenience of the U. P. switching crew?

A. Yes, sir.

Q. After those cars are placed on the hold tracks by the railroad company, what is done with them?

A. The company moisture men get onto the cars 1596 and obtain the samples for securing the moisture of the material in the cars.

Q. They obtain bucket samples of the concentrates in those cars?

A. Samples are obtained by the use of a shovel and digging what is called a post hole sample, and the material thus obtained is placed into a covered bucket which in turn is taken to the sample weighing room.

Q. Now, is that termed pipe sampling?

A. No, sir, that is actually called post hole sampling.

Q. Are these cars of concentrates pipe sampled?

A. Yes, sir.

Q. Where?

A. At that same location.

Q. You take two samples of those cars, one for moisture and one for pipe sampling?

A. That is correct.

Q. And after those samples are taken what is done with those cars?

A. Upon a written switch order from our sample mill foreman they are placed on the middle belt track. The middle belt track supplies all material for the D. & L. roasting department, and the middle belt track is off of the south lead as indicated by Mr. MacDonald's testimony yesterday and is toward the bottom or the south side of the plant.

Q. All lead concentrates go there?

1597 A. Yes, sir.

Q. What happens when they get there?

A. They are unloaded by the plant unloading crews and the empty cars are by gravity—are allowed to roll down that middle belt track to a point below the unloading.

Q. And those empty cars are subsequently hauled out by a switch engine of the D. & R. G. by the U. P.?

A. That is right.

Q. Now, after they are unloaded, what happens to that commodity?

A. That commodity is unloaded into hopper bins beneath which are conveyor belts and material is placed onto the conveyor belts, and with a series of conveyor belts conveyed to the D. & L. mixing building.

Q. Now, the D. & L. mixing building is the Dwight & Lloyd sintering building?

A. It is called the Dwight & Lloyd mixing building on Exhibit No. 17.

Q. That is, without any further railroad handling it moves to the Dwight & Lloyd machines?

A. Yes, sir.

Q. Now, would it be correct to say that a similar handling is made of 25 percent of the iron concentrates as far as the U. P. is concerned?

1598 A. 25 percent of the intrastate shipments would go there, or approximately that.

Q. And what is done with approximately 75 percent of the iron concentrates, how are they handled after being received over the scales?

A. They are pushed into the yard along with lead concentrates and other materials and held on tracks 5 or 6 or the coke tracks at which point moisture samples are obtained similar to that of the lead concentrates and also pipe sampling is taken at that point, and on switch order they are switched 25 percent to the Dwight & Lloyd and 75 percent into the low line and are spotted alongside of the A and B bins on the low line track, which is just west of the wedge mixing building.

Q. Indicated on Exhibit 17?

A. Correct, sir, and that in turn is just west of our fine grinding mill, No. 1.

Q. Now, are those iron concentrates unloaded at that point?

A. Yes, sir.

Q. And what becomes of them?

A. The iron concentrates are unloaded by company-operated cranes into A and B bins, and A and B bins are equipped with conveyor belts beneath them. The conveyor belts convey the charge that is made up at that point to tanks and bins above the Godfrey arsenic roasters.

Q. Will you indicate that point, the Godfrey roasters?

1599 A. The Godfrey roasters are immediately south of the wedge mixing building and Mill 1, the cottrell plant, the wedge roaster building, the cottrell power house, and down then the next building is the Godfrey roaster building.

Q. So indicated on Exhibit 17?

A. That is right, found in the center and lower part of the plant.

Q. I call your attention to an item or a commodity shown on the second page of Exhibit 27 as Garfield dust. How is that handled?

A. Garfield—

Q. The same as lead and iron concentrates?

A. The same as lead concentrates.

Q. The same as lead concentrates?

A. And the iron concentrates. That goes to the sintering plant via the middle belt.

Q. That is, they move down to the sintering plant or the Dwight & Lloyd machines the same as do all the lead concentrates and 25 percent of the iron concentrates?

A. That is correct.

Q. And the number of cars is approximately the same?

A. Yes, sir.

Q. Now, if my addition is correct, you have explained the inbound movement of 1,001 cars consisting of lead concentrates, iron concentrates and Garfield dust, that 1600 is correct, isn't it?

A. Yes, sir.

Q. Now you have said that these concentrates are pipe sampled. Will you explain very briefly for the record what is meant by that?

A. In obtaining a pipe sample the industry has adopted what is recognized as a typical pipe. That pipe generally is an inch and a half in diameter with a slit down the middle and slightly tapered to the bottom, the pipe being long enough to reach to the bottom of the car through the entire body of the ore contained in the car. We have a regular pattern for obtaining these samples. Depending on materials coming in, we generally take 80 samples obtained by the pipe. The procedure in obtaining that is that the operator takes the pipe and places it on top of the ore and pushes it down through the ore, if the ore is soft by hand, if not, by the use of a wooden mallet, as the pipe goes to the bottom of the ore which is at the smaller level. The pipe is withdrawn from the car of ore and the contents of the pipe placed into a suitable sample holder or bucket that the sample crew have at their disposal when the sample is being obtained.

Q. And about how many pipe samples in the car are taken?

A. I would say an average of 80 pipes to the average car.

Q. You used the word "ore". You meant concentrates?

A. I meant concentrates.

1601 Q. The pipe sampling is done of concentrates and not of ore?

A. Yes, sir; concentrates.

Q. Now, when those pipe samples are taken, what is done with them?

A. The sample is marked from the car in its container and taken to the cutting room which is adjacent to the bucking room.

Q. Well, it is taken there, not by railroad conveyor?

A. Absolutely not, by our operating crews.

Q. It is taken by the smelter to its bucking room where the pipe samples are examined or analyzed for metal content?

A. Are prepared.

Q. Are prepared?

A. For the assay of the sample.

Q. And that preparation is by means of grinding?

A. Yes, sir; grinding. Screening is a proper word.

Q. And they having been ground and screened in your bucking room, they are then assayed?

A. After they leave the bucking room they are assayed.

Exam. WAY: Now, the sampling of those cars in that manner, I assume you have to stop the cars at some place?

The WITNESS: The car is stopped at the time the sample is obtained.

Q. (By Mr. FINERTY) Well, the car has been placed 1602 by the railroad in one of two places, the railroad-owned cars on the smelter tracks, either Tracks 5 and 6, or one of the two coke tracks, and it is being held on those tracks for spotting orders?

A. That is correct.

Q. And it is while those cars are held for spotting orders and in order to determine where they are to be spotted that you take pipe samples, and send those samples through your bucking room and the assayer?

A. That is right.

Q. And it is necessary for the railroad, in assessing its freight charges, before it releases those cars, to know what the result of the sampling of those cars is and the assay?

A. I understand freight rates are based on the values obtained that way.

Q. Now, referring to the next heaviest load, inbound material, crude ores, this exhibit shows, does it not, that there were intrastate crude ores 230 carloads and interstate 466 carloads or a total of 696 carloads?

A. That is correct.

Q. Now, will you indicate in connection with the commodity list on the left-hand side of Page 2 of the exhibit what are included in the crude ores?

A. Lakeside Monarch; Shoshone Mines; Silver King Crude; arsenal pyrite, it is abbreviated; Chief Con, 1603 Salt Lake Pioche; A. S. & R. Company, Boston Con.

Then we have listed miscellaneous crude shippers, that is crude ore, Tintic Standard.

Q. Now, are those crude ores handled up to the point of railroad tracks, or Tracks 5 and 6, or the two coke tracks, in the same manner as concentrates?

A. Yes, sir.

Q. Having arrived on the railroad hold tracks, what is done with the crude ores?

A. The moisture samples are obtained at that point similar to the method described with the concentrates.

Q. That is, you take a bucket sample for moisture?

A. That is right.

Q. And is that moisture sample essential to determining the dry weight of the shipment?

A. It is used solely for that purpose.

Q. And without a correct dry weight of the shipment could the value per ton of ore in the shipment be determined?

A. No, sir; not the correct value.

Q. And therefore with rates based on values, until the dry weight of the shipment is determined and the ore assayed, sampled and assayed, the railroad can't determine its freight charges.

A. That is right.

Q. Now, will you state what is done with the crude ore after it is moistured in the hold yards of the railroad?

A. Where it is ordered for spotting, the majority of that crude ore is moved either of those hold tracks to the high line track and spotted on the track at Mill 1.

Q. Now, what percent of that is so handled?

A. Oh, I would say 80 percent.

Q. Between 80 and 85 percent?

A. Probably over 80 percent; yes, sir.

Q. It is placed at Mill 1?

A. Yes, sir.

Q. And having arrived at Mill 1, what happens to that ore?

A. The loaded car is spotted.

MR. FINERTY: Pardon me just a minute. Have you Mill 1 in mind?

EXAM. WAY: Yes.

The WITNESS: The ore is discharged from the railroad car into the mill hopper. From the mill hopper it is conveyed by pan conveyor to the crusher and from the crusher it passes through the crushing and sampling part of the mill, and is further discharged into an empty car on that same track, that Mill 1 track.

Q. (By Mr. FINERTY) Now, until it has passed through the sampler and handled by crushing and screening as you have explained, until it has passed through the sampler, the value of that ore cannot be determined, can it?

1605 A. That is right. That is the only method we have, of sampling the crude ore accurately.

Q. So until it has passed through Mill 1 and the sampling room, the carriers are not in a position to know what its freight charges are on that shipment?

A. That is right.

Exam. WAY: I understand that it is transferred from one car to another at that point?

Mr. FINERTY: No, I am coming to that.

Q. (By Mr. FINERTY) After it passes through Mill 1, what happens to the crushed ore?

A. We have two alternatives at that point.

Q. Well, it is loaded in a car?

A. It can be loaded into a car at Mill 1.

Q. All right, but there is another method of using it also?

A. Yes, sir.

Q. All right. Will you state what is done where it is loaded into a car at Mill 1?

A. We have conveyor belts at Mill 1 which will convey the ore to the wedge mixing building which is immediately west and adjacent to Mill 1, where it is held in tanks.

Q. And for what purpose is that done?

A. That is the make-up, or part of the make-up building for the arsenic roasting operations in the plant.

Q. Which finally results in what product?

1606 A. Calcines.

Q. That is the ore crushed through Mill 1 passes into the wedge building, is then handled through plant facilities and ultimately comes out as calcines?

A. That is correct.

Q. And not until it becomes calcines is it again reloaded into a railroad car?

A. That is right.

Q. And when it is reloaded into a railroad car, it is reloaded and moves out at a line-haul rate, is that correct?
 A. That is correct.

Q. Now, what proportion of the crude ores moving into Mill 1, or what number, would you say, are so handled?

A. It is a pretty difficult question to answer. We had 191 last year that could have been handled that way. I would say for the sake of the record that approximately half of that number was handled through the mill.

Q. That is of the total of 696 cars of crude ore, approximately 96 or 96 cars, after placing at Mill 1, went into the wedge house and came out as calcines, and not until that time were they rehandled by the railroad?

A. I would say that was conservative; yes, sir.

Q. Now, those that are handled through Mill 1 and not handled through the wedge house, what is done with that on coming out of Mill 1?

1607 A. It is moved to the middle belt, head of the Dwight-Lloyd sintering operation.

Q. Just to make sure that the Examiner—

A. The middle belt has been referred to before as receiving lead concentrates and iron concentrates. It also receives the fine ground ore.

Q. And what is the purpose of moving it to that point?

A. It is incorporated into the Dwight & Lloyd charge in preparation for its handling through the blast furnace.

Q. In other words, it is incorporated into the—moves into the Dwight & Lloyd sintering machines to make sinter?

A. That is correct.

Q. And that sinter is ultimately taken to the blast furnaces?

A. That is correct.

Q. Now, does that cover the handling of crude ores?

A. That is a typical handling of crude ores; yes, sir.

Q. Going either to Mill 1 as you have explained—Is there any other place that crude ore is going?

A. Well, we have three sample mills. It could go to any one of the three.

Q. Well, you have stated that the large percentage of them are handled through Mill 1?

A. That is right.

Q. Now, what of the remaining 15 percent, where
 1608 are they handled?

A. The bulk of them at Mill 2, and Mill 2 is located on Track 1.

Q. And after sampling at Mill 2 they come out and are loaded into cars?

A. That is right.

Q. And what is done with the crushed ore after loading it into cars?

A. It will be taken by the railroad switch engine over to the middle belt.

Q. To the middle belt?

A. Which is head of the Dwight & Lloyd operation.

Q. That is, it will be taken over to the sintering machine?

A. That is right.

Q. Is there some ore handled through Mill 4?

A. Yes, sir.

Q. What is that?

A. Exceedingly hard ores or exceedingly wet ores are sometimes handled through Mill 4.

Q. It is handled by the U. P. switch engine from either Tracks 5 and 6 or the coke tracks to Mill 4 and passes through that mill for crushing and sampling, is that correct?

A. That is right.

Q. And after it has passed through that mill, what becomes of that ore?

1069 A. It will either be—it will be loaded into a railroad car and be taken to Mill 1 or placed in stock for further use.

Q. That is, it might be taken to Mill 1 for further grinding?

A. That is right.

Q. Or it will be taken to a stock pile?

A. That is right.

Q. For future use. Where would that stock pile probably be located?

A. It could be located in any part of the railroad yard along any of the various tracks as shown, on the left-hand of the track system within the plant.

Q. That is on the tracks along the bottom, track shown in the plant yard?

A. We use most of the tracks for stocking ores at various times. Some of the tracks are not used. 5 and 6, for instance, we don't do any stocking there. We don't do any

stocking, as a general rule, on the roaster tracks. The bulk of the stocking is done in the central part of the plant rail road system or track system.

Q. And that is an apparently small percentage of ore that moves through Mill 4?

A. No, I wouldn't say it is a relatively small portion. Chances are it is at least 50 percent.

Q. Well, I must have misunderstood you. I understood that 85 percent of your crude ores move to Mill 1.
1610 A. That is right. I misunderstood your question.

Of the total ores going to the mills a relatively small part is sampled in Mill 4.

Q. Let's get that straight. Between 80 and 85 percent of the crude ores go to Mill 1 for sampling and crushing?

A. That is 85 percent of the crude ore.

Q. And of the remaining 15 percent the majority go to Mill 2?

A. That is right.

Q. And it is the remainder of that 15 percent that goes to Mill 4?

A. That is right.

Q. Now again, if my additions are correct, those concentrates and crude ores total 1,697 cars out of a total inbound movement of 1,943 cars, is that right?

A. That is correct.

Q. And then the testimony you have heretofore given accounts for the handling of all but 246 cars of inbound raw materials?

A. That is right.

Q. Now, will you state and identify the inbound raw materials included in those 246 cars?

A. U. S. Speiss, Getchell arsenic dust.

Q. Give the number of carloads of each?

A. U. S. Speiss, 32 cars; Getchell arsenic dust, 133 cars; Richmond-Eureka Speiss, 62 cars.

Q. Well, that is a total of 94 cars of Speiss, 32 And 62?

1611 A. That is right. East Helena and Selby dust, 22 cars; A. V. & Federal Matte, 26 cars, and 1 L. C. L. of pig lead, one car.

Q. Now, generally speaking those miscellaneous raw materials are handled into the railroad hold yard, Tracks 5 and 6 or the two coke tracks in the same manner as the concentrates and ores, are they?

A. That is right.

Q. And will you explain what happens to the 103 cars, or what happened to the 103 cars of Getchell dust?

A. Getchell dust is received into the Pallas yards, put over our track scales. The railroad switch engine places the cars containing Getchell dust on the low line, right at the site of A and B bins.

Q. Now, what are the A and B bins?

A. The A and B bins are the arsenic charge make-up, and bins which have been referred to before as receiving iron concentrates.

Q. And are adjacent to the sinter?

A. No, they are used in connection—

Q. I am talking about where they are, they are adjacent to the sinter?

A. They are adjacent. They come in on the low-line track and adjacent to the wedge mixing building.

Q. To the wedge building which is just west of Mill 1?

1612 A. Mill 1.

Q. Now, do I understand from that testimony that the Garfield dust here is not held by the railroad first on Tracks 5 and 6 or the coke tracks?

A. You mean the Getchell dust?

Q. Yes.

A. As a general rule it is handled just the same as the others. In other words, they bring the whole string of loads into the yards and place it on 5 and 6 or the coke tracks, and Getchell dust would be handled the same way.

Q. In other words, like everything else, the railroad uses those tracks for a hold yard, for spotting orders?

A. That is correct.

Q. Having received spotting orders then the railroad switch engines take it from one or the other of those sets of track to the point you have indicated; just west of Mill 1?

A. That is right.

Q. Is that material sampled?

A. Not until it is placed where we have indicated on the low-line track, at the A and B bins.

Q. And having reached the bins, that material is an arsenic material, is it?

A. It is arsenic flue dust.

Q. And you are required by the rules of the Interstate Commerce Commission to have those cars covered, are you not?

1613 A. That is right.

Q. And what have you, wooden covers, removable wooden covers for those cars?

A. That is right.

Q. And before those cars can be unloaded into those bins, how are those covers removed?

A. They are removed by the company's locomotive crane and placed on the ground.

Q. That is, when you order cars down to the arsenic bins for unloading, you have your locomotive crane down there ready to take the covers off?

A. The locomotive crane follows the orders there, after the engine has pulled in off of that spur track.

Q. So as not to interfere with the U. P. engine at that point?

A. There is no occasion for interference at that point.

Q. After it reaches the arsenic bins, what happens to that commodity?

A. After the tops are removed by our crane, the moisture sample, as well as the pipe sample is obtained.

Q. In other words, that commodity is sampled just as the concentrates are and a moisture and pipe sample taken, but it is taken at that point, rather than in the hold yards?

A. That is right. Then the car is unloaded by means of our locomotive cranes into the A and B bins. The 1614 tops are placed back on the cars; the crane pulls out of the low-line track, and the cars are empty, ready for further handling.

Q. Now, will you state what is done with the 94 cars of Speiss? I assume, is this a correct statement, that all cars, I think you have so stated, whatever the nature of the inbound commodity is, are brought in by the U. P. switch engine as a matter of course and placed at its convenience either on Tracks 5 and 6 or the coke tracks?

A. That is right.

Q. Now, will you therefore explain only as to the handling of the cars of Speiss after being placed in the railroad hold yards?

A. The moisture sample is obtained while they are in the hold yards, and then on a switch order they are placed at Mill 4, the coarse crushed.

Q. Placed by the U. P. engine?

A. By the U. P. switch engine at Mill 4, the coarse crushed and sampled through Mill 4, and the crushed material is reloaded into a car, into a railroad car.

Q. And taken where?

A. Either to stock piles or to Mill 1.

Q. And the stock piles being located, as you stated, generally throughout the lower track system at the southwest end of the yard?

1615 A. That is right.

Q. If they are delivered to Mill 1 they are put through there for further crushing, are they?

A. That is right. The crushing at Mill 4 is coarse. Speiss must not be only crushed but ground, so the material is set up at Mill 1, passes through the grinding process there in Mill 1 similar to ores, and from Mill 1 is conveyed to a hopper in front of our ball mill.

Q. Where is your ball mill?

A. The ball mill is in the section of Mill 1, a part of the building housing Mill 1.

Q. It is in reality, is it, just is the westerly portion of Mill 1?

A. It is the northwesterly corner of Mill 1.

Q. All under one building with Mill 1?

A. That is right.

Q. Well, your Speiss has been sampled when it passed through Mill 4, is that correct?

A. That is correct.

Q. And the next movement after sampling is to Mill 1?

A. That is right.

Q. Now, will you explain the handling of the 26 cars of matte from and after they reach the railroad hold yards?

A. This matte contains excessive percentages of both lead and copper. We take them to Mill 1 for fine grinding.

1616 Q. Just let me interrupt you, Mr. Perry. I think I neglected to ask you, but the Murray smelter is used for the smelting of lead, is it not?

A. That is right.

Q. And the Garfield smelter is for the smelting of copper?

A. That is right.

Q. And therefore the ore you strive to get at Murray is predominantly lead?

A. That is right.

Q. And copper is not a useful material at Murray?

A. In fact, it is an impurity.

Q. Now, would you say these 26 cars of matte consist of both lead and copper?

A. That is correct.

Q. What was done with those cars after they arrived at the railroad hold yard?

A. They were removed to Mill 1 for fine grinding, and reloaded into a rail road car, as has been explained in crude ore crushing and sampling.

Q. Now, when that went into Mill 1 for fine grinding, were they at the same time sampled?

A. That is right.

Q. And after they came out of Mill 1, what was the next move made in the railroad car, from Mill 1 to where?

A. They were moved to—Let's see if I can describe that particular point, on Track 4 which passes the south side of Mill 4 on the upper portion of the plant track system.

Q. What were they moved there for?

A. They were moved there and discharged. That is a trestle, by the way, at that point. The load is dropped to the ground, and the metallurgy consists of charging it to the reverbatory furnace.

Q. So that that matte, having been sampled in Mill 1, moved to the point you have indicated and was dumped to the ground there?

A. Yes, sir.

Q. And in a sense stock piled there?

A. Stock piled, but available to our labor crews for setting to the reverb furnace.

Q. Reverbatory furnace? And that was done by your own crews and not by the railroad engines?

A. That is right.

Q. Now, of the remainder of the miscellaneous shipments that you haven't covered, the 22 cars of Selby dust, what happened to those shipments after placement by the railroad in the railroad holding yards?

A. Those cars, as a general rule, are not always placed in the railroad holding yards, but on the track shown as the brick track, and it is on the brick track because it is right close to the carpenter shop. Those cars arrive at 1618 the plant with wooden tops on and the tops must be removed before any sampling can take place.

Q. Those Selby cars contain arsenic?

A. Small portions of arsenic, but it is a flue dust.

Q. It is a flue dust, and under regulations must have a top on them?

A. A top on them.

Q. And those cars are moved direct, are they, after coming into the plant over the scales, are moved by the railroad switch engine to what is called the brick track?

A. As a general rule that is the procedure. There are times when they are pushed in along with the rest of the loads.

Q. But the general handling is the other way?

A. I would say that is the railroad convenience, whether they are put there or not. They have to be placed there for removal of tops.

Q. In other words, the railroad knows, by long experience, where those cars are going to be ultimately wanted, and therefore place them on the brick track if it is convenient for them to do so?

A. That is right.

Q. Now, the testimony you have given up to date covers the inbound handling of a total of 1,943 cars of raw material received, is that correct?

A. That is right.

1619 Q. Refer to Page 1 of Exhibit 27. That exhibit shows a total of 666 miscellaneous earloads, miscellaneous materials, supplies received for the year ending March 31, 1944, does it not?

A. Yes, sir.

Q. And it shows of those 666 only 10 cars were interstate cars?

A. That is correct.

Q. Is that correct? There are only two commodities, well, say, three commodities, moving in any appreciable volume, lime, sand, a total of 197 cars; furnace coke, a total of 247 cars; and coke breeze, a total of 291 cars. Would you briefly explain where those cars, how those cars containing those commodities are delivered after the railroad has brought them into the railroad hold yards, or Tracks 5 and 6 or the coke tracks?

Q. From those holding tracks, a sizeable proportion of the lime sand is switched by the A. P. switch engine to the middle track or the middle belt, which is the make-up ends for the Dwight-Lloyd operation.

Q. And unloaded?

A. And unloaded. The balance of the lime sand is either stock piled in the yard or placed into beds which go to make up our cadmium roaster charge.

Q. At what point will that be?

1620 A. That will generally be just in the yard along with the stock piles, might be in three or four hundred ton beds.

Q. In other words, there is only one movement after the railroad brings it into the hold yard, or one spot movement?

A. That is right. We take a moisture sample but as a general rule we only pipe sample a small portion of it.

Q. How about furnace coke, 247 cars.

A. As far as furnace coke is concerned, it is brought in with the loads, placed in with the yard holding tracks.

Q. The railroad holding tracks?

A. The railroad holding tracks, and then from the railroad holding tracks on Track 3.

Q. That is at the top of the track system as shown on the map?

A. Yes, sir; and just south of Track 4. There are three coke hoppers there, sufficient each to take one car, and the cars generally arrive in the plant in such a way that whatever arrivals are made, we can place them up there and have them unloaded.

Q. That finishes the line-haul handling of that coke by the railroad?

A. That is right.

Q. There are 91 cars of coke breeze, and you might as well explain for my benefit what coke breeze is.

A. Coke, like coal, is screened, and various products produced at the point of production. In our case it happens to be the Columbia Steel Ironworks plant, at Provo, Utah, which is 40 miles south. In the process the coke is screened, and the larger screenings, or the larger material is furnace coke and the extreme small material is coke breeze. They have intermediate materials, but we don't use them.

A. It might be called coke dust, or something of that sort?

A. A lot of it is practically dust.

Q. Will you explain the handling of those 91 coke breeze cars after the railroad has placed them on the railroad hold tracks?

A. The U. P. switch engine switches them from the hold tracks to the old belt track, and the old belt track is next to the last one on the bottom of the map, just north of the road track.

Q. They are unloaded?

A. They are unloaded by our crews into hoppers beneath the railroad track.

Q. And that finishes the road-haul on that coke breeze?

A. That is right.

Mr. FINERTY: Mr. Examiner, on account of the very small number of carloads of other commodities, and the fact that they are mostly intrastate in any event I don't feel justified in taking up the miscellaneous general commodities unless you have some questions.

1622 Exam. Way: No, I think they are sufficiently identified.

Q. (By Mr. FINERTY) Oh, I neglected to ask you, Mr. Perry, if cars at Murray are sometimes handled into and out of the thaw house?

A. During the winter months that is necessary.

Q. And it is necessary on any lading that may be frozen?

A. That is corr et.

Q. Which would include generally speaking concentrates, crude ores, matte, and sand. Speiss?

A. It is very seldom that Speiss freezes; very seldom that matte freezes, but certainly lime, crude ores and concentrates will all freeze.

Q. Now, if any of those commodities arrive during the winter months frozen, are they first sent over the scale tracks as you have explained with all commodities as they come in?

A. Yes, sir.

Q. And having been weighed, are they then taken to the railroad hold yards, Tracks 5 or 6 or the coke tracks?

A. Yes, sir.

Q. Then if they are frozen they are taken from the railroad hold yard to the thaw house, which adjoins Tracks 5 and 6, about the center of the map?

A. That is right.

Q. And then they are held at the thaw house until thawed out?

A. That is right.

1623 Q. And then what becomes of them?

A. They are withdrawn from the thaw house, and taken back to the scales and set up to the point of unloading.

Q. That is, they are again weighed after being thawed, and are they taken to the point of unloading direct, or are they taken to the hold yards for spotting orders?

A. It could be either. We try to see to it that the cars can be spotted at the point of unloading, and they are taken from the thaw house, because if you leave them out very long they will freeze up again.

Q. In other words, when cars go into the thaw house, they are generally ordered directly to the unloading point?

A. That is right.

Q. From the thaw house.

Mr. FINERTY: Could I have five minutes to consult with my witnesses and see if I have left out anything?

Exam Way: All right, five minutes.

Mr. FINERTY: Before we do that, he can identify these other exhibits.

Q. (By Mr. FINERTY) Referring to Exhibit 28 showing outbound shipments from Murray, what is the heaviest movement of a particular commodity outbound?

A. The heaviest movement outbound is bullion, lead bullion.

Q. And what is the total of that movement outbound?

A. During the 12 months covered by the exhibit, 437 cars.

1624 Q. Of those 437 cars all moved out interstate?

A. That is right.

Q. It is also shown on that exhibit how those cars were divided for outbound movement between the D. & R. G. and the U. P., is that correct?

A. Yes, sir.

Q. Now, taking an outbound shipment of lead bullion, will you explain how that is handled by the U. P.'s engine?

A. Our weighmaster is in constant touch with the two railroad agents at Murray.

Q. That is the D. & R. G. and the U. P. agent?

A. That is right. Both agents are given a general idea of what our loadings are going to be as far as bullion empties are concerned. Each agent makes it a point to see to it that the line-haul engines bring into the Pallas yards sufficient box cars for handling the outgoing bullion shipments.

Q. That is, the U. P. engine will bring in sufficient box cars at its Pallas yard, and the D. & R. G. will bring in sufficient box cars at its Pallas yard?

A. That is right. They are handled just the same as ores. Then the U. P. engine will pick those cars up and take them over the railroad scales for obtaining light weight and place them on the bullion hole track.

Q. Where is the bullion hole? Will you indicate on the map?

A. The bullion hole is a track that leads off from 1625 the west entrance of the plant and passes the arsenic storage bin, and to the east of the arsenic storage bin a spur leads off and is called the matte track and the other track is called the bullion track and leads down to what is shown on the map as a remelting plant, the bullion plant, and just another name for the bullion recasting plant.

Q. Now, how are cars placed to that bullion casting plant?

A. The U. P. switch engine will generally bring in their empties and start down the bullion track, and either they will use a switch point further into the plant toward the west end or they can use the matte track for spotting, but in any event they will spot their empties. After they have unhooked from the empties, they will go in and take hold of the loads and take the loads out far enough to clear the switch. Then they will take their empties back, hook onto the empties and take them back into the bullion hole. The actual manipulation is entirely a matter for the railroad switch engine.

Q. And having been loaded at the bullion house, the movement is in the reverse direction?

A. Directly to the scales where they are weighed and delivered to the railroad.

Q. Now, just one second, before they go to the scales, do they pass through the railroad hold yards, or do they even, going to the scales, pass through the railroad 1626 hold yards, going out of the plant?

A. As a general rule they are probably placed in the hold tracks and taken out as a rule with empties.

Q. In other words—

A. That is a matter for the switch engine crew to decide.

Q. In other words, the switch engine crew decides what switch train, you might say, they will take out of the hold yard for delivery of outbound loads and empties to the D. & R. G. and the U. P. respectively?

A. Out of the hold yards, that is right.

Q. And do they use those hold yards for making up those out-bound switch trains, classifying them?

A. Generally, yes.

Q. That is what I mean, do they line up cars going to the U. P. together and cars going to the D. & R. G. together, so that they can be conveniently handled once they are taken out of the hold yards into the Pallas yard?

A. I can't say as to that. I think that is entirely a question as to the switching crews, as to just how they make up their trains to take to the scales for weighing.

Q. Now, your Speiss calcines are the next largest outbound movement, are they not?

A. That is correct.

Q. And you have, as a matter of fact, already stated how your Speiss calcines are moved out, outbound, 1627 passing through the sintering?

A. Through the arsenic.

Q. Through the arsenic plant, I mean, is that correct?

A. That is correct.

Q. Cars are placed by the switch engine at the arsenic plant until cars are hauled out from there to the Pallas yard is that correct?

A. Via the railroad scales.

Q. Via the railroad scales?

A. The track scales.

Q. Just generally speaking, are outbound empties and outbound loads, are the majority handled first into the railroad hold yards, by which I mean Tracks 5 and 6 or the coke tracks, or do they pass out directly over the scales, do they make up drags in the general—

A. As a general rule they make up drags to take out to the scale track or out to the scales.

Q. Yes. I show you Exhibit 29 which shows switching and weighing charges incurred for work at the Murray plant during the twelve-month period ending March 31, 1944. Was that prepared under your direction?

A. Yes, sir.

Q. Those switching charges, so far as you know, and weighing charges, were paid in accordance with bills rendered by the railroad company under the present tariff provisions?

1628 A. That is right.

Q. And those shipments were wholly to or from points outside of the state of Utah, in other words, interstate shipments?

A. That is right.

Q. And Exhibit 30 shows similar information for intrastate shipments?

A. Yes, sir.

Q. And was prepared in the same way?

A. Yes, sir.

Mr. FINERTY: I think if I may have five minutes now—

Exam. WAY: All right.

(A short recess was taken.)

Q. (By Mr. FINERTY) Mr. Perry, I believe there is a slight correction you want to make on Sheet 2 of Exhibit 27, is that correct?

A. Yes, sir.

Q. Will you state what it is?

A. Yes, sir. In the item of commodity crude arsenic pyrite, 71 cars, our exhibit shows them at 71 cars via in-

terstate and it should be intrastate, inasmuch as the railroad loading point is Wendover, Utah.

Q. And that will change the total then of the column headed, "Number of Cars Received Via Intrastate" from 1079 to 1217?

A. That is right.

Q. And it will change the column headed, "Number of Cars Received Via Interstate" from 797 to 726?

A. That is right.

Q. The corrected total then of the intrastate cars will be 1217, and the corrected total of the interstate will be 726?

A. That is right.

Q. But it makes no difference in the total of both classes of cars received?

A. That is right.

Mr. FINERTY: Mr. Perry is ready for cross examination. Exam. Way: Mr. Campbell?

Mr. CAMPBELL: I have none.

Mr. COLLINS: I have none.

Mr. WILLIAMS: I think no cross examination.

Exam. Way: You are excused.

(Witness excused.)

Mr. FINERTY: Off the record.

(Discussion off the record.)

O. W. TUCKWOOD, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. FINERTY) Will you explain the switching charges, the switching rates shown on both Exhibits 29 and 30?

Exam. Way: They are shown on the bottom of the exhibits.

The WITNESS: Oh, yes, the tariff authority is right there.

Exam. Way: All right. I want the same information that you gave as to the Garfield plant.

The WITNESS: That is correct, the same principal.

Q. (By Mr. FINERTY) That is the same item provisions of that tariff apply?

A. No, no, because at Garfield I used the D. & R. G. tariff and here is the Union Pacific tariff.

Q. I see.

A. I will have to check that. That is Item 520-E of the tariff, named on the exhibit.

Exam. WAY: Which exhibit are you looking at?

The WITNESS: 29 and 30. In the lower right-hand corner the tariff authority is shown.

Exam. WAY: Now, are the amounts that are shown on these exhibits the amounts that are paid by the American Smelting & Refining Company?

The WITNESS: Yes, sir; *in toto*. There is no separation here.

Exam. WAY: There are no absoptions?

The WITNESS: None at all.

Exam. WAY: All right. That is all I wanted. You are excused.

(Witness excused.)

Mr. FINERTY: I desire to offer in evidence Exhibits 27 to 31, inclusive.

Exam. WAY: Any objection?

1631 (No response.)

Exam. WAY: They are received.

(Intervener's identification Exhibits Nos. 27 to 31, both inclusive, Witness Perry, received in evidence.)

Mr. FINERTY: That, Mr. Examiner, completes our evidence with reference to the Murray plant.

Exam. WAY: Is there any further evidence by anybody with respect to the Murray plant?

Mr. CAMPBELL: I don't think there is any more.

Mr. COLLINS: We have no more.

Exam. WAY: How about the cross examination of the Commission's witnesses on the Murray plant?

Mr. FINERTY: I have no further cross examination.

Exam. WAY: Then we will take up the Midvale.

Mr. FINERTY: The Leadville.

Exam. WAY: Excuse me, Leadville.

Mr. FINERTY: Can I have a moment to assemble my papers?

Exam. WAY: All right, Mr. Campbell?

Mr. CAMPBELL: Mr. Examiner, we have some maps here of the Leadville smelter, and there are six of these maps that have designated markings, a number of designated places. There are only six with these particular markings. I would like to introduce this one that has these particular markings with the red pencil showing certain designated places for identification purposes as Exhibit No. 32.

1632 Exam. WAY: Now, are those marks on the official copy you have given the reporter?

Mr. CAMPBELL: These marks are on the official copy that we have furnished to the reporter.

Exam. WAY: And that is the map that I have before me?

Mr. CAMPBELL: That is the map that you have before you.

(Marked for identification "Respondent's Exhibit No. 32, Witness Moriarty.")

Mr. CAMPBELL: Now, our first witness will be Mr. Moriarty.

K. L. MORIARTY, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) Have you this map?

A. Yes, sir; I have a copy of it.

Q. Very well. Will you get it so you can follow it? Now, you stated yesterday that for some two or three years prior to going to Salt Lake City you were the superintendent at Grand Junction, Colorado?

A. That is correct.

Q. And the American Smelting plant at Leadville, Colorado, was under your jurisdiction at that time?

A. That is right, sir, that is correct.

Q. Have you had an opportunity to become familiar with the plant and know the operations?

A. Yes, sir.

Q. Now, without further ado, will you proceed, Mr. Moriarty, to explain these movements? Have you any history or anything like that that you want to state with reference to this particular plant?

A. Yes, sir; I have.

Q. Very well, proceed with it, and I won't ask you in detail.

A. I have prepared a statement showing briefly the location of the Arkansas Valley plant of the American Smelting & Refining Company at Leadville. Before I read this statement it might be well, as a matter of record, to show that this plant is located about 10,000 feet above sea level, and it is very bad country and has very long and tough winters. I will proceed to read it now.

This plant, located on what is known as Leadville Branch, Denver & Rio Grande Western Railroad Company. Leadville Branch connects with D. & R. G. W. main line at Malta, Colorado, located 271 miles west of Denver on Royal Gorge route of the D. & R. G. W. Railroad between Denver and Salt Lake City. Malta is on what is known as Sub-Division 3 of this railroad, 55.9 miles west of Salida and 31.0 miles east of Minturn, Salida and Minturn being respective sub-division terminals of Sub-division 3.

A. S. & R. plant trackage connects with Leadville 1634 Branch main line at a point 2.3 miles from Malta and 2.5 miles from Leadville depot.

Plant is served by 6.04 miles trackage within plant area. This trackage is D. & R. G. W. owned and maintained.

Road haul loads received by A. S. & R. Company at this plant in March, 1944, averaged 6.5 per day, with a total of 201 loads, being divided between following commodities—

Acid	1
Coke	40
Coal	11
Ore and Concentrates	68
Residue	59
Limerock	17
Scrap Iron	9
Steel	1
Tin	4

Total 201

I might add that tin and scrap iron are the same commodity.

Road-haul loads forwarded from this A. S. and R. plant in March, 1944, averaged 1.16 per day or a total of 36, consisting of the following commodities—

Bullion	29
Copper Matte	7

Total 36

In March, 1944, a total of 204 empties moved out 1635 of A. S. & R. plant, divided as follows—

*To Malta for further
movement empty*

5 dumps
32 box
47 coals
14 auto

*For loading at other
points Leadville District*

70 dumps
21 box
9 coals
24 auto

Total 98

124

Majority of loading A. S. & R. Plant is protected with cars arriving under load. In some cases it is necessary to move especially conditioned cars into the plant empty to protect loading.

A. S. & R. Company own 57 open top and 2 flat cars, which are located within the plant and are used for various purposes to protect intra-plant movement of commodities.

A. S. & R. own and operate one steam and one diesel locomotive crane.

D. & R. G. W. Company at this time operate two switch engines, each day, six days per week. At present time one D. & R. G. W. switch engine is operated some Sundays to do plant work. This work is combined on Sunday with what is known as "hill job". The hill job also hauls traffic between Malta, A. S. & R. Plant and Leadville.

Business to and from Malta and A. S. & R. plant is handled by an assigned switch crew, known as the "hill crew", and which operates between Malta and Leadville. On week-days A. S. & R. business is moved from Malta to A. S. & R. By this hill crew and thereafter handled by switch crews within the plant. This hill crew moves outgoing business from A. S. & R. yard, after being assembled by plant switch crews, to Malta. Any empties taken from A. S. & R. yard for other industries in the district are normally handled by switch crews other than the hill crews.

After incoming business is set out in the A. S. & R. yard by the hill crew it is handled within the plant by switch crews as directed by A. S. & R. people, which includes weighing, if necessary, and then spotting to unloading tracks, or placing on hold tracks until plant is ready for the commodity. Thaw house is normally used between October 15 and May 1. When thaw house is in operation, movement of certain loads to and from thaw house is required.

Movements of various loads and empties are covered by switch order issued by the A. S. & R. people. An occasional verbal order for movement of empties or loads is issued and in which case switch foreman makes written record.

Ore handled into the Smelter Plant by truck, in March, 1944, is the equivalent of 29 cars.

Exam. Way: Why do you put truck movement on here?

The WITNESS: Because the cars of ore moved into the plant by truck are unloaded into railroad cars for handling in intra-plant movement throughout the plant.

1637 Mr. FIXERTY: In that connection it also moved out-bound from independent shippers to other plants, does it not, that ore?

The WITNESS: I am not sure I understand you.

Mr. FIXERTY: Is it true that independent shippers load from trucks into cars of the D. & R. G. set on the tracks adjacent to the smelter and those cars are shipped out

road-haul, not by the plant, but by the independent shippers?

The WITNESS: My statement contemplated only A. S. & R. ore, not other ore.

Q. (By Mr. CAMPBELL) Is there a large percent of your ore that comes in, does it come in by truck and then handled by the plant in the railroad cars, do you have an idea of about what percent?

Mr. FINERTY: I have got that.

Mr. CAMPBELL: You have got that? I thought he had it too. Go ahead and make a statement.

Exam. WAY: I just want to ask one question that I don't quite understand. On your first sheet it says, "Road-haul loads forwarded from this A. S. & R. Plant in March, 1944, averaged 1.16 per day, or a total of 36." What do you mean by that?

The WITNESS: There are 30 days in a month and March 31 days, and averaged 36 cars per month.

Exam. WAY: Per month?

1638 The WITNESS: Yes. We will now describe the movements of the various commodities through the plant as handled by Rio Grande engines. This map I have is the same map that you have.

Q. (By Mr. CAMPBELL) Mr. Moriarty, may I interrupt at this point and say it is handled by the Rio Grande engines. The Rio Grande engine is the only one that handles anything at this plant?

A. It is the only railroad that gets to that plant.

Mr. CAMPBELL: That is the point. Very well.

Exam. WAY: Now, do I understand that all of the trackage at this plant is owned by the American Smelting & Refining Company?

The WITNESS: No, sir; it is owned by the Denver & Rio Grande Western as shown in that statement.

Exam. WAY: Is it all maintained by the railroad company?

The WITNESS: Yes, sir. The first commodity is lime rock. I suppose I had better go in a little bit further and state again that the commodities via rail for the smelter, either direct or set out at Malta. Malta being, as I stated in my written statement, 2.3 miles from the plant entrance, from this point (indicating).

Mr. FINERTY: Pardon me, Mr. Moriarty, but Malta is on your main line?

The WITNESS: Yes. From Malta these commodities
1639 ties are moved to the plant and set out in the lower

yard, which in this discussion we will hereinafter call the flat. The flat is composed of seven parallel tracks and is located on the map by coordinates, by 5-E. From this point commodities for distribution throughout the plant are handled by Rio Grande switch engines. Lime rock is moved from the flat to the scale.

Exam. Way: Where is the scale?

The WITNESS: The scale is located on the main entrance to the plant, parallel with the flat yard at coordinate 5-C. After the lime rock is weighed it is taken to a point of unloading on Track Upper 10 or Upper 11, about coordinate 9-F.

Exam. Way: O. K.

The WITNESS: After the car is made empty it is returned to the scale for a light weight, thence set to the flat for further handling, either out to Malta or elsewhere in the Leadville area.

Q. (By Mr. CAMPBELL) Is there just one scale?

A. Yes, sir.

Q. That is back up there—

A. At 5-C.

Q. Very well. Go on.

Exam. Way: Now, in coming down to that lime rock unloading point, you come down over the so-called American track?

The WITNESS: No, sir; Track No. 7.

1640 Exam. Way: How does it get in there?

The WITNESS: Through the plant and known as the main line and going up to all points in the plant. The trackage used is off the scale towards the lower part of the map, over the scale this way (indicating).

Exam. Way: You move it up this way (indicating)?

The WITNESS: Yes.

Exam. Way: And make it come around here?

The WITNESS: That is right. The point of unloading of this lime rock is shown also in blue crayon on the exhibit. Coal, coke bronze and lime rock, I am not going to state in every case, this is set on the flat by our hill engine. It is picked up from the flat, it is taken from the flat over the scale from where it is switched to various points of unloading. These various points of unloading coal and lime rock are shown on the map, and lime rock locations, storage piles, are shown in blue. Is that enough of a description for the handling of that, or do you want me to go into further detail?

Exam. WAY: How many points are there where this lime rock is unloaded?

The WITNESS: Four points.

Exam. WAY: I see, unloaded at four points indicated on the map marked in blue?

The WITNESS: In blue.

Exam. WAY: All right, that is enough.

1641 The WITNESS: Coke is taken from the flat and is moved without weighing to Tracks 3 and 4 in the ore house.

Exam. WAY: What is that last one?

The WITNESS: Coke is not weighed but is taken from the flat to Tracks 3 or 4 in the ore house, which is approximately coordinate 9-H. The tracks are marked.

Exam. WAY: Tracks 3 and 4?

The WITNESS: Yes, sir.

Mr. CAMPBELL: It is marked bins. The ore house is marked bins.

The WITNESS: Brick is not weighed and taken from the flat and set direct to point of use or storage, generally the brick shed or Track 10, which is approximately east of the lime rock unloading point on that track 8½-F. Scrap iron is taken from the flat over the scale to various stock piles, that is stock piles of scrap iron.

Q. (By Mr. CAMPBELL) That is the same as scrap rail?

A. Yes, sir; or scrap rail, are located at various points throughout the plant. However, most of the scrap received is unloaded in the bins on Tracks 6 or 4, which is the same point to which the coke goes.

Exam. WAY: It isn't marked on here.

Mr. CAMPBELL: It is marked scrap rail. Over at the bins it isn't marked.

The WITNESS: It isn't marked, no. Piles of scrap
1642 rail are located at 11-G.

Q. (By Mr. CAMPBELL) 11-G, and there is also some at H-12?

A. Yes, H-12. These points are marked in pencil on the exhibit. Acid is taken from the flat and not weighed and moved to a point of unloading on the American track, coordinate 9-F, at a point on this track marked trestle. Road-haul ore taken from the flat, weighed, thence to Track 10 in the sulphide mill, 9-F.

Q. It is just at the top of G-9 instead of F?

A. Yes, that is right. No, it is in coordinate, F, F-8 and 9.

Q. I guess that is right.

A. Empties are then, when made empty, the car is removed to the scale and weighed and set to the flat for further handling. Concentrates and blackwell residue are taken from the flat and over the scale to Track 9 where they are pipe sampled and loaded on a conveyor at coordinates 7 and 8-G. In red at various points on the map are shown stock piles of this blackwell residue, which is given the same handling except that it is scaled. It is also scaled and set to a point of unloading, the name of these points shown in red, and so marked blackwell residue.

Q. Something down there is marked with red. It has zinc.

A. That is an old storage pile. My statement was it was marked "Blackwell residue" in red.

Q. It has the blackwell. Yes, very well.

1643 — A. This plant has considerable intra-plant movement and stock piles. Lime rock removed from stock piles along the various tracks, picked up, loaded and spotted for unloading at the point of use, which is generally in the bins just described before, 9-H. Coke removed from stock piles is handled in the same manner, not over the scale, but direct to point of unloading in the bins, 9-H. Slack coal is loaded from the stock pile, which is located at various points, particularly between the old bullion track and the lead to Tracks 2, 4, 5, 6 and 7, at approximately Coordinate 6-G, and reloaded and handled, the majority of it, to the bins at Coordinate 9-H. Stock pile residue is reloaded, taken over the scale, and switched to Track 9 for unloading, which is the same point of unloading that they used direct from road-haul on No. 9, which we have previously described.

Exam. Way: 9 what?

The Witness: Track 9, sir.

Exam. Way: Track 9 of what?

The Witness: 7-G.

Mr. FINERTY: Mr. Moriarty, I don't want to interrupt, but all of these movements from stock piles to other places in the plant, and subsequent reloadings are paid for as an intra-plant switching job?

The Witness: Yes, sir; every one of them. I might at this point state that in wintertime, as I stated in my
1644 original statement, this ore and residue, etc., is handled from the inbound—inbound is handled from the flat to the scale to the thaw house, and when thawed back to the scale to these various same points of unloading.

The only difference, it makes the trip to the thaw house and back to the scale.

Trucked-in ore is loaded at the American dock located at Coordinate 12-G.

Mr. CAMPBELL: American track, it is marked here.

The WITNESS: American dock, call it, American track. When this trucked-in ore car is loaded, the car is moved from the dock to the scale and the scale to the unloading point, the unloading point being the conveyor as we have previously talked about on Tracks 10 and 11 at Coordinate 8-F.

Exam. WAY: That is purely an intraplant movement?

The WITNESS: Yes, sir; for which we assess switching charges. In wintertime this ore also takes the thaw house route, if it is frozen, for which the switching charge is also made. Our two engines located at this plant, among other things, also serve other industries, one of which is shown on the map as the O. & C. spur, marking of this spur being Coordinate 10-D. The plant which it serves is not on the map but is further up on the track.

Exam. WAY: What is it?

The WITNESS: The Ore & Chemical Company. These engines also—

1645 Exam WAY: What is the nature of their business?

The WITNESS: Processing ore. These engines also go up our California Gulch Line, which leads off of our line between Malta and Leadville, approximately a mile above, or towards Leadville from Sunshine, and this branch is about a mile and a quarter long. Most of it is on a 4 percent grade at this point. They secure ore from the Resurrection Company and bring it back to the plant where it stays for movement to Malta or beyond, and incidentally, we get the American Smelting Company to weigh it free. In addition to that this ore from this company is brought down to the smelter. Some of it is used in the smelter as a road-haul shipment of ore. Some of the outbound stuff from Resurrection Mine goes to various points throughout the country, but it is weighed over the A. S. & R. scale free and is held in the plant for movement to Malta.

Exam. WAY: Is that plant in connection with this one?

The WITNESS: Only insofar as it brings out the fact these engines are doing work other than smelter work.

Exam. WAY: That Resurrection industry hasn't anything to do with this plant?

The WITNESS: No, not a thing in the world.

Mr. FINERTY: Also the fact, Mr. Moriarty, tracks owned by the D. & R. G. and generally used in service of the 1646 smelter of the American Smelting & Refining Company are also used by the D. & R. G. for other purposes?

A. For other shipments, that is correct. In addition to this outside work done by these engines, there is also some ore loaded on the smelter property, by arrangements with the smelter and the Rio Grande, on trackage in the plant, which moves out of the plant in line-haul, with which the smelter company is not concerned, but this haul is handled by our engines inside the plant area and moved over the A. S. & R. scale. In addition to this work performed by these two engines, by arrangements with the smelter company, by then arranging their work, we also make several trips to Malta to bring up loads to the plant for subsequent placement in the smelter yard.

Exam. Way: Now, do these two locomotives operate at the same time or different?

The WITNESS: In winter months they operate at the same time. They both leave Leadville at six-thirty in the morning and get to the plant about seven o'clock, and their first job is to get into the thaw house and take out the thaw house ore and place it about the plant for handling. However, in the summer months, when the thaw house isn't working and the ore can remain out overnight without freezing, one engine goes to work at six-thirty in the morning and the other at eight a. m.

Exam. Way: Then you have two engines working in there at the same time?

The WITNESS: Yes, sir.

1647 Exam. Way: Do they interfere with one another?

The WITNESS: Very little, sir.

Exam. Way: How do they arrange that?

The WITNESS: They arrange that among themselves.

Exam. Way: How do they do it, do you have one working one part of the yard and another in the other part?

The WITNESS: No, but when one engine is working in one part of the yard, the other is in the other part, and in making these trips down, back and forth between the yard, they seldom mingle together except in the morning at the thaw house when they get in each other's way a little bit.

Mr. FINERTY: I understand they are not always in the yard except when they have gone down to Malta?

The WITNESS: They are not in the same place in the yard at the same time.

Mr. FINERTY: Or always in the yard?

The WITNESS: That is right.

Q. (By Mr. CAMPBELL) How long do these engines work?

A. Their tour of duty is eight hours.

Q. All right.

A. I think that describes—Oh, yes, I forgot to get the bullion out of there. The biggest volume of business out is bullion. A bullion car is light weighed and then set to the bullion track, the bullion track being located at Coordinate 8-H. After the bullion is loaded it is taken to the 1648 scale and weighed and set to the flat for movement out. Matte is loaded on the mill track in box cars on Track 11. Coordinate 9-F, is weighed, set to the flat for movement out. Bag house dust is loaded at the bag house, located at Coordinate 8-H opposite the house marked bag house, set to the scales and weighed. This initial weighing is done to protect against overloading, because the car is next taken to the carpenter shop and the wooden top put on the car, and the car is then reweighed for freight charges, set in the flat for movement out.

There are several other intra-plant movements, the most important ones of which are the Speiss movement from the furnace track, which is located at 9-H and shown on the map as matte craneway.

Mr. FINERTY: One moment, that was an intra-plant movement?

The WITNESS: Intra-plant, yes. Did I say inter-plant? It is an intra-plant movement. It is moved from the furnace track via the scale to Track 11, Coordinate 8-F. Do you find that, Mr. Commissioner?

Exam. WAY: I think so, yes.

The WITNESS: The next move of any consequence is cottrell dust from the cottrell track, which is marked as a spur off of the American track, Coordinate 8-F, and moved from there, via the scale to Track 9, if it is weighed, although in some cases these cars are not weighed for various 1649 plant reasons. It is placed on Track 9, Coordinate 7-G. That constitutes practically all of the major moves in the plant. All these intra-plant movements are paid for under the tariff. I think it is \$2.97 per move. As stated previously, the moves are all made on written instructions except a few which are later added either by the smelter people or by the switch foreman, turned into the agent at Leadville, where the proper interpretation is given to it, the moves, and switch charges assessed under the tariff.

Q. (By Mr. CAMPBELL) You have spoken several times of Malta and the agency at Leadville. Is there any agency at Malta where your junction is at the main line?

A. Yes.

Q. You maintain an agency there? Does this agency have anything to do with the billing you spoke of?

A. No.

Q. All handled through the Leadville agency?

A. All handled through the Leadville agency.

Q. Now, Mr. Moriarty, I notice with reference to thaw house No. 2, is there more than one thaw house?

A. There is only one thaw house in operation, and that is thaw house No. 2 located at Coordinate 7-F.

Q. Now, go ahead, is there anything else you have?

A. I think that is all.

Exam. Way: How many cars a day do you handle of this matte? Apparently you have got 6.5 cars a day, loads in; 1.16 per day out, and around 3 cars a day of empties?

The Witness: That is right.

Exam. Way: And that makes a total of about between 10 and 11 cars?

The Witness: That is right.

Exam. Way: And requires two locomotives to do this switching?

The Witness: Plus the outside work they do.

Exam. Way: Well, the outside work must be the most of it, isn't it?

The Witness: No, the work in the plant is the most of it.

Exam. Way: Two locomotives a day to move 10 cars?

The Witness: Well, there are several movements involved in these 10 cars, a lot of which are paid for and a lot of which are included in the line-haul.

Exam. Way: Well, I assume before you get through with it you will have to show these movements?

The Witness: What movements? I have showed the movements.

Exam. Way: I know you have told us where certain cars were set, commodities from one place to another.

Mr. FINERTY: Well, that isn't a representative month?

The Witness: Oh, no, no, the worst month in the year.

And also you have got this trucked in ore to handle through the plant too.

Exam. Way: That amounts to what?

The WITNESS: I told you. I think it was in the statement, showed it amounted to—

Exam. Way: About 29 cars in a month.

The WITNESS: 29 cars a month.

Exam. Way: Less than a car a day.

Q. (By Mr. CAMPBELL) Now, have you said what you want to say, Mr. Moriarty, about that plant, the terrain and all? You said it is a very high elevation.

A. It is on a steep slope. I might go into that a little bit. The track to the thaw house—

Q. Let's get it, is that near the top of the pass on the main line?

A. It is on a branch that leaves the main line.

Q. That branch is the one that goes down to Leadville?

A. Up to Leadville.

Q. That is how far from Tennessee Pass, 7 or 8 miles?

A. Well, it is 9.

Q. What is the elevation there?

A. 10,000.

Q. The altitude, I mean.

A. A little over 10,000 feet.

Q. Where this plant is?

A. Where this plant is.

1652 Q. Now, go ahead. You started to go ahead with something there.

A. The trackage into the thaw house is on a 4 percent grade, and the balance of the trackage on the upper end of the plant, I will call it upper end of the plant, that portion of the plant away from the scale, is on a 4 percent grade also.

Exam. Way: You mean—

The WITNESS: That portion of the plant away from the scale (indicating).

Exam. Way: Oh, this way (indicating)?

The WITNESS: Yes, sir. That is all I have to offer, I think.

Mr. CAMPBELL: I think now, Mr. Examiner, this is the plant map anyway, and they can develop this probably, some things that you want by cross-examination.

Exam. Way: Cross-examine.

Mr. CAMPBELL: That is, I had, of course, reference to the smelter.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. Moriarty, these two switch engines that are assigned by the D. & R. G. to do the switch-

g of the plant, just to what extent do they do work outside of the plant and for industries outside of the plant?

A. It varies. Some days it will amount to as high as five hours out of the plant. Some days it won't amount to but very little outside of the plant.

Q. Are there any days that they don't go outside the plant at all?

A. I imagine there might be an occasional day where they wouldn't go outside the plant.

Q. Now, the movements that are made between the O. & C., I believe you describe that as the Ore & Chemical Corporation, and the A. S. & R. plant, and the movement made between the Resurrection Mine and the A. S. & R. plant, are any of those movements made by the transfer engines?

A. Occasionally, yes, when the smelter engines are unable to do it.

Q. And by smelter engines, you mean the switch engines?

A. Yes, at the smelter, but that isn't very often. As I stated, lots of this outside work is done by the smelter-assigned engines.

Q. Now, in your statement which you read into the record, the bottom of the first page appears this: "Majority of loading within A. S. & R. Plant is protected with ears arriving under load." And then the next sentence: "In some cases it is necessary to move especially conditioned ears into the plant empty to protect loading." Could you elaborate on that just a little bit?

A. That statement is a little misleading, but what I endeavored to infer, that all of the box cars received in the plant under load with ore and concentrates, etc., are not suitable for outbound loading of bullion, and therefore, it is necessary to pick out some cars that are suitable for bullion loading and move them into the plant.

Q. Now, does the plant determine that necessity or the carrier?

A. That is a railroad service rule.

Q. Do I understand that all of the switching operations within the plant area are done under instructions received from the plant?

A. Right. That is all of that, of course, that has to do with the smelter switching, but the outside work done in the smelter is not done by written instructions from the smelter people.

Q. I meant the switching within the plant area.

A. With the exception as I stated before that occasionally some of it is done verbally over the phone, which is later

added to the instructions, either by the switch foreman himself, or the smelter foreman later.

Q. Now, who of the employees of the plant gives those switch instructions to each of the crews?

A. The smelter yardmaster.

Q. And they are given directly to the crews of each of the two switch engines?

A. Right.

1655 Q. Now, are crews of switch engines switching within the plant paid yard rates?

A. Yes, sir; as well as if they were holding a job between Leadville and Malta.

Q. The same rates?

A. Yes, it is all yard between Malta and Leadville.

Mr. WILLIAMS: No further cross.

Mr. FINERTY: No cross.

Q. (By EXAM. WAY) Now, in addition to the two switch engines you have in the yard, you have a third which is called the transfer locomotive?

A. Yes.

Q. And it is the business of the transfer locomotive to handle all the cars from the switch yards to the entrance of the plant and to Leadville?

A. Also to switch considerable business at Leadville, and this engine also takes care of this hill movement.

Q. What percentage of the time of the two locomotives is occupied in this plant?

A. Well, I should judge about 75 percent of the total probably, about 75 percent would be about right.

Q. Are you going to show the division of the traffic and the volume of traffic upon which the intra-plant switching charges are paid?

A. I don't quite understand what you mean, Mr. Examiner.

1656 Q. You have got two classes of traffic you are hauling here. One is the intra-plant, where you haul cars from one place to another within the plant for which you are paid by the plant.

A. Yes, sir.

Q. And in addition to that you have got cars which move under the line-haul.

A. Right.

Q. Are you going to show us what cars you have been paid for?

A. Yes.

Mr. CAMPBELL: We have a statement prepared to cover that. I didn't ask him anything about this because I thought—

Exam. Way: I think we will excuse you temporarily until we find out a little more about this. I am not altogether satisfied with the showing made as yet about this particular plant, but it may develop as we go along.

Mr. CAMPBELL: The plant has no equipment for crews?

The Witness: No.

(Witness excused.)

W. M. CAREY, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. CAMPBELL) Mr. Carey, have you prepared certain exhibits for use in connection with the Leadville smelter plant?

A. Yes, sir.

Q. Will you take those? Have you some to mark now? Get them marked and identified first.

A. That is all included in this Exhibit No. 4.

Q. That you introduced yesterday?

A. Yes, sir; Pages 13 to 19, inclusive.

Exam. Way: In other words, it is a statement, a history of the rates and tariff sheets?

The Witness: Pages 13 to 15, is a historical statement of the rates and charges for switching at Leadville smelter. Page 16 is a statement showing the present tariff provision, covering the manner of waybilling and rules for determining the rate upon which freight charges are to be assessed on shipments of ore and concentrates destined to the smelter at Leadville. Page 17 is a statement showing the charges made for intra-plant switching at Leadville, and in connection with that I have the details of those charges.

Q. They haven't been filed yet, have they?

A. No, sir.

Mr. CAMPBELL: For identification purposes, I ask that it be marked Exhibit No. 33.

(Marked for identification "Respondent's Exhibit No. 33, Witness Carey.")

Exam. Way: Consisting of how many pages?

1658 The Witness: 27 pages. Page 18 of this exhibit shows the number of tons of fuel, flux, acid and

scrap iron received at the Leadville Smelter for the years 1925 and 1935 to 1943, inclusive.

Exam. WAY: That doesn't divide it up into cars?

The WITNESS: No, sir; that is the tonnage.

Exam. WAY: How can we tell how many cars moved?

The WITNESS: With the exception of the acid probably 40 tons would be a good figure for each of those cars. It would be a reasonable figure. Much of it would weigh more. Page 19 is an exhibit showing the number of tons received in the Leadville Smelter for the years 1925 and 1935 to 1943, inclusive.

Q. (By Mr. CAMPBELL) That is in tons also?

A. That is in tons also; yes, sir.

Q. About the same principle would apply to this as would apply to the other, about 40 tons to a car?

A. Yes, I would say so. Calling attention to Page 13 of the exhibit, it will be noted that prior to February 25, 1920, all switching at Leadville on freight which had paid transportation charges to the plant was switched free. On February 25, 1920, under a freight rate authority of the Director General of Railroads, intra-plant switching charges of \$2.50 per car was published. We still continued to deliver line-haul carload shipments to the plant over the 1659 scales, to and from the sampler to a designated car-loading point.

Mr. FISKERTY: The thaw house?

The WITNESS: At that time the thaw house was not there. That was added on November 27, 1920, the thaw house.

Q. (By Mr. CAMPBELL) You are talking about September 1? From August 26 and September 1, those are the dates.

A. No, sir; I am talking about February 25, 1920.

Q. I see. I got my eye on the wrong figure. I beg your pardon.

A. The rest of the exhibit indicates merely the increases and decreases in the rate. That came about by reason of *ex parte* proceedings in the Interstate Commerce Commission. Page 16, as I stated before, shows the method of way-billing shipments, the rules for determining rate upon which freight charges will be assessed, as being dependent upon an assay certificate furnished by the smelter as to the valuation of the ore.

Page 18 shows the number of tons of fuel, flux, acid, etc., for the year 1925 and the years 1935 to 1943, inclusive. The entire movement was intrastate traffic. 1942, 99 percent of the movement was intrastate traffic. The year 1943, 98.5

percent of the movement was intrastate traffic. Page 19, the year 1925, the entire movement was intrastate traffic. The year 1935, 94 percent of the movement was intrastate traffic. The years 1936 to 1941, inclusive, 95 percent of the movement was intrastate traffic. The years 1942 1940 and 1943, 94 percent of the movement was intrastate traffic.

I wish to call attention too to the figures shown under the heading "Truck", the increase from year to year of the truck movement into this plant. In 1943 of the total movement of ores and concentrates into the plant, 43 percent moved by truck.

I have a statement that I want to read into the record with respect to the Leadville situation.

Mr. WILLIAMS: Mr. Examiner, may I ask the witness if he has any comparable statement about the outbound shipments and their relation to interstate traffic?

The WITNESS: Yes, I think so. I think I can give you that. May I have Mr. Moriarty's original statement. Outbound during the month of March, 1944, there were 36 cars, all of which moved in interstate traffic; 29 cars of bullion and 7 cars of copper matte.

Mr. WILLIAMS: Is the interstate movement as heavy as that during the years which you have just covered, would it be somewhat comparable to that percentage?

The WITNESS: It probably would be more, depending upon the receipts of our crude ore. Probably apply a percentage to the figures that I have shown on this Page 19 that would indicate a heavier movement as the tonnage of ores and concentrates received show a heavier movement.

Mr. WILLIAMS: Is it perfectly reasonable to assume that the large majority of the outbound shipments of bullion and copper matte are interstate?

The WITNESS: Yes, sir.

The Leadville Smelter is dependent entirely on Colorado ores, and because of the complex nature thereof and the fact that the smelter at Leadville cannot treat zinc and copper ores, it is extremely difficult for them to secure a sufficient volume to keep in operation. In fact, they have been forced, from time to time, to work their old slag dumps to accomplish this. At the present time they are using approximately 1,000 tons per month of this material for that purpose.

At one time some twenty-five smelters were located on the line of the D. & R. G. W. in Colorado, at Silverton.

Ouray, Rico, Durango, Gunnison, Leadville, Denver, Pueblo, Florence, Salida, Minnequa, Grand Junction, and Buena Vista. Today there is but one. That is the Leadville smelter. Inability to secure proper assortment of ores, and the dwindling supply thereof, were mainly responsible for this situation.

The Denver & Rio Grande Western Railroad was primarily constructed for the purpose of serving the mining districts in Colorado and Utah, and in normal times the movement of products of mines has constituted the preponderance of tonnage handled by them. In the year 1922, products of mines constituted 75 percent of the total tonnage, and this has gradually dwindled until in 1940 this tonnage amounted to but 51 percent of the 1662 total.

EXAM. WAY: While there has been a dwindling of the percentage, has there been an actual increase in the volume? It is assumed in 1922 you did not do anywhere near as much business as in 1940.

THE WITNESS: That is true. The movement of ores and concentrates has been dwindling right along.

EXAM. WAY: That is taking the volume, you have a less volume of products from the mines now than you had in 1922?

THE WITNESS: Yes, sir; that is true.

I desire to call the attention of the Examiner to Exhibit No. 4, Page 19, showing the 1925 movement of ores and concentrates to the Leadville plant, which, it will be noted, amounted to 237,185 tons. In the year 1943 this had dwindled to 96,125 tons, 41,789 tons of which moved into the plant by truck. In the year 1925, the gross earnings of the Denver and Rio Grande Western Railroad, obtained from the movement of ores, supplies, etc., moving to, from, and within the Leadville plant, approximated \$1,000,000. In 1943, this had declined to approximately \$450,000.

The Durango, Colorado, plant of the American Smelting & Refining Company closed in 1930 because of the inability to secure proper supply and assortment of ores. This forced the movement of ores from mines operating in Southwestern Colorado to other smelting points, 1663 much of it to the Leadville plant. By reason of the longer haul to Leadville, it, of course, was not possible to maintain the same freight rate structure as these mines formerly enjoyed into Durango, and at that time and for that reason the increased transportation charges im-

posed on these ores amounted to from \$2.50 to \$3.50 per ton, and this condition placed many of the mines in the position of becoming so-called marginal operations, from what might have been termed profitable operations.

The situation at Leadville is precarious, and the imposition of the additional charges on the ore they now receive, most of which is marginal, is apt to result in the closing of mines and resultant loss of this important industry to us. In fact, many properties and dumps are being worked only because of the premium price now paid by the Government on copper, lead, and zinc, and with the termination of the present war, when undoubtedly not only these premium prices will be cancelled, but also the returns on these commodities will slump below what might be considered normal, these marginal mines will close and the working of the dumps cease. In all probability reopening of the gold mines throughout the State may replace this loss to the extent necessary to justify continued operation of this plant, but it may take such mines a period of six months after the ban is lifted to again resume operations.

Our past experience as to the loss of this line of 1664 industry, and the precariousness of the situation as to the ore supply for the Leadville plant, leads us to emphatically express our opposition to the imposition of additional switch charges at this plant.

Exam. Way: I merely want to make one remark about this statement, that is, while it is interesting, it is wholly immaterial in this case. We are not here dealing with rates. The only subject that appears to be before us is whether or not it is the duty of the carriers to switch these cars in the plant under the line-haul rates.

The Witness: I realize that, Mr. Examiner, but in view of the fact that the tonnage involved here is practically all intrastate, it is our feeling that this arrangement that we now have for switching at Leadville should not be disturbed. The fact of the matter is that if the charges are made because of the interstate movement, why then the tail is wagging the horse.

Exam. Way: Well, in any event, your statement is in.

Mr. FINERTY: May I ask you one question there?

The Witness: Yes, sir.

Mr. FINERTY: At Leadville since 1920, the published interstate rates have all included the services of weighing, sampling, thaw house, and spotting after sampling?

The Witness: That is true.

Mr. FINERTY: Have they not?

1665 The WITNESS: Yes, sir.

Mr. FINERTY: Now, if there is any purpose whatever to this investigation, it is to determine whether those line-haul charges shall now be plussed by switch charges?

The WITNESS: That is correct.

Mr. FINERTY: And can that be judged in an investigation addressed to whether or not the Commission considers this is a service that should or should not be performed by the carrier? Doesn't it have to be judged as to the effect of that service on the community?

The WITNESS: I would say so, yes. There is one further statement I wish to make in connection with this Exhibit 19. The movement in 1925 was—

Mr. CAMPBELL: You mean Exhibit 19?

The WITNESS: Page 19, pardon me.

Mr. CAMPBELL: Exhibit 4, Page 19.

The WITNESS: Yes. The movement in 1925 was entirely intrastate. In 1935 I show that it started to have an interstate movement, and by referring to the Rio Grande Railroad map, a copy of which is, I believe in the record, as an exhibit—

Mr. CAMPBELL: Yes, that is true.

The WITNESS: The tonnage of interstate traffic originated at Silverton, Colorado. Here is Silverton (indicating). The movement at that time was up over the Rio Grande Southern Railroad through Montrose and

1666 Grand Junction into Leadville. In the year 1928 the Rio Grande Southern encountered a slide here at Ames, and as a result of which—Now, let me go back. That movement, you will notice, was all intrastate. Because of this slide rates were established by the D. & R. G. W. through Antonito and Alamosa which made that movement interstate. The line of the D. & R. G. transgresses into New Mexico for a short distance here. So there has been no change in the source of supply, but because of that difficulty on the Rio Grande Southern, those ores became interstate ores.

Q. (By Mr. CAMPBELL) The entire source of supply is from Colorado and not from any other state?

A. That is right. With the exception of here lately they have been getting some residue from Blackwell, Oklahoma, but none of that is in these exhibits.

Q. Is there anything else you want to explain, Mr. Carey?

A. That is all I have.

Q. Now, Mr. Carey, we have introduced Exhibit 33. Is there anything you want to explain in connection with this exhibit, the figures and the matters that you have thereon?

A. No. That is in connection with the statement of switching charges that have been made.

Q. This is simply in connection with the charges?

A. Yes, supplementary to Page 17 of Exhibit 4.

Mr. CAMPBELL: I just want to make it clear it is in connection with that particular matter.

1667 Exam. WAY: This Exhibit No. 33 covers all of the intraplant charges during the month of March of 1944?

The WITNESS: That is correct; yes, sir.

Mr. CAMPBELL: Now, we will ask, Mr. Examiner, that Exhibits 32 and 33, be accepted in evidence.

Exam. WAY: Any objections?

(No response.)

Exam. WAY: They are received, Mr. Campbell.

(Respondent's Identification Exhibit No. 32, Witness Moriarty, and Identification Exhibit No. 33, Witness Carey, received in evidence.)

Mr. WILLIAMS: No cross examination.

Cross Examination.

Q. (By Mr. FINERTY) May I just ask you one question, if the present movement of ores to Leadville represent a normal movement, or is it restricted by the restrictions on coal?

A. Very much restricted; yes, sir.

Q. So that the figures that you have for March, 1944, would not represent a normal movement, even for that month?

A. No, and I might say this in connection with this exhibit showing the tonnages, that I have not brought that up to date for this reason, that under Government restrictions we don't have any figures on the movement of strategic metals.

Exam. WAY: Now, I am not familiar with the thing that you are talking about. I don't know whether I
1668 should be or not, but if it is material in this case, I think you should tell me enough about it so that we know what it is all about.

The WITNESS: Well, under orders of the Commission we are not permitted to show in any of our reports movements of copper ores, zinc ores, lead ores, because under

the W. P. B.—yes, W. P. B. instructions, why that information might become of value to the enemy.

Mr. CAMPBELL: That is a wartime measure.

Exam. WAY: I see.

Mr. ROOT: That even includes omitting the figures from your annual report to the Interstate Commerce Commission?

The WITNESS: Yes.

Mr. ROOT: And the state commission?

The WITNESS: Yes.

Exam. WAY: All right, you are excused.

(Witness excused.)

Mr. CAMPBELL: I think we are through, Mr. Examiner.

Exam. WAY: Off the record.

(Discussion off the record.)

F. C. MacDONALD, previously sworn, testified further as follows:

Direct Examination.

Q. (By Mr. WILLIAMS) State your name, address and occupation, please.

1669 A. F. C. MacDonald, I. C. C. Building, Washington, D. C., Chief, Section of Safety Appliances, Bureau of Safety, Interstate Commerce Commission.

Exam. WAY: Your qualifications are already in. He has already been sworn and qualified.

Q. (By Mr. WILLIAMS) Mr. MacDonald, did the Commission assign you to supervise the investigation of switch operations at the plant of the American Smelting & Refining Company at or near Leadville, Colorado?

A. Yes, sir.

Q. That plant is known as the Arkansas Valley Plant of the A. S. & R.?

A. Yes, sir.

Q. Did you make such an investigation and supervise it?

A. I did.

Q. Did you yourself personally go over the plant and observe the operations?

A. I did.

Q. Upon what dates did you do that?

A. March 17, 18 and 20, 1944.

Q. Now, will you state the general nature of your observations?

A. The Arkansas Valley Plant of the American Smelting and Refining Company is located near Leadville,

Colorado. It is situated on the Leadville Subdi-
 1670 vision No. 3A of the Grand Junction Division of the
 Denver & Rio Grande Western Railroad which ex-
 tends between Malta, Colorado, on the main line, and Lead-
 ville, Colorado. The principal business of this plant is the
 processing of lead ores and concentrates.

The principal commodities brought into the plant con-
 sist of coke, concentrates, lime rock, coal, and various kinds
 of residues. Principal commodities shipped from the plant
 are lead bullion and lead matte. Most of the shipments re-
 ceived by the plant are intrastate in character. Some of
 the ore used by the plant is delivered by trucks from near-
 by mines.

Cars destined to the plant are moved from Malta to the
 plant by a transfer engine of the D. & R. G. W. Railroad,
 which does not work in the plant area. Cars delivered by
 this engine are placed in a storage yard, known as the Flat
 Yard, which is located within the confines of the plant area.
 Cars placed in this storage yard are later moved by switch
 engines of the D. & R. G. W. Railroad assigned to perform
 service in the plant area.

Standard gauge trackage in the plant is on two levels. On
 the upper level it consists of the storage yard mentioned
 above, a scale track located opposite to and parallel with
 the receiving yard, a track, designated as Track 7, which
 extends entirely through the plant west to east and is a
 continuation of the lead that diverges from the Lead-
 1671 ville Subdivision. From Track 7 there are leads to
 various unloading points including the Thaw House,
 the Crushing Plant, The Roaster Plant, the Ore Bins, and
 the Bullion Track, a loading dock, and a repair track.

A second lead diverges from the Leadville subdivision at
 a point about one thousand feet east of the switch leading
 to the Flat Yard. This lead serves the Cottrell plant and
 also a dock used for transferring ore from trucks to cars;
 this dock is known as the Upper or American Dock, and
 has a capacity for loading about 7 cars at a time. This
 second lead which is known as Cottrell track merges with
 Track 7 near the east end of that track.

Track 7 extends for a considerable distance eastward
 beyond the limits of the plant, and is stub-ended. Toward
 its east end, this track is on a sharply descending grade,
 and tracks on the lower level are reached by a reverse
 movement over a switchback from the extension of Track 7.

The tracks on the lower level consist of a loading dock known as the Lower Dock, which is used by the D. & R. G. W. Railroad with the permission of the industry, for transferring from trucks to cars ore received from mines in the vicinity of Leadville for destinations reached via that carrier. Altogether there are approximately 5 miles of standard gauge track in the plant; this track is not used exclusively by engines of the carrier, but is also 1672 so used to a limited extent by locomotive cranes belonging to the industry.

The receiving yard consists of 7 tracks numbered 1 to 7, west to east. All of these tracks are stub-end. They range in length from approximately 750 feet to approximately 400 feet. The scale track diverges from the main lead near the west end of the plant.

The Thaw House, which is located about 1,800 feet from the scale, is served by 6 stub-end tracks numbered 12 to 17, south to north; each track has capacity for 4 cars. The Thaw House is kept hot for approximately 5 months of each year, November 1st to April 1st.

There is also considerable narrow-gauge track in the plant, but none of this track interferes with the standard-gauge track.

Cars are placed in the Flat Yard by the transfer engine. They are later handled to the plant track scale and weighed by one of the carrier's switch engines. During cold weather ore goes from the scale to the Thaw House, where it remains for periods of two to four days, after which it is taken out, weighed, sampled, and placed at an unloading spot.

Some sampling of ore is done while the cars are in transit, within the plant area, and other sampling is done by transferring portions of the lading of several cars to an empty car which is later moved to the sample house.

Ore received by truck is either transferred directly 1673 to cars belonging to the A. S. & R. Company at the loading dock or it is dumped on a stock-pile from which it is later loaded into cars belonging to the A. S. & R. Company. In either case, after it has been loaded in cars it follows the same course as does ore received by rail except that in some cases it is not weighed en route to the Thaw House.

Charges for switching in this plant are published in D. & R. G. W. Freight Tariff No. 6600—L. C. C. No. 736, effective, June 10, 1942.

Two engines of the D. & R. G. W. Railroad are required to service this plant. Each crew has a nominal tour of duty of eight hours. One crew starts work at 6:30 a. m., and the other starts at 8 a. m.

Movements made within the plant area consist of handling of cars from the Flat Yard over the scale for weighing, and then to either the thaw house or to some unloading point or back to the Flat Yard. Reverse movements are made with the empty equipment, and in practically every case carrier-owned empty cars are also weighed before being returned to the Flat Yard. All cars leaving the plant move from the Flat Yard. Other movements within the plant consist of handling A. S. & R. cars empty to stock-piles or other points for loading, and the return movement to loading or unloading points.

Charges for demurrage are assessed in accordance with the terms of an average agreement.

1674 Cars received for line-haul by the D. & R. G. W.

Railroad from the Resurrection Mine, the Ore and Chemical Corporation, and other industries in the vicinity of Leadville which are located on tracks diverging from the Leadville Subdivision at points west of Leadville, are weighed on the scale of the A. S. & R. Company without charge.

Exam. WAY: That is, you mean without charge to the D. & R. G. W.?

The WITNESS: Without a charge.

Mr. FINERTY: And also to the mining company?

The WITNESS: I didn't say anything about that.

The reason for weighing at the A. S. & R. scale instead of at the carrier's scale which is located near the agent's office in Leadville is to eliminate a back haul of about one mile up a grade of approximately 2 percent.

There is in the plant a small repair track to which A. S. & R. cars are moved for repairs without charge.

There are no car pallers or other devices for moving cars in the plant other than the locomotives of the carrier and the locomotive cranes of the industry.

A yardmaster employed by the industry is in charge of the carriers' crews while they are at work in the plant. All orders relating to the distribution of cars within the plant emanate from his office.

Mr. WILLIAMS: Before I proceed to introduce an exhibit through this witness, I have no objection if it is desired to examine the witness on this statement he just made.

Cross Examination.

Q. (By Mr. CAMPBELL) May I call your attention to one thing? On Page 4 of your statement, down below the second paragraph, I suppose you would call it under General Information, you have west of Leadville. Don't you mean east of Leadville?

A. Well, I don't know how your line runs. I thought I had it right.

Mr. MORIARTY: It runs east and west.

The WITNESS: It runs east of Malta, it should be east.

Q. (By Mr. CAMPBELL) Where you have it 2 percent, isn't that 3 percent?

A. I thought probably that was nearer, but I wanted to be conservative.

Mr. CAMPBELL: I see.

Mr. FINERTY: No cross-examination.

Q. (By Exam. WAY) Well now, I want to ask you something about some of your observations in that plant, if this would be the appropriate time to do it. You say there are two engines of the D. & R. G., or two engines of the D. & R. G. are required to service this plant. Have you observed any interference because of the operation of the two engines?

A. I think it was once that it was reported to me of somewhere around half an hour, one engine in the way of 1676 the other. Outside of that I don't recall any other delays.

Q. Well, do you know about the specific plan, for the use of two locomotives, how they can keep out of one another's way in a plant of this size?

A. Well, of course, there are two methods of getting from one end to the other. We have the American track and we have No. 7 track, and I presume that they can arrange to keep out of each others way. The volume of business in that plant is not great, and a great many of the movements made are with one or two cars.

Q. And then it is a case of moving cars from one end of the plant to the other. The cars that are moved down the lower end of this plant, some of them have to go all the way through this plant to get to upper tracks?

A. It is true, of course, that any cars they move, we call it south end of the yard at the extreme right, possibly the east end of the yard would have to go through the entire yard because the receiving yard is at the other end.

Q. Well, as I understand it, the great majority of traffic which is handled in this yard is intrastate as well as intraplant?

A. Practically all intrastate. About the only thing that isn't intrastate is the bullion. That is about a little over one car a day, about one car a day of bullion.

Q. And copper matte?

1677 A. And copper matte, yes, but the two of them together don't make up two cars a day.

Q. They show for the month of March, 36 cars. As a matter of fact that is about all the interstate traffic that is handled?

A. Well, there are a few cars that come from Oklahoma, Blackwell residue, and there are some Globe concentrates in the cars. Whether there is any being moved in there now, I do not know.

Q. What is the condition of the tracks?

A. The tracks are in very good condition. I don't know anything about the track that is wrong, except in one place there, the new track there, I believe it is, it is G-6, there is a considerable amount of debris around that track. It isn't any too safe to move in there. It is a short track.

Q. How about impairment because of the buildings along the right of way, I mean along these tracks?

A. Oh, there are some places where the clearance is somewhat impaired, but no place that the locomotive can't operate.

Q. Would you say it is a safe plant for operation?

A. I think so; yes, sir.

Q. Do you know anything complicated about the switching in this plant?

A. No. It can hardly be very complicated. They don't handle very many cars at a time. The most, the biggest runs they have would be in the morning when they 1678 switch the thaw house and get out sometimes as many as five or six cars and shove them around to Track 9 and Track 10. That is about the most that ever get together at one time.

Q. Now, about the plan of switching, as I understand it, the carrier receives those orders from the industry?

A. Yes, sir.

Q. And can the rail carriers set in line-haul traffic in a straight uninterrupted movement?

A. No, sir. All line-haul cars are first set in the flat yard, left there by the transfer engine that first handles

them and later on handled by the switch engine over the scale and the various unloading points.

Q. And they cannot be moved until they receive orders?

A. That is right.

Q. From the industry?

A. Yes, sir.

Q. Do you know of any other disabilities of this plant, that is disabilities as to switching, either to the point of interruption or interference?

A. I don't know of any interruption, but their cranes, they work around there quite a bit, but I don't think they get in the way any. I don't know of anything else that I could say about it.

Exam. WAY: That is all I have on cross.

Mr. WILLIAMS: I have a few more questions.

1679

Re-Direct Examination.

Q. (By Mr. WILLIAMS) Mr. MacDonald, did you happen to observe the operation of the switch engines outside the plant area at times you were there?

A. No, sir. According to the information I received they worked in the plant at all times.

Q. Throughout the day?

A. Throughout the particular days we were there.

Mr. FINERTY: That must illustrate how unrepresentative the days you were there were.

The WITNESS: I don't know about that. I know they didn't work out the day we were there.

Q. (By Mr. WILLIAMS) Mr. MacDonald, I think it has been made clear, has it not, while the map shows two thaw houses, there is only one in operation, isn't that right?

A. That is correct; yes, sir.

Q. In your judgment, could two road-haul engines safely negotiate these tracks and switch this plant?

A. Road-haul engines?

Q. Yes.

A. Well, I don't know. Of course, that would depend a great deal on the size and character of the road-haul engine, but I don't know of any places where the road-haul engines that they use in that vicinity wouldn't work in the plant.

They don't have any very large engines over there.

1680 Mr. FINERTY: You don't know any place they couldn't work in the plant?

The WITNESS: No.

Q. (By Mr. WILLIAMS) Did you observe the size of the two switch engines that are assigned to this plant?

A. The two engines assigned to this plant are small engines. I don't imagine they weigh over 20 tons, maybe not that much. I think the transfer engine is 110 tons, something like that.

Q. Do you think that transfer engine could safely operate in that territory?

A. I think it could.

Mr. WILLIAMS: Could I have this exhibit marked for identification, consisting of 19 pages?

(Marked for identification "Commission's Exhibit No. 4, Witness MacDonald.")

Q. (By Mr. WILLIAMS) Mr. MacDonald, I hand you exhibit marked for identification No. 34, and can you state what that is?

A. This represents a group of cars moved through the plant on the three days of our investigation and is intended to show representative movements made within the plant area.

Q. Where did you secure that information?

A. From reports made to me by the investigators.

Q. You did supervise the investigation made by individual representatives of the Commission?

A. Yes, sir.

681 Q. And how many were there?

A. There were three altogether at that time.

Q. And they reported their observations and information to you?

A. Yes, sir.

Q. And from that information you selected those shipments?

A. Yes, sir. These movements rather.

Q. Will you select a shipment from that statement, Mr. MacDonald, that you consider to be representative and trace the movement through?

A. Here is one that I have called an intra-plant movement, A. S. & R. 173. There are two movements involved. On the 18th of March, 12:25 p. m., this car, loaded with ore, was taken from 8 hole track. By the way, that hasn't been mentioned. That is an unloading dock for trucks to cars, and is—

Q. Identify it on the map, please.

A. Is located at 10-G, right close to the—It is in 11-G, and is marked unloading dock. It is a depressed track where cars can be placed to have ore received by truck loaded into the car.

Mr. FINERTY: Dumped from the truck into the car?

The WITNESS: Dumped from the truck into the car. It was taken from the S hole track to the ore house. On the 20th, about 8:15 a. m., as an empty, it was taken from 1682 the ore house to Track 10. The same day at 10:44 a. m. it was taken from Track 10 to the scales and weighed empty. At 12:35 on the same day it was taken from the scales, from the scale track, that would be, and placed on Track 1. The same day at 3:45 p. m., loaded with coal, it was taken from Track 1 to the scales and weighed, and the same day at 4:25 p. m. it was placed on Track 4 for unloading. Bill No. 31406, March 21, 1944, moved that car from Track 7 to 4, on March 18, 1944, at a charge of \$2.97. Bill No. 31408 of March 25, 1944 shows that car moving from 1 to 4 on March 20, 1944, and the charge of \$2.97 assessed.

Exam. Way: Now, what do you make out of that?

The WITNESS: Of course, this first move, you understand, was part of a movement from empty to loaded that was started before our observations began. The second move, that would be the one covered by Bill 31408, the second movement shows the entire movement.

Exam. Way: Apparently the entire movement of the second one is shown?

The WITNESS: Yes, sir.

Exam. Way: But the first four moves here seem to be entirely unrelated to the bill.

The WITNESS: Yes, to the second bill, except to show how cars move around the plant.

Mr. FINERTY: Well, you don't know why they moved?

1683 The WITNESS: They moved to load them, take them somewhere else.

Mr. FINERTY: In each of the moves necessary to load, there may have been some other move?

The WITNESS: How is that?

Mr. FINERTY: You don't know whether each of the moves is necessary to load?

The WITNESS: I see what you mean. Of course not necessarily. They could be moved for some other purpose.

Mr. FINERTY: Yes. It was a plant car owned by the A. S. & R. Company itself?

The WITNESS: Yes.

Mr. FINERTY: Could it be moved for any other purpose

whatever, perhaps because the D. & R. G. wanted to get it out of the way or something?

The WITNESS: I suppose so.

Q. (By Mr. WILLIAMS) The plant cars, owned by the plant, they are designated by the initial A. S. & R.?

A. Yes, sir.

Exam. WAY: That movement doesn't mean much.

The WITNESS: It means an intra-plant move was made though, and an empty car was delivered to Track 1 and loaded with coal and then delivered to Track 4.

Exam. WAY: Now, then, this move, the second move of the car on the 20th, about 8:15 in the morning, and 1684 moved as an empty from the ore house to Track 10—

The WITNESS: That is the end of an earlier movement.

Exam. WAY: That is the end of an earlier movement? Well now, at 10:44 it was moved from Track 10 to the scales and weighed?

The WITNESS: Yes. It was evidently left on the scale track.

Exam. WAY: And then at 12:35 it was taken from the scales and put on Track No. 1?

The WITNESS: That is right.

Exam. WAY: So the movement there would have been from the ore house to Track No. 1 by the way of the scales?

The WITNESS: That is right; yes, sir.

Exam. WAY: That may have been one move. Does that suggest itself to you as being one move?

The WITNESS: It was one move, but it wasn't made—it certainly wasn't made without any interruption, because there is a two-hour period in there when it remained on the scale.

Exam. WAY: Yes, and then there was another two-hour period between the ore house and the scales, or between Track 10 and the scales, wherever it was.

The WITNESS: Yes, sir.

Mr. FINERTY: Mr. Examiner, I think I am going to move to strike all the testimony of the Interstate Commerce Commission with reference to so-called intra-plant 1685 switching, moves paid for under the intra-plant switch rates, on the ground it is not included in the order for investigation.

Exam. WAY: Your objection will be noted and be denied.

Mr. FINERTY: I understand the investigation is con-

cerned only with the receipt and delivery of line-haul switching in the smelters.

Q. (By Mr. WILLIAMS: Mr. MacDonald, do you have any testimony that you wish to add to that which you have already given?

A. No, I don't think so.

Mr. WILLIAMS: You may cross-examine.

Mr. CAMPBELL: I don't care to cross-examine.

Mr. WILLIAMS: I offer in evidence Exhibit marked for identification No. 34.

Exam. Way: It is received.

(Commission's identification Exhibit No. 34, Witness MacDonald, received in evidence.)

Mr. FINERTY: I take it my objection to that exhibit is no good and overruled?

Exam. Way: That is right. Does that complete your case?

Mr. WILLIAMS: That completes the Commission's case.

Exam. Way: No cross-examination?

Mr. CAMPBELL: No, I think that is satisfactory.

Exam. Way: You are excused.

(Witness excused.)

Exam. Way: We will adjourn until seven-thirty.
1686 (Whereupon at 5:30 p. m. a recess was taken until 7:30 p. m. of the same day.)

EVENING SESSION

7:30 p. m.

Exam. Way: We will proceed.

Mr. CAMPBELL: Mr. Carey is here now. Maybe he has the mileage.

Mr. CAREY: 6.04 miles within the Leadville plant.

Exam. Way: I don't know whether we have that same information for the other plants or not.

Mr. TUCKWOOD: You do for Garfield.

Mr. FINERTY: Have we the mileage at the Murray plant?

Mr. TUCKWOOD: Yes, I can give that.

Exam. Way: If it isn't there, will you give that?

Mr. TUCKWOOD: Total mileage of standard gauge tracks, located on company property and owned by the company, is 6 miles, 5½ miles being within the fenced enclosure of the main plant and ½ mile from the plant to the scale house.

Exam. Way: Thank you very much.

LEO HENNEBACH, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. FINERTY) Will you give your name, address and occupation?

A. Leo Hennebach, H-e-n-n-e-b-a-c-h. I am superintendent of the Leadville Smelter and live at Leadville. 1687 The Leadville Smelter is officially called the Arkansas Valley Plant of the American Smelting & Refining Company.

Q. How long have you occupied that position, Mr. Hennebach?

A. Since November, 1928.

Q. And prior to that what position did you occupy?

A. Before that I was ore buyer, assistant superintendent, metallurgist, assaying chemist for the American Smelting & Refining Company in various plants. I graduated from the University of California in 1912 as a metallurgical engineer.

Q. And incidentally among the plants at which you have served was the Garfield plant?

A. That is right. I was there for eight years.

Q. In the capacity of metallurgist?

A. Metallurgist chiefly.

Mr. FINERTY: Mr. Examiner, I would like to have marked for identification as Exhibit No. 35 a statement showing incoming shipments for 12 months period ending with March 31, 1944, at the Leadville Smelter.

(Marked for identification "Intervener's Exhibit No. 35, Witness Hennebach.")

Mr. FINERTY: That statement consists of three sheets. I would like to have marked for identification as Exhibit No. 36 a statement showing outgoing shipments for the twelve months period ending March 31, 1944, the same smelter.

(Marked for identification "Intervener's Exhibit 1688 No. 36, Witness Hennebach.")

Mr. FINERTY: I should like to have marked for identification as Exhibit 37 a statement showing analysis of switching and weighing charges incurred for work performed by railroad during 12 month period ending March 31, 1944, at the Leadville Smelter, applying on shipments originating outside of or shipped to points located outside the state of Colorado.

(Marked for identification "Intervener's Exhibit No. 37, Witness Hennebach.")

Mr. FINERTY: I would like to have marked as Exhibit 38 for identification a similar statement applying to shipments originating within or shipped to points within the state of Colorado.

Exam. WAY: They are so marked.

(Marked for identification "Intervener's Exhibit No. 38, Witness Hennebach.")

Q. (By Mr. FINERTY) Mr. Hennebach, you have heard testimony of Mr. Moriarty as to the manner in which shipments are delivered to the Denver & Rio Grande Railroad at the Leadville Smelter and the manner in which shipments are moved out of the smelter by that railroad?

A. Yes, sir.

Q. In general is that testimony correct?

A. Quite correct.

Q. Mr. Moriarty testified that the railroad hold 1689 yard of which shipments were placed after weighing was the so-called flat tracks, Nos. 1 to 7, inclusive.

A. That is right.

Q. Is there any other hold yard customarily used by the railroad upon which to hold cars?

A. Yes.

Q. Where is that?

A. It is these tracks 7-G, these coordinates.

Q. Located by coordinates 7-G?

A. Coordinates 7-G, as well as 8-G.

Q. And numbered how?

A. Numbered 1, 2, 5, 6, and that is all. Tracks 3 and 4 are not used for storage because they lead into these bins where the coke and other materials are stocked and so there are just Tracks 1, 2, 5 and 6 that are used for storage, in addition to these tracks in the plant.

Q. All those tracks have been shown on Exhibit 32?

A. That is right.

Exam. WAY: Now, let's see if I can identify those tracks, 7 and 8, and these tracks here, Tracks 1—

The WITNESS: That is right.

Exam. WAY: I don't see 1.

The WITNESS: It is a short track.

Q. (By Mr. FINERTY) Will you please refer to exhibit marked for identification No. 35. The first page of 1690 that exhibit and the first four lines on the second page show materials and supplies received at the Leadville Smelter?

A. That is right.

Q. And the remainder of Page 2 and Page 3 of that exhibit show raw materials received at that smelter?

A. That is right.

Q. What is the total number of all inbound shipments received in the smelter?

A. 2,260 cars in the twelve months ending March 31, 1944, as shown by this exhibit.

Q. Of those 2,260 cars, how many are intrastate?

A. 93 per cent.

Exam. Way: Of this 2,100?

The WITNESS: 2,260, that is the total 100 percent. That is the last line.

Exam. Way: Yes, I see.

Q. (By Mr. FINERTY) Of the 2,260, 93 percent are intrastate cars?

A. That is right.

Q. Of the remaining 7 percent how many originate in Colorado, though technically interstate?

A. 5 percent.

Q. That is only 2 percent of the 7 percent interstate cars originate outside of Colorado?

A. That is right.

1691 Q. And the 5 percent of that 7 percent that originate in Colorado move outside the state in transit to the smelter?

A. That is right.

Exam. Way: That is by reason of its—

The WITNESS: New Mexico.

Exam. Way: New Mexico, yes—

Q. (By Mr. FINERTY) Can you state the points at which the majority of all the shipments, inbound shipments shown on the exhibit, both of materials and supplies and raw materials are delivered?

A. They are delivered, unloaded at Track 9.

Q. What percentage?

A. 50 percent. That is, to be exact, 1,112 cars out of those 2,260 were unloaded at point G-7, G-7 on the map at Track 9. Now, these materials consist of concentrates and residues. 50 percent of all these cars were unloaded right there.

Q. That is, 50 percent of the total number of cars, of concentrates and residues, were unloaded at that point?

A. That is right.

Q. What other points are used for the unloading of the majority of the materials and supplies and raw materials?

A. Crude ore and lime rock that has to be crushed was unloaded at point F-9 and F-8 on the map, what we call the sulphide mill, and 17 percent of the 2260 cars were unloaded there.

Q. 17 percent of the 2,260 cars were unloaded there?

1692 A. Yes, or 372.

Q. That is at the point you have specified, 372 cars consisting of ore—

A. And lime rock.

Q. And lime rock were unloaded?

A. That is right.

Q. Representing 17 percent of the total number of inbound shipments?

A. That is right.

Q. At what point was the remainder of the 82 percent unloaded?

A. They were unloaded at 9-H, H-9. This material was coke and constituted 15 percent of the 2,260, or 324 cars. They were all unloaded in the place marked bins on 9-H.

Q. In other words, at the three points you mentioned, 82 percent of the total inbound shipments to the Leadville Smelter were unloaded?

A. That is right.

Q. Now, referring to the raw materials, will you state how those materials are divided, intra and interstate?

A. Out of 1,550 cars of raw materials, there were 1,539 cars of raw materials, there were 1,323 intrastate and 216 interstate, and when we say interstate we also include the material originating in Colorado that moves through New Mexico.

Q. Now, what did those raw materials consist of?

1693 A. They consisted of concentrates of lime rock, or residues, and of crude ore.

Q. Will you give the total number of concentrates received?

A. The total number of concentrates received were 991 cars.

Q. And how were they divided between intra and interstate?

A. 817 of which were intrastate and 174 were interstate.

Q. How about lime rock?

A. Lime rock was all intrastate.

Q. And a total of how many cars?

A. 333 cars all intrastate.

Q. What about residues?

A. The residues consist of a total of 123 cars, 81 intra and 42 interstate.

Q. The crude ore?

A. The crude ore comprised 92 cars of intrastate.

Q. And that total of 1,539 cars represents what percentage of the total raw materials received?

A. 99 percent.

Q. The others being some miscellaneous?

A. Miscellaneous.

Q. Unusual shipments?

A. That is right.

Q. Now, taking the materials and supplies, what are the principal materials and supplies received?

A. They are coke, coke breeze, scrap iron and coal.

Q. Will you state the total number of each and 1694 divide it between intra and interstate?

A. That was 316 cars of coke. Each one of them was intrastate. There were 149, coke breeze. Each one was intrastate. There were 114 cars of scrap iron, every single one of which was intrastate. There were 93 cars of coal, every one of which was intrastate.

Q. In other words, of the materials and supplies, 672 cars represent what percentage of all materials and supplies?

A. Represent 92 percent, 95 percent.

Q. 95 percent, and all of that 95 percent were intrastate?

A. That is right.

Q. Now, Mr. Hennebach, will you explain briefly in what manner shipments of lime rock are received inbound at the Leadville Smelter?

A. They are taken to the lower flat yard, what we call the flat, as Mr. Moriarty said, and when they are to be unloaded they are ordered out. They are ordered weighed and then they are spotted on F-9 to be crushed, and then the rail is through except for weighing the empty.

Q. That is, the lime rock is taken to the mill and crushed?

A. That is right.

Q. And once it is placed at the mill and unloaded there, the railroad does not further handle the lime rock but simply handles the empty car back to where it was taken?

A. That is right, with this small exception. Every 1695 once in a while we get more lime rock than we care to crush. Then the lime rock is weighed and goes to a stock pile marked in blue as explained by Mr. Moriarty.

The railroad spots it there and the railroad is through except to take out the empty.

Q. Except to take out the empty?

A. That is right.

Exam. Way: Now, subsequently, when you want to move the lime rock—

The Witness: It becomes a revenue move.

Exam. Way: It becomes an intra-plant move?

The Witness: It becomes an intra-plant move for every move it makes.

Exam. Way: For which it is paid for at the tariff rate?

The Witness: That is right.

Q. (By Mr. FINERTY) Will you state how coal and coke breeze are handled?

A. They are taken over the scale from the railroad yard, the flat, and they are weighed. That is, coal is weighed; coke breeze is weighed, and spotted at the designated point of unloading. The railroad is through except for weighing out of empties.

Q. And where is that designated point of unloading?

A. Well, that may be either on the stock pile or it may be here in this bin where 15 percent of it is unloaded.
1696 All the coke goes here.

Q. All the coke moves as you have previously indicated?

A. It is G-8 or 9. That is G-9 is right. H-9 it should be. That is correct.

Exam. Way: I find H-9, but what spot?

The Witness: On those tracks.

Q. (By Mr. FINERTY) Marked bins, and when that coal is unloaded at the bins the railroad performs no further service except to take the empty out?

A. That is right.

Exam. Way: Pardon me just a moment, Mr. Finerty. I notice here on this coal, slack coal. On this map it shows it is unloaded a great number of different points throughout the plant.

The Witness: That is right, when it goes into stock, and also it is used, say, in this thaw house or at the bullion room or at the acid furnace or at the boilers.

Exam. Way: Well, the operation is exactly the same in any event.

The Witness: That is right.

Exam. Way: It is taken in and it is unloaded, and then they take the empty out?

The WITNESS: That is right.

Q. (By Mr. FINERTY) How is brick handled?

A. Brick is not weighed. It just simply is set at 1697 the brick shed or at a point where it should be unloaded, and the empty is not weighed out.

Q. Is brick first handled ~~into~~ the hold yard known as the flat and then ordered spotted, or is it handled direct to the brick shed?

A. It depends on the railroad's convenience. Suppose the railroad brings up a trainload of material which contains a car of brick. Well, we don't expect them to take the ore train up to the brick shed and then switch out that car of brick. They take their train into the railroad yard and take out that car of brick, and then they will take out that car from the railroad yard and bring it up to the brick shed.

Exam. WAY: At their convenience?

The WITNESS: At their convenience.

Q. (By Mr. FINERTY) How about scrap iron?

A. Scrap iron is handled the same way. It comes from the railroad yard and is weighed and placed at the point where it is to be unloaded. The railroad is through.

Q. And where is that scrap iron generally spotted?

A. As a rule it is unloaded at H-9, in the bin which is adjacent to this big bin.

Q. Which is adjacent to the bin where you unload your coke?

A. That is right.

Exam. WAY: There again we have a variety of different unloading points?

1698 The WITNESS: Exactly.

Exam. WAY: And might I suggest that if this statement contains all of the unloading points, perhaps it would be better to use the statement, since they are all indicated?

The WITNESS: That might be a good idea, because it is also stocked from time to time and put in a pile here or there as designated on this map.

Exam. WAY: Yes. I have noticed two or three times that you have given a specific spot for the unloading.

The WITNESS: Because that is the bulk of it, let's say, as a rule. I would say the bulk of this scrap iron, 75 per cent, is unloaded at the point I mentioned.

Q. (By Mr. FINERTY) The remainder is unloaded at stock piles as indicated on Exhibit 35?

A. That is right.

Q. And there again the movement to the point of unloading ends the railroad movement of the car except for taking the empty out?

A. That is right.

Q. Now, acid and Diesel fuel, how is that handled?

A. Acid is brought to the place on F-9 where it is marked trestle. The acid car is brought to this point, is unloaded and moves out.

Q. Empty?

A. Empty. The acid is not weighed.

1699 Exam. WAY: Is that a tank car?

The WITNESS: That is a tank car.

Q. (By Mr. FINERTY) How about Diesel fuel?

A. Diesel fuel is brought to the tank called Diesel tank on G-10.

Q. Indicated on the—

A. Indicated on the map as Diesel tank. That is also a tank car. It is brought from the lower yard without weighing to this point and unloaded.

Q. Now, when you speak of the lower yard, you mean the flat?

A. The flat, yes.

Q. Let's use one term.

A. Let's use the flat.

Q. That means the railroad hold yard?

A. Yes.

Q. Now, on ores the movement generally speaking is to the mill, is it not?

A. That is right.

Q. And after going into the mill, is the railroad finished with those ores?

A. Yes. The ores are crushed in the mill and transported by means of an electric larry car to the bedding bins. The railroad is through.

Q. Now, are any of those ores stock piled at any time?

A. Let's say 1 percent of the ore might be stock piled.

1700 Q. As a matter of fact at Leadville now you are so short on ores you don't have occasion to stock pile, do you?

A. That is right. We are praying every night to be able to build a stock pile the next morning, but we never can.

Q. Now, when ores are brought in, will you explain how they are handled with reference to a sampler and weighing?

A. They are taken from the flat over the scale and the gross is determined, then they are spotted at the mill and the moisture sample is taken. We do that as a rule so as not to inconvenience the railroad.

Q. That is, they are first taken from the plant and weighed?

A. That is right.

Q. And then taken direct to the mill?

A. Yes, r.

Q. And the moisture sample taken at the mill instead of being taken before weighing?

A. That is right.

Q. Then when those cars arrive at the mill, they are passed through the mill for grinding and sampling?

A. That is right.

Q. And not until they come out of the mill can you determine the value of the ore in those cars?

A. That is right.

Q. So that until the car comes out of the mill the railroad is not in a position, on ore cars, to know what
1701 will be the freight charges on that car?

A. Quite right.

Q. What move is made with that ore after it comes out of the mill. Is it further handled by the railroads?

A. In 99 percent of the cases it is not. In 99 percent of the cases the crushed ore goes into an electric larry car which takes it to the bedding bins.

Q. That is an electric larry car operated by the smelter company itself?

A. Exactly.

Q. It goes into bedding bins and from there goes to the—

A. Sintering machine.

Q. And from there to the—

A. Furnace.

Q. And comes out as lead peg?

A. We hope.

Q. And if your hopes are justified, Mr. Hennebach, that lead peg is the next time that the railroad sees the 99 percent of the ore that has gone into the mill?

A. That is right.

Q. And the lead peg pays a line-haul rate all the way down?

A. That is right.

Q. Now, concentrates and residues, how are they handled with reference to sampling and weighing?

A. The concentrates and residues—let's say the 1702 concentrates first, are taken from the flat over the scale and spotted on Track 9. That is G-7.

Q. Now, all the concentrates are delivered at the point on Track 9 designated as—

A. Conveyor shed.

Q. Conveyor shed.

A. Without exception. 100 percent of the concentrates go here.

Q. Before they leave that point are they sampled?

A. They are moistured and sampled at this point.

Q. So that as far as the railroad is concerned, all the concentrates, after being weighed, move directly to the conveyor shed and are there sampled for moisture and pipe sampled?

A. That is right, pipe sampled for value and moisture sampled in the ordinary standard practice of digging post holes for moisture. The railroad is through with the car except for weighing out the empty.

Q. All the railroad does is to take the empty car out and determine the light weight of the car for the purpose of determining the freight charges based on the net weight of the car?

A. That is right. Now, residue is handled the same way if it goes directly to the bins as the concentrates do, but again, from time to time, we get a surplus of residues and we have to stock that residue. In that case the 1703 residue, instead of being spotted here—

Q. Spotted here, you mean at the bins?

A. The conveyor shed.

Q. Conveyor shed?

A. Goes to one of these places that is marked in red on the map and there—

Q. Those are marked more or less adjacent to the conveyor shed. There are two marks, Denver Residue and Blackwell residue.

A. That is right.

Q. And the residue is stock piled at those points?

A. Well, here there is another point marked Blackwell residue; all these red points are placed where the residue is being stored, and in that case the residue does not go to the conveyor. It comes from the scale house, after being weighed, directly to this point. There it is pipe sampled, moistured and unloaded. The Railroad is through.

Q. That is, it comes directly to the stock pile point and unloaded there?

A. That is right.

Q. And the railroad merely takes that empty car out?

A. That is right.

Q. If the residue moves out of the stock pile the smelter then pays an intra-plant switching charge?

A. That is right.

1704 Q. Now, will you explain what movements, intra-plant movements, are made from stock piles within the plant?

A. Well, we take lime rock from stock. We take coke from stock, coal, residue, in other words, all the commodities, all the materials that we mentioned in our discussion so far.

Q. That is, all the materials coming in by railroad that go to stock pile, if, after they are delivered at the stock pile, they are moved from stock pile, they move under an intra-plant switching charge?

A. That is right.

Q. Now, there are other materials coming in by truck, are there not?

A. Yes.

Q. And what are those?

A. Chiefly ore. In fact, I would say exclusively ore, except merchandise.

Q. And where is that ore received from trucks?

A. It is chiefly received on the American track unloading dock, which is located at G-12.

Q. And where does that ore come from?

A. That ore comes from chiefly mines around Leadville and vicinity. It is trucked in in dump trucks and is dumped into our railroad cars which are spotted along this dock on the American track.

Q. By that you mean that trucked-in ore is loaded into A. S. & R. owned cars?

A. Yes, sir.

Q. And how are those cars handled then?

A. These cars upon order from us are taken from the dock, taken down to the scale, weighed and sampled, moistured and spotted at a designated unloading point. Every move is an intra-plant move.

Q. Now, on such a move, what intra-plant switching charges do you pay?

A. \$2.97 a move.

Q. \$2.97 a move?

A. \$2.97 a move, to be exact, plus \$3.07, \$3.06.

Q. But how many \$2.97 charges do you pay before that car is finally unloaded?

A. In the summer, say a car goes from the loading dock to the scale, that is one move.

Q. For which you pay \$2.97?

A. That is right. From the scale to the unloading point, that is another move.

Q. For which you pay another \$2.97?

A. That is right.

Q. Now, in the winter if that car goes to the thaw house—

A. We also pay a move for moving into the thaw house and coming out of the thaw house. We pay an intra-plant move for each one of those, \$2.97.

1706 Q. So that all of this trucked-in ore is handled within the plant by the engines of the D. & R. G. Railroad at intra-plant switching charges for each individual move made of that ore?

A. That is right.

Q. Now, Mr. Moriarty referred today to the fact that the railroad hold tracks on the flat were used for the holding and storage of cars of other shippers or receivers of freight than the smelter company.

A. That is correct.

Q. Will you state just what use is made of those tracks by the D. & R. G. Railroad for others than the smelter company?

A. There is, in the first place, ore from the Ore & Chemical Company, to be exact, concentrates. The Ore & Chemical Company is located here about—it isn't shown here—something like 13-C on the map outside of our property line, and that is a zinc-float process.

In other words, what they do, they dump here from Leadville running perhaps 5 or 6 percent combined lead and zinc, make the preliminary concentration. They build it up into material that might run 15 to 20 percent combined lead and zinc. That material is not ready for smelting. It is done by the zinc float process. It is a new process. This material has to go to a selective flotation mill for further treatment. In this particular case it goes to the
1707 Golden Cycle Electric Flotation Mill.

Q. Where.

A. At Colorado City, that is Colorado Springs, where a zinc concentrate is made and a lead concentrate. The zinc concentrates goes into a zinc smelter and the lead concentrate goes to Leadville.

Q. That Ore & Chemical Company concentrate is taken by the D. & R. G. switch engine for the Ore & Chemical Company plant over the track shown as O. & C. spur down to the

track shown as Malta main line track, and then how is that handled by the D. & R. G. into the flat yard?

A. It comes into our yard just as if it were a shipment coming from Malta in our yard. It goes over our scale and is weighed and then generally placed in the flat, and a number of cars are assembled there until a train has accumulated, not necessarily that. At the railroad's convenience the car is taken to Malta with other cars and shipped out. About 70 to 80 cars a month are treated in that manner. Our weight-master weighs the car free of charge.

Q. And those cars, pending their moving out of the flat by the D. & R. G. Railroad, are left there along with cars of the smelter company?

A. That is right.

Q. Are there any other cars of shippers, other than the smelting company handled over the track shown on this exhibit?

1708 A. The Resurrection zinc concentrates are handled in practically the same manner as described just now. The Resurrection mill is a mill in California Gulch.

Q. California Gulch in Leadville?

A. California Gulch in Leadville, yes. Mr. Moriarty said, I believe, it was some two or three miles from the smelter. That mill treats complex lead-zinc ores, produces a lead concentrate and a zinc concentrate. The lead concentrates, of course, comes to us. The zinc concentrate has to be shipped to a zinc plant. Now then, our switch engine very frequently goes up to the Resurrection Mill and brings down the zinc concentrates produced up there.

Q. You mean the plant switch engine of the D. & R. G. switch engine?

A. Not always the plant, but as a rule our own engine leaves our yard. When I say our engine, I mean the D. & R. G. doing the work in our yard.

Q. You mean the D. & R. G. engine?

A. That is right.

Q. Goes up to the Resurrection mill and brings these shipments down to the plant, is that correct?

A. That is right. When I said our engine, I meant to distinguish it from the main-line engine.

Q. What you refer to is the D. & R. G. switch engine assigned to service at the Leadville smelter?

1709 A. Yes, sir.

Q. And that engine handles the cars at the Resurrection mill and the Ore & Chemical Company plants, as well as into the flat?

A. That is right. About 22 cars a month easily of the zinc concentrates are being handled now in addition to the 70 or 80 cars a month from the Ore & Chemical Company.

Q. In addition to that are certain cars of ore trucked into the smelter property and unloaded there into cars for out-bound road haul movement over the D. & R. G.?

A. Yes, sir.

Q. Where are those cars loaded?

A. These cars are loaded at one of our docks, as a rule on what we call the lower dock, which is marked unloading dock at H-12. We allow people who have certain ores they want to be shipped to either Kansas or to Utah for certain reasons, we allow these people to come in there with their trucks over our property and allow them to go into this unloading dock where they dump their ore into cars belonging to the railroad, and the railroad then ships these cars out wherever they happen to go.

Q. And these cars also move up to the flat and over the railroad scale?

A. That is right; yes, sir.

Q. And are weighed there without charge?

1710 A. That is right.

Q. Is scrap iron also similarly handled?

A. Yes.

Q. For independent shippers?

A. For the C. F. & L. particularly.

Q. Do you happen to have the number of cars of ore for independent shippers?

A. Perhaps half a dozen a month.

Q. And of scrap iron?

A. Perhaps two a month.

Q. Now, will you explain how outbound shipments are handled and what they consist of, referring to Exhibit 36?

A. The principal material which we ship out, of course, is lead bullion. Lead bullion is the final product from the blast furnace. It appears in this dressing plant finally which is located at H-9 and is marked dressing plant.

Q. And that is just to the west of a building marked blast furnace building?

A. That is right. You will notice a track goes in here marked bullion track. Practically daily at least one car, or sometimes two cars of this bullion will be shipped. We order a weighed empty to be spotted on this bullion track. Then the railroad at its convenience picks out a car that is good enough to be used for bullion shipment, weighs it,

and spots it at this point. We load the car and
 1711 then the railroad puts it over the scale where the
 gross weight is taken and takes it out of the yard
 if they please and ship it, or they take it over here in the
 flat and take it out the next morning. Of course, we seal
 the car before it goes out.

Q. But it is the railroad's convenience, after it leaves
 the bullion building it is taken over the scale or directly
 out of the yard or into the flat for holding to be taken out
 with other cars later?

A. That is right.

Q. At the railroad's convenience?

A. That is right.

Q. When is the bill of lading issued?

A. The same day after the car goes over the scale it is
 telephoned to Leadville, such and such a car with so many
 pounds of bullion.

Exam. WAY: At that time the bill of lading is issued?

The WITNESS: Immediately.

Q. (By Mr. FINERTY) You made out the bill of lading?

A. Yes.

Q. The second commodity in amount shown is matte
 and Speiss.

A. Yes, matte is a furnace product which is similar to
 bullion. That material contains a certain amount of cop-
 per. For that reason we want to ship it to a copper smelt-
 er, which, in this case, happens to be Garfield. This ma-
 terial is made at the furnace, and it is made in big
 1712 cakes, and it goes, to the specific, from the furnace
 to the crushing mill at F-8. Now, that is done on
 intra-plant switching. It is crushed here and goes into
 a box car which is spotted right behind, right south of
 this sulphide mill, at a point 9-G, and the material after
 crushing, as I said, is loaded in that box car. That box
 car, of course, has been previously weighed empty and
 spotted at this point by the railroad on our order. The
 railroad now hooks onto it, weighs it, and takes it out like
 bullion.

Q. But that movement from the furnace track up to the
 sulphide bin—

A. Mill crusher.

Q. Sulphide crushing mill is paid for separately as an
 intraplant switching movement?

A. That is right.

Q. It is the movement out of that mill of the matte that
 pursues the road-haul movement that you have explained?

A. That is right.

Q. How is bag house dust handled?

A. You are talking about bag house dust being shipped out?

Q. Yes.

A. That bag house dust is loaded at what is called the bag house, which is marked bag house and is located at H-7 and 8, right on the line between 7 and 8. It is loaded into a car that has been spotted on this track running south of the bag house marked bag house track. Now, this 1713 material contains arsenic, and for that reason, under the Interstate Commerce Commission rulings, it has to be topped, these open cars, and these cars have to be topped with wooden covers. Therefore, we first take the car down to the scale to be sure it is not overloaded. Then we take the car to the carpenter shop. That is up here at H-12.

Q. You mean the D. & R. G. switch engine takes it up?

A. The D. & R. G. switch engines, yes. Whenever I say we it is the D. & R. G. switch engine. It takes it to the carpenter shop where there is put on a wooden top and takes it out and it is sent on its way. We get only one free move. The move from the bag house to the scale, the scale to the carpenter shop, are intra-plant moves paid for at \$2.97.

Q. Now, that comprises the handling that you have specified, of all the inbound and outbound shipments of the smelter?

A. That is right.

Q. Incidentally, while the tracks at the smelter are owned and maintained by the D. & R. G. Railroad, the land on which the tracks are placed is owned by whom?

A. By the American Smelting & Refining Company.

Exam. WAY: Under what arrangement are the tracks on the property of the American Smelting & Refining Company?

Mr. FINERTY: Well, I think I may be safe in saying that it is under what might be called an easement by custom.

Exam. WAY: I wouldn't have asked the question 1714 if you hadn't raised it.

Mr. TUCKWOOD: It may not even be an easement because old records are awfully hard to search. I went back to 1880 and got dizzy.

Mr. FINERTY: Mr. Tuckwood, I would like the record to show when the plant, the smelter at Leadville was originally constructed, if you know.

Mr. TUCKWOOD: Well, I can't say definitely, but the official files in New York show that the American Smelting & Refining Company took over the Arkansas Valley Smelter, which was an independent smelter, and I believe was constructed in the 1880's.

Mr. FINERTY: And how long has that smelter been operated by the American Smelting & Refining Company?

Mr. TUCKWOOD: Since about 1902, 1900, around in there.

Mr. FINERTY: And since ~~that~~ time, either by custom or agreement of tolerance, one or the other, the D. & R. G. has maintained its tracks on the smelter company property?

Mr. TUCKWOOD: We have other smelters where the easement is in existence, is almost identical to the Leadville Smelter.

Mr. FINERTY: So that the assumption is that there was at some time or other a legal easement granted the D. & R. G.?

Mr. TUCKWOOD: I would presume that.

Q. (By Mr. FINERTY) I call your attention, Mr. Hennebach to Exhibits Nos. 37 and 38, covering switching 1715 charges paid by the smelter company at the Leadville Smelter. Exhibit 37 shows that no charges were paid in connection with line-haul traffic?

A. That is right.

Q. And that is because the tariffs at that smelter provided for the weighing, sampling, movement to the thaw house and one spotting of the car after sampling?

A. And applies only to interstate.

Q. Yes, and those are interstate tariffs?

A. That is right.

Q. Now, Exhibit 38 shows that the smelter—

Exam. WAY: Pardon me, we have the tariff reference?

The WITNESS: Yes.

Exam. WAY: That is the one Mr. Carey—

Mr. FINERTY: Mr. Carey furnished the tariff references.

Q. (By Mr. FINERTY) Exhibit 38 shows that for a total number of intra-plant switching moves of 3,787 the smelter company paid \$11,247.39. Now, where those intra-plant switching moves here of the character you have mentioned in connection with the handling of various commodities within the plant which were handled after the line-haul service had ceased, or were trucked into the plant or were moved between various points in the plant?

A. That is right. They all originated within the state.

Q. And, Mr. Hennebach, does the D. & R. G. switch engine at times go down to Malta, either hauling loads down or loads back?

A. Oh, yes, indeed, whenever our engine isn't particularly busy.

Q. Now, that is the engine?

A. That is right.

Mr. MORIARTY: That is the one I am going to give them.

The WITNESS: Whenever the smelter engine, or either one of the smelter engines is not busy, the railroad sends it down to Malta to get material that has to go into our yard. It very seldom is sent up to Leadville with material, although it may be in isolated cases, particularly when the line-haul is particularly busy. It might leave our yard completely and pick up a load of merchandise or two and take it up to Leadville.

Q. (By Mr. FINERTY) Just for my information, would it ever handle shipments to Malta from the Ore & Chemical Company or the Resurrection Company?

A. No, those shipments do not go from Malta to these places, they go from those places to Malta.

Q. Do they handle both places?

A. The switch engines takes the material from the Ore & Chemical Company into our yard and from there it sometimes takes these cars down, those empties on down, takes our empties down to Malta if it hasn't enough work to do.

1717 Q. So the D. & R. G. engine, if it isn't spending its time either on delivering or receiving road-haul shipments in the smelter plant or in intra-plant switching movements for which it is paid, is generally occupied in the other ways you have mentioned with the Resurrection or Ore & Chemical traffic or going down to Malta to relieve, I think Mr. Moriarty called it the hill crew engine?

A. That is right.

Q. Do your bullion cars outbound bear a transit privilege notation.

Mr. TUCKWOOD: The bill of lading.

Mr. FINERTY: The bill of lading.

A. Yes.

Mr. TUCKWOOD: The larry car tracks, do they interfere with the standard gauge tracks?

The WITNESS: Not at all.

Mr. FINERTY: I think that is all.

Mr. TUCKWOOD: Before we go on, I would like to make one statement here in connection with these exhibits, be-

cause it quite frequently comes up, the Examiner would like to know why a certain period was chosen, and this ending in March being rather unusual. The plants were instructed by me to use the twelve months ending March 31, 1944, for the reason we received the notice, the President of the company received the notice from the Interstate Commerce Commission on March 17, and I received it the same day and I wanted to get as near a twelve months period as I could.

Mr. FINERTY: I offer in evidence Exhibits 35 to 38, inclusive.

Exam. WAY: Without objection, they are received.

(Intervener's Identification Exhibits Nos. 35 to 38, both inclusive, Witness Hennebach, received in evidence.)

Exam. WAY: Cross examine.

Mr. CAMPBELL: No cross examination for us.

Cross Examination.

Q. (By Mr. WILLIAMS) Mr. Hennebach, you have stated that the plant makes up the bills of lading covering all outbound shipments, is that correct?

A. Yes.

Q. What do you do with those bills of lading when they are made up?

A. I am not quite sure. I believe we send them to the railroad office up in Leadville.

Q. You mean you mail them there?

A. We mail them there, either that, or the man from the railroad comes down daily to check our yard and he picks them up and takes them with him.

Q. There is a person connected with the railroad who makes a daily check of your yard?

A. That is right.

1719 Q. And you think it is that person to whom you give these bills of lading?

A. Either that or mail them.

Q. How much time does a yard check require, do you know?

A. No, I don't. I would say an hour or two. I am not sure. It is the railroad's business.

Q. And aside from the crews handling the railroad business, does the railroad keep a representative in your plant during most of the day?

A. No.

—Mr. FINERTY: Any further questions?

Mr. WILLIAMS: That is all.

Exam. Way: You are excused.

(Witness excused.)

Mr. FINERTY: I think that is all, Mr. Examiner.

Exam. Way: How about the railroads?

Mr. CAMPBELL: I think we are through. I don't know of anything else at all we want to put in now, Mr. Examiner.

Exam. Way: Have you anything else, Mr. Williams?

Mr. WILLIAMS: The Commission has nothing further.

Exam. Way: Does anyone else have anything to offer?

(No response.)

Exam. Way: There will be a proposed report issued in this case and the briefs will be due on July 15. If there is nothing further the hearing is closed.

1720 Mr. FINERTY: I would like to give notice on the record, while I realize you are required to set these briefs on that date, it will probably be impossible to prepare them by July 15.

Exam. Way: You know how to request an extension.

Mr. CAMPBELL: July 15, 1944?

Exam. Way: That is right.

Mr. CAMPBELL: Mr. Examiner, I am quite sure that I have asked two or three times that our exhibits be introduced and they have been received.

Exam. Way: They have been received. Off the record.
(Discussion off the record.)

Exam. Way: The record is closed.

(Whereupon, at 9 p. m., May 27, 1944, the hearing in the above-entitled matter was closed.)

Exhibit No. 3.

1721

Exhibit No. 4

Witness: W. M. CARVE

Before the Interstate Commerce Commission

Ex Parte 104, Part II, Terminal Service at Garfield and
Murray, Utah, Smelters and at Leadville,
Colorado, Smelter

Page
Numbers
(Inclusive)

CONTENTS

1-3	Statement Showing History of Switching at Garfield, Utah, Smelter on Line-Haul Shipments and Intra-Plant Switching at Such Smelter.
-----	---

- 4 Statement Showing Present Tariff Switching Provisions and Charges For: Delivery of Line-Haul Carload Shipments at Garfield and Murray, Utah, Smelters; Additional Movements of Such Shipments Within the Plants; and Intra-Plant Switching at Garfield and Murray, Utah, Smelters.
- 5 Other Specific Switching at Garfield, Utah.
- 6 Statement Showing Number of Cars and Tons Switched by the D&RGW Railroad for the American Smelting and Refining Company at Garfield, Utah, during the Month of March, 1944, and the Revenue Accruing Thereon.
- 7-9 Statement Showing History of Switching at Murray, Utah, Smelter on Line-Haul Shipments, and Intra-Plant Switching at Such Smelter.
- 10 Statement Showing Present Tariff Provisions Covering Manner of Waybilling, Rule for Determining Rate upon which Freight Charges shall be Assessed, and Weights Applicable on Shipments of Ore and Concentrates Destined Smelters at Murray and Garfield, Utah.
- 11 Statement Showing Present Tariff Provisions Covering Manner of Waybilling and Rules for Determining Rate Upon Which Freight Charges shall be Assessed on Shipments of Ore and Concentrates Destined Smelters at Murray and Garfield, Utah.
- 12 Statement Showing Present Tariff Provisions of Rules Governing the Weighing of Carload Freight at Stations on the D&RGW.
- 13-14 Statement Showing History of Switching at Leadville, Colorado, Smelter on Line-Haul Shipments, and Intra-Plant Switching at Such Smelter.
- 15 Statement Showing Present Tariff Switching Provisions and Charges for: Delivery of Line-Haul Carload Shipments at Leadville, Colorado, Smelter; Additional Movements of Such Shipments within the Plant; and Intra-Plant Switching at Leadville, Colorado, Smelter.

- 16 Statement Showing Present Tariff Provisions Covering Manner of Waybilling and Rules for Determining Rate Upon Which Freight Charges shall be Assessed on Shipments of Ore and Concentrates Destined Smelter at Leadville, Colorado.

1722

Page
Numbers
(Inclusive)

CONTENTS

- 17 Statement Showing Number of Cars and Tons Switched Intra-Plant by the D&RGW RR for the American Smelting and Refining Company at Leadville, Colorado, during the Month of March, 1944, and the Revenue Accruing to the D&RGW Railroad thereon.
- 18 Statement Showing Number of Tons of Fuel, Flux, Acid, and Scrap Iron Received at Arkansas Valley Plant for Years 1925 and 1935 to 1943 inclusive.
- 19 Statement Showing Number of Tons by Truck and Rail of Ore Received at Arkansas Valley Plant for Years 1925 and 1935 to 1943 inclusive.

1723

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Garfield, Utah

Witness: W. M. CAREY

STATEMENT SHOWING HISTORY OF SWITCHING AT GARFIELD,
UTAH, SMELTER ON LINE HAUL SHIPMENTS AND INTRA-
PLANT SWITCHING AT SUCH SMELTER

Effective Date

Dec. 22, 1915

Item 255 of Freight Tariff D&RG GFD
No. 4486-C, ICC 2460:

Switching at Garfield, Utah, from track to track within Smelter Plants served by the Denver & Rio Grande Railroad Company, of cars containing freight which has paid transportation charges to the plant, FREE.

Feb. 25, 1920

Item 15 of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

Delivery of a Line Haul carload shipment destined to smelters at Durango,

Leadville, Pueblo, Blende, and Salida, Colorado, Garfield, Murray, and Midvale, Utah, will include one movement of Commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company.

Item 20 of Freight Tariff D&RG GFD No. 4486-E, ICC 2770:

From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car.

Aug. 26, 1920
(Interstate)

Item 20 of Freight Traffic D&RG GFD No. 4486-E, ICC 2770:

For each additional movement not provided for in Item No. 15, from track to track within smelter plant (including weighing over scales within plant) Coal and Ore

\$2.50 per car (1).

All other freight

\$3.00 per car.

(1) Applies on Intrastate Traffic only.

Rate on Interstate Traffic \$3.00 per car.

Nov. 6, 1920

(2) Item 20-B of Freight Tariff D&RG JFD 4486-E, ICC 2770:

For each additional movement not provided for in Item No. 15-A, from track to track within smelter plant (including weighing over scales within plant) \$3.00 per car

(2) Advance on coal and ore on Utah Intrastate Traffic only.

Nov. 27, 1920

Item 15-A of Freight Tariff D&RG GFD No. 4486-E, ICC 2770:

Delivery of a line-haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende, and Salida, Colorado, Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales, TO AND FROM THAW

1724

Page 2

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Garfield, Utah

Witness: W. M. CAREY

Effective Date

Nov. 27, 1920

(Cont'd)

July 1, 1922

House, to and from a smelter sampler, or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

Item 20 of Freight Tariff D&RG GFD No. 4486-F, ICC 24:

Intra-Plant or internal switching at Smelters in Colorado and Utah. For each additional movement not provided for in Item No. 15, or as amended, from track to track within Smelter Plant, (including the weighing over scales within plant) \$2.70 per car.

Sept. 10, 1931

Item 1670 of Freight Tariff D&RG GFD No. 6600, ICC 429:

Delivery of a line-haul carload shipment, destined to smelter at Garfield, Utah, will include movement within smelter plant over track scales, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant) \$2.70 per car

March 28, 1938
(Interstate)

Item 2280 of Freight Tariff D&RG GFD No. 6600-B, ICC 577:

Delivery of a line-haul carload shipment, destined to smelter at Garfield, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a design-

gated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within

plant)\$2.97 per car

June 25, 1938

(Utah Interstate)

July 5, 1938

(Interstate)

Item 2322 of D&RGW Freight Tariff No. 6600-B, ICC 577:

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

1725

Page 3

Exhibit No.

Ex Parte 104, Part II, Terminal Service—Garfield, Utah

Witness: W. M. CAREY

Effective Date

June 25, 1938

(Utah Intrastate)

July 5, 1938

(Interstate)

(Cont'd)

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and sub-

sequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from the track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

1726

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Garfield and Murray,
Utah .

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF SWITCHING PROVISIONS
AND CHARGES FOR: DELIVERY OF LINE-HAUL CARLOAD SHIP-
MENTS AT GARFIELD AND MURRAY, UTAH, SMELTERS; ADDI-
TIONAL MOVEMENTS OF SUCH SHIPMENTS WITHIN THE
PLANTS; AND INTRA-PLANT SWITCHING AT GARFIELD AND
MURRAY, UTAH, SMELTERS**

Item 2320 of Rio Grande Freight Tariff No. 6600-D, ICC
736:

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one

interrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore, concentrates or other commodities are delivered to the smelting plants in frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore, concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within plant) will be charged for at .70 per car for each movement.

(d) In the event the smelting company shall demand weighing of empty cars on its own track scales, on either inbound or outbound movement, the service of switching the cars to and from the track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

(f) Open top cars loaded with Baghouse Fume or Arsenal Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

27.

Page No. 2.

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Garfield, Utah

Witness: W. M. CAREY

Other Specific Switching at Garfield, Utah

Item 2290 of Rio Grande Freight Tariff No.
600-D, ICC 736;

Min. charge
in Dollars &
Cents per car

Concentrates, carloads, originating at Magna or Arthur, Utah, on B&G, switched to Garfield Smelter unloading bins, including service designated in Item No. 2320 \$2.25
Item 2300 of Rio Grande Freight Tariff No. 6600-D, ICC 736:

Clay and Sand, carloads, received from B&G, and switched to American Smelting & Refining Company plant yards 2.25
Item 2310 of Rio Grande Freight Tariff No. 6600-D, ICC 736:

All carload freight not provided for above, between track connection with B&G and points within yards of the American Smelting & Refining Company # 3.60
* 3.96

Applies only on Intrastate Traffic.

* Applies only in Interstate Traffic.

D&RGW Freight Traffic Dept.

May 19, 1944

1728

Exhibit No.

Ex Parte 104, Part II, Terminal
Services, Garfield, Utah

Witness: W. M. CAREY

STATEMENT SHOWING NUMBER OF CARS AND TONS SWITCHED BY THE D&RGW RR FOR THE AMERICAN SMELTING AND REFINING COMPANY AT GARFIELD, UTAH, DURING THE MONTH OF MARCH, 1944, AND THE REVENUE ACCRUING THEREON

	Cars	Tons	Revenue
Concentrates from Magna and Arthur	1,069	81,042	\$2,405.25
Ore and Precipitates from B&G Ry.	114	5,700	412.56
Beach Sand from B&G Ry.	250	16,000	564.50
Total Received	1,433	102,742	\$3,382.31
Bullion to B&G Ry.	500	28,150	\$1,979.28
Acid to B&G Ry.	8	442	31.68
Sulphur to B&G Ry.	2	92	7.92
Total Forwarded	510	28,684	\$2,018.88
Total Forwarded and Received	1,943	131,426	\$5,401.19

Intraplant Scale Moves	712	\$ 356.00
Intraplant Thaw House Moves ..	82	41.00
Intraplant Yard and Stock Moves	154	308.90
<hr/>		
Total Intraplant	948	\$ 705.90
<hr/>		
Grand Total	2,891	\$6,107.09

D&RGW Freight Traffic Dept.
May 19, 1944

1729

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Murray, Utah

Witness: W. M. CAREY

STATEMENT SHOWING HISTORY OF SWITCHING AT MURRAY,
UTAH, SMELTER ON LINE HAUL SHIPMENTS, AND INTRA-
PLANT SWITCHING AT SUGH SMELTER.

Effective Date

Dec. 22, 1915 Item 455 of Freight Tariff D&RG GFD
No. 4486-C, ICC 2460:

Switching at Murray from track to track
within smelter plants served by the
D&RG Railroad Company, of cars con-
taining freight which has paid trans-
portation charges to the plant... FREE

Feb. 25, 1920 Item of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

Delivery of a Line-Haul carload ship-
ment destined to smelters at Durango,
Leadville, Pueblo, Blende, and Salida,
Colorado, Garfield, Murray, and Mid-
vale, Utah, will include one movement
of Commodity within a smelter plant
over track scales to and from smelter
sampler (or to and from combination
sampler and concentrator), to a desig-
nated unloading point indicated by the
Smelting Company.

Item 20 of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

From track to track within smelter plant
for each additional movement not pro-
vided for in Item No. 15; \$2.50 per car.

Aug. 26, 1920

Item 20 of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

For each additional movement not provided for in Item No. 15, from track to track within smelter plant (including weighing over scales within plant). Coal and Ore.

\$2.50 per car (1)

All other freight

\$3.00 per car

(1) Applies on Intrastate Traffic only.
Rate on Interstate Traffic, \$3.00 per car.

Nov. 6, 1920

(2) Item 20-B of Freight Tariff D&RG
GFD No. 4486-E, ICC 2770:

For each additional movement not provided for in Item 15, from track to track within smelter plant (including weighing over scales within plant). \$3.00 per car

(2) Advance on coal and ore on Utah
Intrastate Traffic only.

Nov. 27, 1920

Item 15-A of Freight Tariff D&RG GFD
No. 4486-E, ICC 2770:

Delivery of a line-haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende, and Salida, Colorado, Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales To and From THAW HOUSE, to and from a smelter sampler, or to

1730

Page 2

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Murray, Utah

Witness: W. M. CAREY

Effective date

Nov. 27, 1920
(Con'd)

point indicated by the sampling combination and from a combination sampler and centrator to a designated unloading pany.

July 1, 1922

Item 20 of Freight Tariff D&RG GFD
No. 4486-F, ICC 24:

Intra-Plant or internal switching at
Smelters in Colorado and Utah. For

Sept. 10, 1931

each additional movement not provided for in Item No. 15, or as amended; from track to track within Smelter Plant (including weighing over scales within plant). \$2.70 per car

Item 1710 of Freight Tariff D&RGW GFD No. 6600, ICC 429:

Delivery of a line-haul carload shipment, destined to smelter at Murray, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler, or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant). \$2.70 per car

March 28, 1938
(Interstate)

Item 2320 of Freight Tariff D&RGW GFD No. 6600-B, ICC 577:

Delivery of a line-haul carload shipment, destined to smelter at Murray, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant). \$2.97 per car

June 25, 1938
(Utah Intrastate)

Item 2322 of D&RGW Freight Tariff No. 6600-B, ICC 577:

July 5, 1938
(Interstate)

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-

haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

Note—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

1731

Page 3

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Murray, Utah

Witness: W. M. CAREY

Effective Date

June 25, 1938

(Utah Intrastate)

July 5, 1938

(Interstate)

(Cont'd)

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car.

After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from the track scales for such light

weighing shall be charged for at 50 cents per car.

- (c) The line haul rate will also include outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

1732

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Murray & Garfield,
Utah

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS COVERING
MANNER OF WAYBILLING, RULE FOR DETERMINING RATE
UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED, AND
WEIGHTS APPLICABLE ON SHIPMENTS OF ORE AND CONCENTRATES
DESTINED SMELTERS AT MURRAY AND GARFIELD,
UTAH**

Item 40 of Local Utah Freight Tariff No. 6-F, Agent
F. W. McManus ICC 3:

Ore and Concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable for the approximate value; or, when the approximate value cannot be ascertained, at the rate applicable for \$100.00 per ton value.

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

Item 115 of Local Utah Freight Tariff No. 6-F, Agent
F. W. McManus' ICC 3:

The provisions of T.C.F.B. tariff No. 58-D, Agent L. E. Kipp's L.C.C. No. A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern. (See exception.)

Shipments of Ore and/or Ore Concentrates originating at points on the Union Pacific Railroad may be weighed at point of origin without extra charge.

Exception—Where weights on Ore, Concentrates, Mill or Smelter products are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carriers will also accept such weights as a basis for assessing freight charges.

D&RGW Freight Traffic Dept.

May 19, 1944

1733

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Murray and Garfield,
Utah

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS COVERING
MANNER OF WAYBILLING AND RULES FOR DETERMINING
RATE UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED
ON SHIPMENTS OF ORE AND CONCENTRATES DESTINED SMEL-
TERS AT MURRAY AND GARFIELD, UTAH**

Item 30 of D&GW Freight No. 6000-F, ICC 641:

Ore and Concentrates, for which rates based on value per ton are published herein will be waybilled from point of origin at the rate applicable to Ore for \$100.00 per ton value. If no rate is published for Ore of \$100.00 per ton value, then at the highest rate per ton for which a rate is published:

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

D&RGW Freight Traffic Dept.

May 19, 1943

1734

Exhibit No

Ex Parte 104, Part II, Terminal
Service, Murray and Garfield,
Utah, and Leadville, Colorado

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS OF RULES
GOVERNING THE WEIGHING OF CARLOAD FREIGHT
AT STATIONS ON THE D&RGW**

Item 475 of Rio Grande Freight Tariff No. 6450-G, ICC 729:

All freight in carloads should be weighed. Track scales are placed at certain stations for that purpose. All cars will be weighed on nearest track scale to point of origin unless there is good and sufficient reason for weighing elsewhere.

All cars forwarded from track scale stations will be weighed at such stations, except as above.

Cars forwarded from stations where there are no track scales, and passing beyond that district will be weighed at the end of the district on which the forwarding station is located except where consigned to a track scale station, when the cars will be weighed at the station to which consigned.

Cars forwarded from one station to another in the same district, neither of which station has a track scale, will be weighed at the first track scale they pass.

Forwarding agents at non-track scale stations will enter upon way-bills the estimated weights, and, for the information of conductors, will note on the face and back of the way-bill, IN LSK, the station where the cars are to be weighed.

If, from any cause, a car is not weighed at a track scale station, as provided for herein, the agent at such station will state the cause, and note on way-bill that it must be weighed at the next track scale station, provided the destination of the car is beyond the next track scale.

Agents at intermediate stations, where cars in transit are weighed, will stamp the gross, tare and net weights on the way-bills, and agents at receiving stations will extend the charges on the weight thus shown.

Carload shipments originating at, and destined to, non-track scale stations, and which do not pass track scales enroute, should be carefully checked at destination and weight estimated as accurately as possible.

D&RGW Freight Traffic Dept.

May 19, 1944

1735

Exhibit No.

Ex Parte 104, Part II, Terminal
Service—Leadville, Colorado

Witness: W. M. CAREY

**STATEMENT SHOWING HISTORY OF SWITCHING AT LEADVILLE,
COLORADO, SMELTER ON LINE HAUL SHIPMENTS, AND
INTRA-PLANT SWITCHING AT SUCH SMELTER**

Effective Date

- Dec. 22, 1915** Item 425 of Freight tariff D&RGW GFD
No. 4486-C, ICC 2460:
Switching at Leadville, from track to track
within smelter plants served by The
D&RGW RR Co. of cars containing
freight which has paid transportation
charges to the plant.....FREE
- Feb. 25, 1920** Item 15 of Freight Tariff D&RGW GFD
No. 4486-E, ICC 2770:
Delivery of a line haul carload shipment,
destined to smelters at Durango, Lead-
ville, Pueblo, Blende, and Salida, Colo-
rado, Garfield, Murray, and Midvale,
Utah, will include one movement of Com-
modity within a smelter plant over track
scales to and from smelter sampler (or
to and from combination sampler and
concentrator), to a designated unload-
ing point indicated by the Smelting
Company.
- Item 20 of Freight Tariff D&RGW GFD
No. 4486-E, ICC 2770:
From track to track within smelter plant
for each additional movement not pre-
vided for in Item No. 15, \$2.50 per car.
- August 26, 1920** Item 20 of Freight Tariff D&RGW GFD
(Interstate) No. 4486-E, ICC 2770:
- Sept. 1, 1920** From track to track within smelter plant
(Intrastate) for each additional movement not pro-
vided for in Item No. 15, \$3.00 per car.
- Nov. 27, 1920** Item 15-A of Supp. 7 to Freight Tariff
D&RGW GFD No. 4486-E, ICC 2770:
Delivery of a line haul carload shipment,
destined to smelters at Durango, Lead-
ville, Pueblo, Blende, and Salida, Colo-

rado, Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales ~~TO AND FROM THAW HOUSE~~ to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

July 1, 1922

Item 20 of Freight Tariff D&RGW GFD No. 4486-F, ICC 24:

Intra-Plant or internal switching at Smelters in Colorado and Utah. For each additional movement not provided for in Item No. 15, or as amended, from track to track within Smelter Plant, (including weighing over scales within plant)
.....\$2.70 per car

1736

Page 2

Exhibit No.

Ex Parte 104, Part II, Terminal Service—Leadville, Colorado

Witness: W. M. CAREY

Sept. 10, 1931

Item 1230 of Freight Tariff D&RG GFD No. 6600, ICC 429:

Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant).....\$2.70 per car

March 28, 1938

Item 1670 of Freight Tariff D&RGW GFD No. 6600-B, ICC 577:

Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from

thaw-house, to and from a smelter sampler, or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant) . . . \$2.97 per car
Item 250 of D&RGW Freight Tariff No. 6600-B, ICC 577:

Jan. 27, 1939
(Intrastate)

July 1, 1939
(Interstate)

ALL STATIONS ON D&RGW
SWITCHING CARLOAD FREIGHT IN
INTRA-PLANT MOVEMENT

(Except as Otherwise Provided)

At points not specifically provided for herein the rate on Intra-Plant Switching will be \$3.47 per car for each switching movement performed at all points Denver to Trinidad, Colorado, inclusive, and \$2.97 per car at all other points.

Jan. 27, 1939
(Intrastate)

July 1, 1939
(Interstate)

Item 1670-A, Supp. 21 to D&RGW Freight Tariff No. 6600-B, ICC 577:

Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point, indicated by the sampling company.

For each additional movement of line-haul carload shipments, not provided for above, from track to track within smelter plant (including weighing over scales within plant) \$2.97 per car

1737

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Leadville, Colorado

Witness: W. M. Carey

STATEMENT SHOWING PRESENT TARIFF SWITCHING PROVISIONS AND CHARGES FOR: DELIVERY OF LINE-HAUL CARLOAD SHIPMENTS AT LEADVILLE, COLO., SMELTER; ADDITIONAL MOVEMENTS OF SUCH SHIPMENTS WITHIN THE PLANT; AND INTRA-PLANT SWITCHING AT LEADVILLE, COLORADO, SMELTER

Item 1670 of Rio Grande Freight Tariff No. 6600-D, ICC 736:

DELIVERY OF LINE-HAUL CARLOAD SHIPMENT DESTINED TO SMELTER AT LEADVILLE, COLO.

Min. Charge
in dollars and
Cents per Car

Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement of line-haul carload shipments, not provided for above, from track to track within smelter plant (including weighing over scales within plant) \$2.97

Item 250 of Rio Grande Freight Tariff No. 6600-D, ICC 736:

SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT AT ALL STATIONS ON THE D&RGW

At points not specifically provided for in Tariff, the rate on Intra-Plant Switching (see Item 180) will be \$3.47 per car for each switching movement performed at all points named in Item 130, and \$2.97 per car at all other points. (See Exception.)

At points not specifically provided for, the rate on Intra-Plant shipments of Coal in Utah will be \$6.44 per car for each switch movement when no further rail haul service is performed.

Exception—At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

(Item 130 of Rio Grande Freight Tariff No. 6600-D, ICC 736. When this item is referred to, the following stations on the D&RGW in Colorado are referred to: D&RGW stations in Colorado-Common Point territory: Denver to Trinidad, Colo., inclusive.)

(Item 180 of Rio Grande Freight Tariff No. 6600-D, ICC736: Intra-Plant switching—a switch movement from one track to another within the same plant or industry.)

D&RGW Freight Traffic Dept.
May 19, 1944

1738

Exhibit No. _____

Ex Parte 104, Part II, Terminal
Service, Leadville, Colorado

Witness: W. M. CAREY

**STATEMENT SHOWING PRESENT TARIFF PROVISIONS COVERING
MANNER OF WAYBILLING AND RULES FOR DETERMINING
RATE UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED
ON SHIPMENTS OF ORE AND CONCENTRATES DESTINED
SMELTER AT LEADVILLE, COLORADO**

Item 130 of DRGW Freight Tariff No. 6000-F, ICC 641:
Ore and Concentrates, for which rates based on value per ton are published herein will be waybilled from point of origin at the rate applicable to Ore for \$100.00 per ton value. If no rate is published for Ore of \$100.00 ton value, then at the highest rate per ton for which a rate is published.

After arrival at mill, smelter, or other industry to which shipment is consigned, and settlement between shipper and consignee is made on the basis of return or assay by such mill, smelter, or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter, or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

D&RGW Freight Traffic Dept.
May 19, 1943

1739

Exhibit No.

Ex Parte 104, Part II, Terminal
Service, Leadville, Colorado

Witness: W. M. CAREY

STATEMENT SHOWING NUMBER OF CARS AND TONS SWITCHED
INTRA-PLANT BY THE D&RGW RR FOR THE AMERICAN
SMELTING AND REFINING COMPANY AT LEADVILLE, COLO-
RADO DURING THE MONTH OF MARCH, 1944, AND THE REV-
ENUE ACCRUING TO THE D&RGW RAILROAD THEREON.

<i>Intraplant</i>	<i>Cars</i>	<i>Revenue</i>
Scale Moves	62	\$184.14
Thaw House Moves	69	204.93
Yard and Stock Moves	93	276.21
Total	224	\$665.28

D&RGW Freight Traffic Dept.
May 19, 1944

1740

Exhibit No. A

Ex Parte 104, Part II, Terminal
Service, Leadville, Colo.

Witness: W. M. CAREY

STATEMENT SHOWING NUMBER OF TONS OF FUEL, FLUX, ACID,
AND SCRAP IRON RECEIVED AT ARKANSAS VALLEY PLANT
FOR YEARS 1925 AND 1935 TO 1943 INCLUSIVE

TONS RECEIVED

<i>Year</i>	<i>Fuel</i>	<i>Flux</i>	<i>Acid</i>	<i>Scrap Iron</i>
1925	56,420	27,597	—	93
1935	24,244	24,933	—	382
1936	25,203	13,951	—	437
1937	26,175	14,899	—	906
1938	23,305	16,176	—	303
1939	21,452	14,715	—	432
1940	24,285	13,943	—	323
1941	26,337	17,306	—	1,334
1942	30,262	17,041	453	1,261
1943	24,084	19,586	731	3,104

D&RGW Freight Traffic Dept.
May 19, 1944

1741

Exhibit No.
 Ex Parte 104, Part II, Terminal
 Service, Leadville, Colorado
 Witness: W. M. CAREY

STATEMENT SHOWING NUMBER OF TONS BY TRUCK AND RAIL
 OF ORE RECEIVED AT ARKANSAS VALLEY PLANT FOR YEARS
 1925 AND 1935 TO 1943 INCLUSIVE

TONS RECEIVED			
Year	Truck	Railroad	Total
1925	3,778	253,407	257,185
1935	14,002	93,356	107,358
1936	21,132	107,021	128,153
1937	25,763	102,538	128,301
1938	21,595	90,575	112,170
1939	33,256	83,733	116,989
1940	50,013	70,532	120,545
1941	52,325	75,368	127,693
1942	47,772	57,074	104,846
1943	41,789	54,336	96,125

D&RGW Freight Traffic Dept.
 May 19, 1944

1741-A

Exhibit No. 5

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
 Wilson, McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81500

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Beach Sand

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
3206-3200-3221-3205-3203-3209-3218-2/1-3211-3217-3215-3222-3206-3216-3201-3202-3210-2/30-3220-3213-3212-3204-3203-3209-3218-2/4-3218-3201-3214-3219-3217-3208-3222-3210-2/7-3215-3209-3202-3205-3207-3216-3206-3200-3221-3211-2/8-3202-3217-3219-3201-3214-3220-3213-3212-3204-3208-2/10-3218-3221-3211-3216-3206-3200-3222-3210-2/12-3215-3209-3202-3204-3208-3205-3207-2/14-3220-3212-3204-3213-3203-3217-3219-3200-3222-3210-2/16-3208-3205-3207-3209-3202-3211-3216-3206-2/17-3203-3201-3218-3215-3222-3210-3217-3200-3215-2/19-3211-3216-3220-3219-3212-3206-3204-3214-2/21-3202-3205-3207-3218-3208-3201-3200-3213-3203-3209-2/24-3215-3222-3210-3217-3211-3216-3220-3221-2/25-3219-3204-3206-3214-3209-3207-3201-3207-3218-2/28						

TOTAL TO COLLECT 285.75

Switched to 127 Cars @ 2.25 per car

COPY

() 1st Copy Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment.....19...
 T. F. MAHER Agent

1741-B

Form 1741-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81501

FOR SWITCHING PERFORMED ON CARS LISTED

9688 GARFIELD STATION March 1, 1944

From Union Pac Mlys Weighed by D&RGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Contents	Consignee and Weight			
Number		Destination	Rate	Collect	Prepaid
20347-63507-46663-20440-64399-20218-64588-64474-63759-20881-64027- 64002-64958-62968-62256-41387-93853-83747-21763-62331-40328-64645- 63559-20361-20438-20419-62783-20783-20156-21042-92267-63566-96375- 63807-64996-20055-64163-63803-63111-63992-63050-64577-63874-20068- 62065-63091-20738-20924-20333-64625-95197-21924-64699-64796-63434- 64255-64279-4201-63053-20370-20327-20046-63416-20625-23002-21112- 63513-64723-63490-64211-71477-64081-64101-20476-63727-20404-93330- 20649-63777-63967-64043-52735-64789-92950-21915-64874-20976-63623- 62909-64786-62073-20196-20386-64015-20560-20477-91663-21913-63201- 21967-42265-21898-64582-201946- sulph-148694					

TOTAL TO COLLECT 52.50

Switched to 105 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
T. F. MAHER Agent

1741-C

Form 1741-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81502

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From DRGW Mlys Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Contents	Consignee and Weight			
Number		Destination	Rate	Collect	Prepaid
40707-71907-21787-40274-43270-40514-43134-70068-40244-71382-21088- 42437-67435-5441-40083-66048-20602-41073-43110-40269-41756-43123- 41163-43170-40509-67144-40516-42043-43070-41970-43184-42506-21814- 42090-20759-40678-21667-21751-71570-12194-41635-40229-41433-43293- 41216-41467-20489-41548-40793-41714-21591-43236-43243-63779-5836- 42018-67439-21664-25083-21298-5334-41678-20717-40292-40466-41188- 21347					

TOTAL TO COLLECT 33.50

Switched to 67 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
T. F. MAHER Agent

1741-D

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81503

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Thaw House Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
64786-64874-62735-2/24-92115-20717-64577-21347-21787-20570-21924-64255-25083-5534-40466-62883-63566-2/25-21591-96375-3616-40963-41073-42437-40244-40036-40267-40514-64789-63967-64081-20404-64723-20625-42264-42492-40680-45496-40401-5302-41970-40516-43170-41756-5796-20560-63201-62073-71570-40676-20976-21314-42248-41927-2/7-41318-21664-20783-40279-4496-41848-45040-40459-40765-2/29							

TOTAL TO COLLECT 30.50

Switched to 61 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-E

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81504

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
44119-20259-2/8-21012-62665-63720-20990-62207-2/9-42207-41537-41459-2/11-20259-40824-64119-2/12-41859-2/13-20382-32626-20663-41745-42143-40472-2/16-42442-40524-63759-41834-2/17-21763-40904-41029-42192-2/18-63602-42192-42448-40524-41834-201046-43283-41745-41859-40824-41029-21763-2/19-5649-2/20-63566-21767-2/27							

TOTAL TO COLLECT 116.10

Switched to 43 Cars @ 2.70 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-F

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81505

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Interrupted Movement on Line Haul Loads

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial Number	Contents	Consignee and Weight Destination	Rate	Collect	Prepaid
112-221-226-12/31-108-205-218-213-200-206-2/3-20579-21183-20259-					
64119-2/7-20653-41745-40472-41024-40824-42132-2/11-41024-41859-					
40824-218-200-2/15-209-2/18-42448-40524-20438-2/21-106-2/25-206-					
217-101-110-213-2/29-226-2/28					

TOTAL TO COLLECT 35.00

Switched to 35 cars @ 1.00 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-G

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81506

FOR SWITCHING PERFORMED ON CARS LISTED

..... STATION March 1, 1944

From B&G Mtys Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial Number	Contents	Consignee and Weight Destination	Rate	Collect	Prepaid
3048-3000-1804-1810-1812-3044-3046-3047-3005-3035-1802-1807-3016-					
3010-21664-21761-3028-30550 Sulphur 2/29-102					

TOTAL TO COLLECT 9.50

Switched to 19 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-H

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81507

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
UCCX	1807	PPTS MAGNA	SMELTER	2/12			
B&G	3032	Scrap Iron	SMELTER	ARTHUR			

TOTAL TO COLLECT 7.20

Switched to 2 Cars @ 3.60 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-I

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81508

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From UT CTU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2013-2006-2069-2031-2059-2041-2063-2111-2072-2032-2103-2131-2052-2074- 2015-2129-2104-2134-2064-2033-2127-2003-2019-2144-2034-2080-2112-2018- 2050-2130-2022-2080-2143-2148-2137-2106-2/29							

TOTAL TO COLLECT 81.00

Switched to 36 Cars @ 2.25 per car.

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..

T. F. MAHER Agent

1741-J

Form 2714-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McArthur and Henry Swan, Trustees

GARFIELD CHEM. Co.

Number 81509

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 1, 1944

From Acid Mtys Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR				SWITCHING CHARGES		
Initial Number	Contents	Consignee and Destination	Weight	Rate	Collect	Prepaid
4956-38268-2/1-8685-38285-4955-39683-2/2-4951-2/3-38278-92165-2/4-38280-38287-19102-8494-2/7-38614-39409-4957-4954-2/7-39474-8668-38281-4976-2/8-4959-39592-39593-2/9-38279-39465-4960-39448-2/10-39463-38826-4953-2/11-92119-4976-4964-2/12-8914-4975-4951-8665-2/14-4972-8666-39627-2/15-38286-2/18-39683-38288-2/20-8494-2/22-38278-39448-2/21-4952-4955-4975-2/22-4958-4953-39593-2/23-4965-4960-4956-4959-2/24-8666-4976-2/25-2975-39465-39592-2/26-38285-38614-2/28-4954-4970-4972-2/29						

TOTAL TO COLLECT 33.50

Switched to 67 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
 Agent

1741-K

Form 2714-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McArthur and Henry Swan, Trustees

AS&R Co.

Number 81510

FOR SWITCHING PERFORMED ON CARS LISTED

A9680 GARFIELD STATION March 6, 1944

From UT CTU CTS

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR				SWITCHING CHARGES		
Initial Number	Contents	Consignee and Destination	Weight	Rate	Collect	Prepaid
2075-2067-2070-2121-2065-2089-2122-2058-2042-2035-2061-2024-2124-2071-2002-2005-2038-2000-2141-2062-2034-2017-2114-2001-2116-2109-2096-2001-2020-2142-2053-2084-2007-2046-2030-3/1-2013-2006-2069-2031-2149-2051-2018-2056-2130-2022-2080-2026-2094-2118-2039-2077-2078-2066-2045-2115-2009-2025-2099-2068-2043-2064-2033-2127-2003-3/2-2048-2134-2106-2075-2067-2070-2055-2030-2017-2103-2014-2091-2121-2058-2042-2035-2081-2019-2144-2109-2034-2060-2112-2059-2041-2063-2111-2072-2032-2096-2001-3/3-2044-2143-2148-2137-2131-2052-2043-2064-2033-2127-2003-2149-2074-2015-2129-2104-2005-2038-2000-2142-2124-2071-2002-2089-2122-2141-2062-2054-2050-2053-2084-2007-3/4						

TOTAL TO COLLECT 285.75

Switched to 127 Cars @ 2.25 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
 Agent

1741-L

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DE
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81511

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 8, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
2070-2051-2018-2058-2130-2022-2080-2006-2072-2032-2103-2109-2096- 2001-2082-2078-2040-2046-2077-2045-2115-2009-2023-2099-2068-2013- 2069-2031-2121-2058-2067-2070-2055-2030-2008-3/5-2083-2048-2134- 2106-2075-2044-2124-2071-2002-2089-2122-2141-2143-2148-2042-2035- 2017-2019-2144-2034-2060-2112-2059-2041-2063-2111-2054-2129-2005- 2038-2137-2052-2043-2064-2131-3/6-2061-2053-2084-2007-2020-2046- 2089-2142-2104-2092-2025-2076-2061-2018-2058-2033-2127-2003-2149- 2074-2015-2000-2022-2080-2009-2077-2045-2115-2009-2023-2/7-2006- 2001-2082-2083-2048-2134-2111-2054-2030-2063-2017-2106-2075-2094- 2068-2051-2069-2031-2121-2058-2067-2070-2006-2072-2032-2103-2109- 2112-2059-3/6-						

TOTAL TO COLLECT 290.25

Switched to 129 Cars @ 2.25 per car

COPY

- () 1st Copy-Switch Bill
() 2nd " Auditor's Copy
() 3rd " Cashier's Memo
() 4th " Station Record

Received Payment..... 19.

T. F. MAHER Agent

1741-M

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DE
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81512

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 11, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
2118-2129-2005-2038-2052-2043-2084-2008-2077-2045-2115-2009-2081- 2018-2033-2061-2041-2044-2124-2071-2002-2089-2122-2141-2042-2035- 2079-2040-2055-2127-2003-3/9-2053-2056-2023-2143-2148-2137-2103- 2109-2112-2059-2131-2019-2144-2034-2149-2074-2015-2000-2022-2080- 2046-2099-2142-2104-2092-2025-2076-2096-2001-2082-3/10-2041-2060- 2118-2129-2005-2038-2052-2042-2035-2079-2040-2063-2007-2106-2143- 2066-2072-2130-2083-2031-2121-2058-2067-2070-2048-2154-2111-2054- 2030-2055-2127-2003-2045-2115-2009-2008-3/11-2014-2051-2018-2033- 2061-2053-2075-2046-2090-2142-2104-2092-2025-2076-2094-2068-2013- 2069-2004-2077-2044-2124-2071-2002-2086-2122-2141-2096-2059-2019- 2144-2034-2149-2074-2015-2006-3/12						

TOTAL TO COLLECT 299.25

Switched to 133 Cars @ 2.25 per car

COPY

- () 1st Copy-Switch Bill
() 2nd " Auditor's Copy
() 3rd " Cashier's Memo
() 4th " Station Record

Received Payment..... 19.

T. F. MAHER Agent

1741-N

Form 2734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81513

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 18, 1944

From Union Pac Mlys Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
45465-64072-94765-20609-63373-64169-63605-21440-64659-94720-62147- 62083-21122-64459-64216-64049-40863-21754-62319-92786-63418-64399- 62558-20342-21555-20258-62279-62617-62961-64261-21675-63681-20399- 64741-20864-21362-63305-63631-20506-91462-92951-20166-62825-20633- 64866-21873-63776-62259-70324-5954-62841-40269-62543-46492-62290- 63478-63349-62106-4354-64556-63178-64486-64196-63298-20397-21964- 63257-62936-63401-63471-21910-63035-63949-63658-62783-64645-63378- 64961-20619-54019-92463-20210-21294-63431-21830-64617-64325-64405- 64095-63272-64378-62767-62577-64043-62167-20347-63011						

TOTAL TO COLLECT 48.50

Switched to 97 Cars @ .50 per car

COPY

- 1st Copy-Switch Bill
2nd Auditor's Copy
3rd Cashier's Memo
4th Station Record

Received Payment, 19..

DON NASH Agent

1741-O

Form 2734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81514

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 18, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
2062-2041-2066-2118-2129-2005-2059-2134-2111-2054-2030-2055-2127- 2066-2032-2091-2022-2080-2056-2023-2143-2137-2103-2109-2112-2045- 2115-2083-2031-2021-2058-2067-2070-2048-2038-2052-2042-3/13-2009- 2008-2003-2014-2051-2018-2148-2032-2034-2149-2074-2053-2033-2035- 2079-2040-2063-2017-2044-2124-2071-2002-2089-2182-2141-2096-2059- 2019-2144-3/14-2075-2046-2099-2142-2083-2031-2060-2118-2104-2092- 2025-2061-2106-2094-2068-2613-2069-2004-2015-2000-2041-2082-2022- 2076-3/14-2043-2103-2009-2068-2003-2109-2017-2044-2124-2071-2002- 2080-2056-2023-2143-2137-2039-2134-2089-2111-2054-3/16						

TOTAL TO COLLECT 249.75

Switched to 111 Cars @ 2.25 per car

COPY

- 1st Copy-Switch Bill
2nd Auditor's Copy
3rd Cashier's Memo
4th Station Record

Received Payment, 19..

T. F. MAHAR—DON NASH Agent

1741-P

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81515

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 20, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Weight Destination	Rate	Collect	Prepaid
2112-2122-2074-2053-2033-2039-2015-2000-2041-2082-2022-2067-2070-2045-2115-2121-2030-2055-2127-2066-2062-2091-2042-2035-2079-2040-2063-2014-2051-2018-2148-3/17-2080-2056-2043-2103-2009-2008-2104-2092-2025-2061-2106-2048-2129-2005-2077-2032-2043-2034-2149-2099-2142-2141-2096-2068-2013-2069-2084-2075-2046-2083-2031-2060-2118-3/18-2058-2012-2112-2122-2074-2053-2033-2079-2035-2040-2063-2015-2076-2094-2006-2072-2130-2023-2143-2137-2039-2134-2054-2124-2081-2002-2089-2003-2109-2017-2044-2121-2030-2055-2127-2066-3/19-2018-2148-2067-2070-2045-2113-2019-2144-2141-2096-2149-2099-2142-2038-2032-2084-2097-2049-2050-2057-2062-2059-2015-2000-2041-2082-2022-2083-2031-2060-2118-2056-2043-2103-2009-2008-2104-2092-2025-2061-3/20					

TOTAL TO COLLECT 312.75

Switched to 139 Cars @ 2.25

Copy

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
DON NASH Agent

1741-Q

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81516

FOR SWITCHING PERFORMED ON CARS LISTED

STATION March 25, 1944

From DRG MtyS Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Weight Destination	Rate	Collect	Prepaid
41391-84323-85372-67366-43091					

TOTAL TO COLLECT 2.50

Switched to 5 cars @ .50 per car

Copy

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
Agent

1741-R

Form 2794-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, DR.
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81517

FOR SWITCHING PERFORMED ON CARS LISTED

STATION March 25, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Destination	Rate	Collect	Prepaid
63182-202-60-21573-20560-63101-		Stock Ore			

TOTAL TO COLLECT 13.50

Switched to 5 Cars @ 2.70 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd Auditor's Copy
 () 3rd Cashier's Memo.
 () 4th Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-S

Form 2794-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, DR.
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81518

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From Union Pac Mty's Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Destination	Rate	Collect	Prepaid
91451-91972-20779-20830-21485-20432					

TOTAL TO COLLECT 3.00

Switched to 6 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd Auditor's Copy
 () 3rd Cashier's Memo.
 () 4th Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-T

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81519

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
41088-41252-41435-40729-20512-3/6						
20515-64211-63418-64697-21027-3/16						
21914-21405-20428-21791-45785-43184-3/20						

TOTAL TO COLLECT 43.20

Switched to 16 Cars @ 2.70 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-U

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81520

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From UT CU CTS

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
				Rate	Collect	Prepaid
2109-2121-2030-2055-2127-2143-2137-2035-2142-2130-2044-2099-2041-						
2082-2040-2000-2039-2002-2089-2022-2008-2104-2015-2007-2020-2116-						
2024-2012-2063-2014-2076-2094-2006-3/24						

TOTAL TO COLLECT 74.25

Switched to 33 Cars @ 2.25 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-V

Form 2784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81521

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2068-2013-2069-2004-2075-2034-2023-2111-2143-2137-2039-2134-2054- 2124-2046-2058-2012-2106-2048-2129-2005-2077-2071-2002-2089-2003- 2109-2017-2074-2053-2033-2079-2035-2040-3/21-2121-2030-2055-2127- 2066-2062-2059-2056-2043-2103-2009-2008-2104-2015-2007-2020-2116- 2024-2063-2014-2076-2094-2006-2072-2130-2044-2099-2142-2000-2041- 2082-2022-2083-2031-2060-3/22-2112-2092-2025-2061-2038-2052-2084- 2097-2068-2013-2069-2122-2080-2032-2091-2036-2003-2118-2018-2148- 2067-2070-2045-2115-2119-2053-2033-2079-2034-2023-2111-2004-2057- 2106-2048-2129-2005-2077-2071-3/23							

TOTAL TO COLLECT 243.00

Switched to 108 Cars @ 2.25 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-W

Form 2784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81522

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From Union Pac Mty's Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
90650-92052-92430-20024-43166-94571-95059-95321-84673-63201-64513-20524-21918-64652-93111-63666-21260-63037-20894-21573-42254-93088-63507-63327-20769-45010-62078-64336-46298-63863-21349-20085-63101-20060-63634-63182-21094-63364-63442-62884-21876-62653-82950-92725-20560-20957-94732-63479-16814-21293-21795-28184-21323-63257-21405-30165-62290-64350-63230-62666-21914-20796-20414-63389-21743-63992-20428-63943-62201-64318-63811-63802							

TOTAL TO COLLECT 36.00

Switched to 72 Cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81523

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From Beach Sand

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR	Contents	Consignee and Destination	Weight	SWITCHING CHARGES
Initial Number				Rate Collect Prepaid
3221-3208-3217-3216-3200-3216-3203-3212-3/1				
3205-3271-3210-3215-3222-3219-3204-3218-3208-3201-3/6				
3214-3216-3217-3206-3212-3200-3213-3209-3207-3206-3/6				
3205-3211-3210-3218-3218-3208-3201-3/8				
3222-3219-3214-3218-3203-3217-3216-3/10				
3204-3220-3207-3206-3201-3200-3221-3202-3209-3212-3/13				
3215-3218-3208-3211-3210-3/13				
3216-3205-3222-3219-3214-3205-3217-3/17				
3214-3218-3215-3217-3220-3210-3208-3207				
3212-3209-3202-3221-3204-3213-3/20				
3205-3/21				
3216-3205-3209-3211-3203-3222-3219-3200-3/22				

TOTAL TO COLLECT 197.75

Switched to 87 Cars @ 2.23 per car

COPY

()	1st	Copy-Switch Bill
()	2nd	Auditor's Copy
()	3rd	Cashier's Memo.
()	4th	Station Record

Received Payment..... 19.

D. L. NASH Agent

1741-AA-2

Form 2784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81524

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From B & G Mtys Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents Consignee and Weight		SWITCHING CHARGES	
Initial Number	Destination	Rate	Collect	Prepaid	
1808-1817-3048-3002-1801-3042-3019-3044-3074-3019-5583	3046-3027-				
1812-1803-5749-3033-1810-3049-1802-3023-3041-3026-3011-1805-3012-					
3049-1806-3021-3039-1811-1807-3034-1816-3039-3026-3043-3034-1800-					
3006-3013-3028-5716-3029-3018-3034-1801-3002-3013-1805-3033-3002-					
1811-1817-1804-1806-3027-1809-1816-1802-3015-1804-1808-3038-3045-					
1807-1803-1809-1812-18101032-3011-1800-3007-3030-17336-Sulp					
3/1-252-3/3-311-3/4-251-3/7-300-252-3/9-251-3/10-105-303-3/11-252-					
3/18-252-303-3/20-251-3/23-303-252					

TOTAL TO COLLECT 45.00

Switched to 90 Cars @ .50 per car

COPY

1st	Copy-Switch Bill
2nd	Auditor's Copy
3rd	Cashier's Memo
4th	Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-BB-1

Form 2784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

A S & R Co.

Number 81525

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From DRGW MtyS Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
41182-70114-43250-43185-40272-20177-21445-631278-12097-20030-40819-7							
67278-21067-20008-41343-40911-40858-45247-43097-45109-43330-40002							
43082-41249-41048-20512-40559-42298-70394-40754-43186-46576-42276							
40090-67004-92379-43338-42493-42276-41518-42294-45150-45429-40546							
442356-43097-12192-12306-71667-43030-21479-66688-70604-12290-87988							
43282-71134-71135-41822-43115-34178-444-4131-70108-43309-62388-71554							
41450-40262-85214-88806-63339-43000-85726-42383-21920-41863-43194							
85338-41721-71598-43257-45386-43162-42413-34138-69603-40202-43325							
41317-71172-43184							

TOTAL TO COLLECT 46.00

Switched to 92 cars @ .50 per car

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-BB-2

Form 2784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

GARFIELD CHEM. CORPN.

Number 81526

FOR SWITCHING PERFORMED ON CARS LISTED

..... STATION March 25, 1944

From Acid MtyS Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
4952-5614-92119-3/1-4957-4963-4961-3/2-39627-3837-3/3-8668-19102-							
3/4-38280-38281-3/6-4965-4951-8494-3/7-4975-38278-3/8-4960-29448							
3/9-38279-3/10-4973-4970-4976-3/11-8666-3/13-4953-38285-4950-3/14-							
39683-38614-4955-3/15-8614-8494-8668-3/16-38288-3/17-38286-39593-							
3/18-38280-3/20-8665-3/22-38278-3/23-39465							

TOTAL TO COLLECT 20.00

Switched to 40 cars @ .50

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1741-CC

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

GARFIELD CHEM. CORPN.

Number 81527

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 25, 1944

From Acid Mtys Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
	19102-39592						

TOTAL TO COLLECT 1.00

Switched to 2 cars @ .50

COPY

- () 1st Copy-Switch Bill
- () 2nd " Auditor's Copy
- () 3rd " Cashier's Memo.
- () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

17411-DD

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81528

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From DRG Mtys Weighed by DRGW

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
	43326-62012						

TOTAL TO COLLECT 1.00

Switched to 2 @ .50

COPY

- () 1st Copy-Switch Bill
- () 2nd " Auditor's Copy
- () 3rd " Cashier's Memo.
- () 4th " Station Record

Received Payment..... 19..

D. L. NASH Agent

1169

1741-EE

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
 Wilson McCarthy and Henry Swan, Trustees

AS & R Co.

Number 81529

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION 3-27-44

From B & G Mty's Weighed by DRG

(Name of Consignor, Industry, Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
	1816-3009-1805		3/26-231				

TOTAL TO COLLECT 2.00

Switched to 4 @ .50

COPY

() 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19.
 D. L. NASH Agent

1741-FF

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
 Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81530

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Union Pac Mty's Weighed by DRG

(Name of Consignor, Industry, Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
	5783-62617-64580-20638						

TOTAL TO COLLECT 2.00

Switched to 4 @ .50

COPY

() 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19.
 D. L. NASH Agent

1170

1741-GG

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

Number 81531

FOR SWITCHING PERFORMED ON CARS LISTED

..... STATION 19.

From
(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid

TOTAL TO COLLECT.

Switched to

- () 1st Copy-Switch Bill
() 2nd " Auditor's Copy
() 3rd " Cashier's Memo.
() 4th " Station Record

Received Payment. 19..
..... Agent

1741-HH

Form 3734-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81532

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From B & G Mty's Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid

1801-3024-3044-3016-3021-2008-3010-1804

TOTAL TO COLLECT 4.00

Switched to 8 cars @ .50

COPY

- () 1st Copy-Switch Bill
() 2nd " Auditor's Copy
() 3rd " Cashier's Memo.
() 4th " Station Record

Received Payment. 19..
D. L. NASH Agent

1171

1741-II

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

A S & R Co.

Number 81533

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Union Pac Mty's Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
46516-Sulph	201057-64775-21337-62773-62175-40682-21200-71116-70057-21623						

TOTAL TO COLLECT 5.50

Switched to 11 cars @ .50

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1741-JJ

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81534

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Beach Sand

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
3220-3214-3218-3204-3213-3202-3221-3201-3212-3/24							

TOTAL TO COLLECT 20.25

Switched to 9 @ 2.25

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1172

1741-KK

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81535

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR				SWITCHING CHARGES		
Initial	Number	Contents	Consignee and Destination	Weight	Rate	Collect Prepaid
224-RG-41391-45263-41034-45372-40387-DEL	34095-43091-43186					

TOTAL TO COLLECT 24.30

Switched to 9 cars @ 2.70

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
D. L. NASH Agent

1741-LL

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81536

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Interrupted Movement of Line Haul Loads

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR				SWITCHING CHARGES		
Initial	Number	Contents	Consignee and Destination	Weight	Rate	Collect Prepaid
Mill Ore 202-3/2-22 5-218-3/3-100-41450-3/5-219-101-214-3/6-106-217-200-3/7-2/294-3/8-103-2/28-102-202-3/9-215-226-3/16-217-3/17-219-212-107-109-104-3/18-202-220-3/22 Thaw House 43194-3/14 20894-3/15						

TOTAL TO COLLECT 27.00

Switched to 27 @ 1.00

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment..... 19..
D. L. NASH Agent

1741-MM

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81537

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From UT CU CTS

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2031, 2134-2060-2083-2112-2092-2097-2054-2124-2046-2058-2025-2061- 2038-2052-2072-2066-2062-2059-2086-2043-2103-2009-2043-2115-2019- 2053-2033-2079-2034-3/25							

TOTAL TO COLLECT 69.75

Switched to 31 cars @ 2.25

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment 19.
 D. L. NASH Agent

1741-NN

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81538

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From UT CU CTS

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2084-2003-2111-2004-2057-2106-2048-2118-2099-2008-2104-2015-2007- 2020-2129-2081-2017-2023-2080-2032-2091-2036-2018-2148-2067-2068- 2013-2069-2122-2035-2142-2130-2044-2005-3/26							

TOTAL TO COLLECT 76.50

Switched to 34 @ 2.25

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment 19.
 D. L. NASH Agent

1174

1741-00

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

GARFIELD CHEM. CORPN.

Number 81539

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 27, 1944

From Acid Mtys Weighed by DRG

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
	3/25-4959-38279						

TOTAL TO COLLECT 1.00

Switched to 2 @ .50

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 2nd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
D. L. NASH Agent

1741-PP

Form 3784-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

A S & R Co.

Number 81540

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 30, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2014-2000-2041-2132-2040-2039-2060-2062-2059-2056-2043-2076-2094- 2006-2031-2134-2064-2096-2077-2071-2002-2089-2022-2109-2121-2030- 2055-2103-2009-2070-2045-2083-2112-2092-2097-2054-3/27-2057-2115- 2019-2053-2033-2079-2034-2072-2066-2084-2111-2004-2046-2032-2091- 2036-2116-2024-2012-2124-2058-2025-2016-2038-2052-2142-2130-2106- 2048-2118-2099-2080-2008-2104-2015-2007-2020-3/28-2063-2014-2000- 2041-2082-2018-2148-2067-2121-2030-2055-2103-2009-2070-2045-2094- 2023-2068-2013-2069-2129-2081-2017-2044-2005-2006-2031-2134-2074- 2096-2112-2077-2071-2002-2089-2022-2109-2040-3/29							

TOTAL TO COLLECT 249.75

Switched to 111 cars @ 2.25

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 2nd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
D. L. NASH Agent

1175

1741-QQ

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81541

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 31, 1944

From Interrupted Movement of Line Haul Loads

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Destination	Rate	Collect	Prepaid
o	110-3/27-Mill Ore	114-207-3/30			
TOTAL TO COLLECT				3.00	

Switched to 3 @ 1.00

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1741-RR

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS & R Co.

Number 81542

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 31, 1944

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR			SWITCHING CHARGES		
Initial	Number	Contents Consignee and Destination	Rate	Collect	Prepaid
UCCX	1803 3/2	PPTS			
UCCS	1808 3/30	"			
TOTAL TO COLLECT				7.20	

Switched to 2 @ 3.60

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1176

1741-SS

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81543

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 31, 1944

From Thaw House Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
41450-61339-45863-3041-4369-3/3-3049-21675-40754-40002-64399-70108-3/3-62279-3/4-45168-43340-21440-3/6-21754-62558-62617-3/7-43257-3/14-92052-63178-3/16							

TOTAL TO COLLECT 10.50

Switched to 21 @ .50

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1741-TT

Form 3754-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

AS&R Co.

Number 81544

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION 19..
v

From Intraplant Switching

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
64580-63010-20560-63182-21573-3/27							
110 Yd Tings							
21228-20567-64231-41766-40706-3/30-45308-3/31							

TOTAL TO COLLECT 32.40

Switched to 12 @ 2.70

COPY

- () 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo.
 () 4th " Station Record

Received Payment..... 19..
 D. L. NASH Agent

1177

1741-UU

Form 2784-A

TO: THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

A S & R Co.

Number 81545

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION March 31, 1944

From UT CU CTS.

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
2122-2127-2097-2054-2083-2057-2115-2019-2078-2087-2102-2011-2035-							
2137-2053-2033-2079-2039-2069-2062-2059-2056-2043-2026-2061-2038-							
2052-2142-2130-2106-2048-2118-2099-2032-2091-2036-2143-2092-3/30-							
2034-2024-2012-2080-2008-2104-2015-2007-2031-2134-2074-2096-2009-							
2070-2045-2020-2063-2014-2000-2041-2116-2066-2084-2111-2004-2124-							
2046-2058-2025-2013-2129-2081-2044-2005-2006-2082-2018-2148-20673-							
3/31							

TOTAL TO COLLECT 173.25

Switched to 77 cars @ 2.25

COPY

() 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment 19.
 D. L. NASH Agent

1741-VV

Form 2784-A

TO: THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

A S & R Co.

Number 81546

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION 19.

From Beach Sand

(Name of Consignor, Industry Track, Team or Connecting Line Track)

CAR		Contents	Consignee and Destination	Weight	SWITCHING CHARGES		
Initial	Number				Rate	Collect	Prepaid
3215-3217-3208-3206-3210-3209-3222-3/27-3211-3209-3219-3204-3213-							
3205-3216-3220-3214-3213-3/28-3202-3200-3222-3208-3206-3210-3215-							
3217-3221-3201-3/30							

TOTAL TO COLLECT 60.75

Switched to 27 @ 2.25

COPY

() 1st Copy-Switch Bill
 () 2nd " Auditor's Copy
 () 3rd " Cashier's Memo
 () 4th " Station Record

Received Payment 19.
 D. L. NASH Agent

1741-WW

Form 1741-A

TO THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY DR
Wilson McCarthy and Henry Swan, Trustees

GARFIELD CHEM. CORPN.

Number 81547

FOR SWITCHING PERFORMED ON CARS LISTED

9680 GARFIELD STATION 19..

From Acid Mty's Weighed by DRGW

(Name of Consignor, Industry Truck, Team or Connecting Line Track)

CAR Initial Number	Contents	Consignee and Destination	SWITCHING CHARGES		
			Rate	Collect	Prepaid
4950-4957-39448-3/27-4956-4974-4958-3/28-4952-4963-3/29-39465-					
4965-8666-38281-3/30-8494-38285-39683-3/21					

TOTAL TO COLLECT 7.50

Switched to 15 @ .50

COPY

- () 1st Copy-Switch Bill
- () 2nd Auditor's Copy
- () 3rd Cashier's Memo
- () 4th Station Record

Received Payment 19..

D. L. NASH Agent

1742 Assignment No. 3

Page 1

Exhibit No. 6

Report of Inspectors MacDonald and McCormick observing switching performed by D&RGW engine 1024 at the American Smelting and Refining Company Plant at Garfield, Utah. March 23, 1944, as follows:

Commenced tour of duty at 3:30 p.m., and departed from Shore House track in Smelter yard at 3:53 p. m. moving light to Whiskers track at 3:56.

Picked up on Whiskers track at 3:58 p.m., and set to No. 5 track at 4:12 p. m.

UCR 20497 gon load of cottrell

Picked up on Middle track at 4:01 p. m., and set to No. 5 track at 4:12 p. m. the following:

NYC 111569 box car load of copper bars

" 99777 box car load of copper bars

Picked up on Bouillon track at 4:02 p. m., and set to NO. 5 track at 4:12 p. m.

D&RGW 67413 box load of bouillon

Moved light to coal trestle track, and at 4:17 p. m. picked up, and set to house track at 4:27 the following:

P&LE 33120 empty box
 NYC 146493 empty box
 PM 86278 empty box
 DRGW 56874 empty box
 NYC 277314 empty box
 PRR 596204 empty box

Moved light to coal trestle track, and at 4:17 p. m., picked up, and set to middle track at 4:25 p. m. the following:

Erie 78595 empty box
 NYC 120524 empty box

Picked up on House track at 4:22 p. m., and set to middle track at 4:25 p. m. the following empty box cars:

PRR 78546
 NYC 117205
 NYC 133156
 C&O 11481

Picked up on bouillon track at 4:20 p. m., and set to track No. 5 at 4:36 p. m. the following loads of copper bars:

NYC 117155
 WRT 917
 SEA BOARD 16114
 GM&O 6488
 MEC 4889

Moved light to track No. 2 and at 4:39 p. m., picked up the following bad order empty cars:

1743 Assignment No. 3

Page 2

AS&R Plant Garfield, Utah—

UP 62201
 D&RGW 43147
 " 43050

Above cars set on No. 9 at 4:41 p. m.

Moved light to east end of yard at 4:43 p. m., and at 4:50 p. m., picked up from Rip Track No. 2 the following empty gons:

D&RGW 45401, set to track No. 6 at 4:54 p. m.
 T&NO 42254, set to track No. 7 at 4:53 p. m.
 D&RGW 43121, set to track No. 10 at 4:52 p. m.
 UP 62073 set to track No. 7 at 4:51 p. m.

Picked up from Rip track No. 1, at 4:56 p. m. the following cars:

D&RGW 41822 empty gon, set back to rip No. 2 at 5:12 p. m.

D&RGW 67098 empty box, set to track No. 3 at 5:02 p. m.

D&RGW 42243 empty gon, set back to rip No. 2 at 5:12 p. m.

D&RGW 45299 empty gon, set to No. 6 at 5:01 p. m.

D&RGW 42199 empty gon, set back to rip No. 2 at 5:12 p. m.

UCR 21573 empty gon, set to track No. 3 at 5:00 p. m.

UCR 21260 empty gon, set to track No. 3 at 5:00 p. m.

UP 63182 empty gon, set to track No. 3 at 5:00 p. m.

UP 63101 empty gon, set to track No. 3 at 5:00 p. m.

UCR 20560 empty gon, set to track No. 3 at 5:00 p. m.

NP 50115 empty gon, set to track No. 6 at 4:58 p. m.

UCR 21344 empty gon, set to No. 7 at 4:57 p. m.

Picked up on No. 9 the following empty cars; at 5:05 p. m.

D&RGW 45386 empty gon, set to rip No. 2 at 5:12 p. m.

UP 85338 empty hopper, set to rip No. 1 at 5:09 p. m.

UCR 20414 empty gon, set to rip No. 1 at 5:09 p. m.

D&RGW 40865 empty gon, set to rip No. 1 at 5:09 p. m.

" 41320 empty gon, set to rip No. 1 at 5:09 p. m.

UP 62666 empty gon, set to rip No. 1 at 5:09 p. m.

D&RGW 42383 empty gon, set to rip No. 1 at 5:09 p. m.

" 41157 empty gon, set to rip No. 1 at 5:09 p. m.

" 45276 empty gon, set to rip No. 1 at 5:09 p. m.

" 71554 empty gon, set to rip No. 1 at 5:09 p. m.

" 43050 empty gon, set to rip No. 1 at 5:09 p. m.

" 43147 empty gon, set to rip No. 1 at 5:09 p. m.

UP 62201 empty gon, set to rip No. 1 at 5:09 p. m.

Moved lite from Rip No. 2 to track No. 8 at 5:15 p. m.

Picked up on No. 8 at 5:17 p. m., and set to track No. 4 at 5:20 p. m. the following cars:

D&RGW 45263 gon load of ore

" 45146 gon load of ore

" 41034 gon load of ore

1744 Assignment No. 3

Page 3

AS&R Plant Garfield, Utah—

Moved lite from track No. 4 to track No. 2, and at 5:26 p. m. picked up the following cars:

D&RGW 40209 gon load, set to No. 8 at 5:37 p. m.

" 43057 gon load, set to No. 8 at 5:37 p. m.

" 67366 box load, set to No. 2 at 5:36 p. m.

" 43186 empty gon, set to No. 9 at 5:35 p. m.

D&RGW 43091 gon load, set to No. 4 at 5:34 p. m.
 IC 85372 gon load, set to No. 2 at 5:33 p. m.
 IC 84323 gon load, set to No. 2 at 5:33 p. m.
 UP 64991 gon load, set to No. 8 at 5:31 p. m.
 UCR 20404 gon load, set to No. 8 at 5:31 p. m.
 HCRR 859 box load, set to No. 5 at 5:30 p. m.
 IC 11522 box load, set to No. 3 at 5:27 p. m.

Moved lite to No. 4 track at 5:38 p. m., and picked up at 5:40 p. m. the following cars:

D&RGW 43091 gon load, set to D line at 5:45 p. m.
 " 45263 gon load, set to "B" line at 5:43 p. m.
 " 45146 gon load, set to "B" line at 5:43 p. m.
 " 41034 gon load, set to "B" line at 5:43 p. m.

Moved lite from "B" Line to No. 2 at 5:46 p. m., and at 5:47 p. m. picked up on track No. 2 the following cars:

D&RGW 67366 box load, set to No. 1 Thaw House at 5:55 p. m.
 IC 85372 gon load, set to No. 1 Thaw House at 5:55 p. m.
 IC 84323 gon load, set to No. 1 Thaw House at 5:55 p. m.
 UCCX 1807 empty gon, set to No. 10 track 5:54 p. m.
 " 1808 empty gon, set to No. 10 track 5:54 p. m.
 " 1812 empty gon, set to No. 10 track 5:54 p. m.
 BG 2031 empty gon, set to No. 10 track 5:54 p. m.
 " 2060 empty gon, set to No. 10 track 5:54 p. m.
 " 2083 empty gon, set to No. 10 track 5:54 p. m.
 " 2112 empty gon, set to No. 10 track 5:54 p. m.
 " 2092 empty gon, set to No. 10 track 5:54 p. m.
 " 2025 empty gon, set to No. 10 track 5:54 p. m.
 " 2061 empty gon, set to No. 10 track 5:54 p. m.
 " 2038 empty gon, set to No. 10 track 5:54 p. m.
 " 2052 empty gon, set to No. 10 track 5:54 p. m.
 " 2084 empty gon, set to No. 10 track 5:54 p. m.
 " 2097 empty gon, set to No. 10 track 5:54 p. m.

Picked up on No. 1 Thaw House at 5:55 p. m., and set "C" Line at 6:00 p. m. the following cars:

D&RGW 67366 box load
 IC 85322 gon load
 IC 84323 gon load
 BG 3219 gon load
 BG 3222 gon load

Moved light from "C" Line to extension track at 6:01 p. m., and picked up at 6:03 p. m. the following cars
 D&RGW 19102 empty tank set to 2 line @ 6:50 p. m.
 GATX 39592 empty tank set to 5 line @ 6:54 p. m.

1745 Assignment No. 3

Page 4

AS&R Plant Garfield, Utah—

Engine and 2 cars moved from extension to track No. 3, at 6:04 p. m., picked up the following cars:

IC 11522 load, set to No. 5 track at 6:15 p. m.
 UCR 20560 empty gon, set to Wall track at 6:33 p. m.
 UP 63101 empty gon, set to Wall track at 6:33 p. m.
 UP 63182 empty gon, set to Wall track at 6:33 p. m.
 UCR 21260 empty gon, set to Wall track at 6:33 p. m.
 UCR 21573 empty gon, set to Wall track at 6:33 p. m.

Picked up on No. 5 track at 6:13 p. m., the following cars:

HCRR 859 set to store house at 6:27 p. m.
 IC 11522 set to Ping Pong Track at 6:29 p. m.

Engine and 2 cars moved from Ping Pong track at 6:31 p. m., to track 2 Line, and at 6:46 p. m., picked up: the following car

CNW 46516, box load, set to No. 5 track at 7:05 p. m.

Engine moved lite to Pest House No. 1 at 7:06 p. m., and at 7:11 p. m., picked up the following cars; and set to No. 1 track:

BG 3210 empty gon
 BG 3200 empty gon
 BG 2118 empty gon
 BG 2018 empty gon
 BG 2148 empty gon
 BG 2067 empty gon

These cars and the 4 cars listed below were picked up from No. 1 track, and taken to scale track at 7:15 p. m.

BG 2068 empty gon
 BG 2013 empty gon
 BG 2069 empty gon
 BG 2122 empty gon

All cars from No. 1 track weighed between 7:18 p. m. and 7:25 P. M., and left on scales.

Then picked up on Pocket track at 7:26 p. m., and set to No. 1 track at 7:28 p. m.

BG 2003 gon load

Engine 624 left for Garfield, Utah, at 7:35 p. m.

1746 Assignment No. 3

Page 5

Report of Inspector McCormick observing switching performed by D&RGW engine 1024 at the American Smelting and Refining Company Plant at Garfield, Utah. March 24, 1944 as follows:

Commenced tour of duty at 3:30 p. m., and departed from Store House track in Smelter yard at 3:51 p. m., moving light from Store House to Long House, and picked at 3:51 p. m., and set to Middle Track at 3:54 p. m. the following cars:

Milw 701456 empty box
SSW 32432 empty box
Milw. 712277 empty box
RI 146973 empty box

Picked up on bullion track at 3:56 p. m., and set to No. 5 track at 4:04 p. m. the following cars:

D&RGW 66874 box car bullion
PRR 596204 box car bullion
NYC 146493 box car bullion
PM 86278 box car bullion
C&O 4388 box car bullion

Moved lite from 5 to No. 2, and at 4:14 p. m., picked up, and set to No. 10 track at 4:18 p. m. the following empty cars:

BG 2003
BG 2111
BG 2004
BG 2057
BG 2106
BG 2048
BG 2129

Picked up on No. 2 track at 4:14 p. m., and set to "B" line at 4:20 p. m. the following cars:

UCR 21573 gon load
UCR 21260 gon load

Moved light from "B" line to east end of track No. 3 and at 4:25 picked up the following cars, and set to scales at 4:28 p. m.

UP 64223 gon load
UCR 21249 gon load
UP 87184 hopper load
UCR 21061 gon load
UP 62773 gon load
UP 64938 gon load

UP 4965 empty tank
 GATX 39448 empty tank
 DRGW 70057 gon load
 DRGW 71116 gon load
 UCR 21200 gon load
 DRGW 40682 gon load
 UP 62175 gon load
 UP 4952 empty tank
 UP 62617 gon load
 WP 5783 gon load

All of above cars weighed between 4:34 p. m. and 4:52 p. m.

1747 Assignment No. 3

Page 6

Moved light from scale track to rip No. 2 at 4:55 p. m. Picked up the following cars and set to track No. 6 at 5:07 p. m.

L&RGW 31822 empty gon

" 45386 empty gon

Picked up from Rip track No. 1 at 4:56 p. m. the following cars:

UCR 20414 empty gon, set to track No. 7 at 5:05 p. m.
 UP 62366 empty gon, set to track No. 7 at 5:05 p. m.
 UP 62261 empty gon, set to track No. 7 at 5:00 p. m.
 DRGW 42383 empty gon, set to No. 6 track at 5:03 p. m.
 DRGW 45276 empty gon, set to No. 6 track at 5:02 p. m.
 DRGW 43050 empty gon, set to No. 8 track at 5:01 p. m.
 " 43147 empty gon, set to No. 8 track at 5:01 p. m.

Picked up on No. 9 track at 5:14 p. m. the following cars:

UCR 20779 empty gon, set to No. 5 track at 5:16 p. m.
 SP 91979 empty gon, set to No. 5 track at 5:16 p. m.
 SP 91451 empty gon, set to No. 5 track at 5:19 p. m.
 UCR 20830 empty gon, set to No. 5 track at 5:23 p. m.
 DRGW 67366 empty box, set to No. 5 at 5:24 p. m.
 IC 85372 empty gon, set to No. 5 at 5:24 p. m.
 IC 84323 empty gon, set to No. 5 at 5:24 p. m.
 NP 50115 empty gon, set to No. 5 at 5:20 p. m.
 DRGW 45263 empty gon, set to No. 6 at 5:21 p. m.
 " 41034 empty gon, set to No. 6 at 5:21 p. m.
 " 45273 empty gon, set to No. 6 at 5:21 p. m.
 " 40387 empty gon, set to No. 6 at 5:21 p. m.
 D&SL 34095 empty gon, set to No. 6 at 5:21 p. m.
 DRGW 43991 empty gon, set to No. 6 at 5:22 p. m.
 " 43186 empty gon, set to No. 6 at 5:25 p. m.

Picked up on No. 5 track at 5:28 p. m. the following cars:

UCR 20779 empty gon. set to rip No. 1 at 5:31 p. m.
 SP 91979 empty gon. set to rip No. 1 at 5:31 p. m.
 SP 91451 empty gon. set to rip No. 1 at 5:31 p. m.
 UCR 20830 empty gon. set to rip No. 1 at 5:31 p. m.
 D&RGW 67366 empty box, set to rip No. 2 at 5:33 p. m.
 IC 85372 empty gon. set to rip No. 2 at 5:33 p. m.
 IC 84323 empty gon. set to rip No. 2 at 5:33 p. m.
 NP 50115 empty gon. set to rip No. 2 at 5:33 p. m.

Moved lite from Rip 2 to No. 6, and at 5:35 picked up the following cars, and set to Wall track in New Yard at 5:44 p. m.

D&RGW 41391 empty gon
 " 45263 empty gon
 " 41034 empty gon
 " 45273 empty gon
 " 40387 empty gon
 " 43186 empty gon
 " 43091 empty gon

D&SE 34095 empty gon

Moved Lite from New Yard to west end of No. 2 at 5:48 p. m. and at 6:00 p. m. picked up the following cars:

UP 64223 load gon. set to No. 8 track at 6:20 p. m.

1748 Assignment No. 3

Page 7

UCR 21249 gon load, set to No. 8 track at 6:20 p. m.
 UP 87184 hop load, set to No. 8 track at 6:20 p. m.
 UCR 21061 gon load, set to No. 8 track at 6:20 p. m.
 UP 64938 gon load, set to No. 8 track at 6:03 p. m.
 UP 62617 gon load, set to No. 8 track at 6:10 p. m.
 WP 5783 gon load, set to No. 8 track at 6:10 p. m.
 DRGW 42111 gon load, set to No. 2 track at 6:12 p. m.
 UP 63182 gon load, set to No. 8 track at 6:14 p. m.
 UCR 20560 gon load, set to No. 8 track at 6:14 p. m.
 UP 63101 gon load, set to No. 8 track at 6:14 p. m.
 UP 62773 gon load, set to "D" Line at 6:25 p. m.
 DRGW 70057 gon load, set to "D" Line at 6:25 p. m.
 DRGW 71116 gon load, set to "D" Line at 6:25 p. m.
 DRGW 40682 gon load, set to "D" Line at 6:25 p. m.
 UCR 21200 gon load, set to "D" Line at 6:25 p. m.
 UP 62175 gon load, set to "D" Line at 6:25 p. m.
 UP 62012 gon load, set to "D" Line at 6:25 p. m.
 UP 4965 empty tank, set to extension at 6:30 p. m.
 UP 4952 empty tank, set to extension at 6:30 p. m.
 GATX 39448 empty tank, set to extension at 6:30 p. m.

Moved lite from extension to No. 5 line at 6:31 p. m., and at 6:42 p. m. picked up the following cars, and set to No. 5 track at 7:02 p. m.

GATX 38279 tank car acid

UP 4959 tank car acid

Picked up on coal trestle at 6:48 p. m. the following cars:

NYC 111562 empty box, set to middle track at 6:51 p. m.

NYC 110694 empty box, set to middle track at 6:51 p. m.

DRGW 67098 empty box, set to middle track at 6:51 p. m.

W&LE 25044 empty box, set to middle track at 6:51 p. m.

L&N 90888 empty box, set to Long house track at 6:52 p. m.

B&O 381580 empty box, set to Long house track at 6:52 p. m.

SLSF 160536 empty box, set to Long house track at 6:52 p. m.

C&O 4464 empty box, set to Long house track at 6:52 p. m.

Picked up on bullion track at 6:55 p. m., and set to No. 5 track at 7:02 p. m. the following cars.

P&LE 33120 box load

NKP 15556 box load

PRR 70051 box load

Moved lite from No. 5 track to Pest House track, and at 7:03 p. m. picked up the following cars, and set to scale track at 7:08 p. m.

BG 2005 empty gon

BG 2077 empty gon

BG 2071 empty gon

BG 2002 empty gon

BG 2089 empty gon

BG 2022 empty gon

1749 Assignment No. 3

Page 8

Picked up on No. 1 track at 7:06 p. m., and set to scale track at 7:08 p. m. the following cars:

BG 2109 empty gon

BG 2121 empty gon

BG 2030 empty gon

BG 2055 empty gon

Cars picked up on Pest House and No. 1, were weighed between 7:08 p. m. and 7:15 p. m.

Picked up on Engles track at 7:15 p. m. the following cars:
 BG 2020 gon load, set to Pest House track at 7:18 p. m.
 BG 2024 gon load, set to Pest House track at 7:18 p. m.
 BG 2156 gon load, set to Pest House track at 7:18 p. m.
 BG 2012 gon load, set to Pest House track at 7:18 p. m.
 BG 2063 gon load, set to Pest House track at 7:18 p. m.
 BG 2014 gon load, set to Pest House track at 7:18 p. m.
 BG 2076 gon load, set to No. 1 track at 7:21 p. m.
 BG 2094 gon load, set to No. 1 track at 7:21 p. m.
 BG 2006 gon load, set to No. 1 track at 7:21 p. m.

Picked up from Pocket track at 7:25 p. m., and set to No. 1 track at 7:27 p. m. the following car:
 BG 2039 gon load

Departed for Garfield at 7:30 p. m.

Cars originally spotted on Long House track are set over to middle track, as Loading Superintendent claims cars can be handled by their engine from middle track easier than from house track. After switch engine goes off duty, the smelter engine handles cars from the house track the same as from the middle track.

1750 Assignment No. 3

Page 9

Report of Inspector McCormick observing switching performed by D&RGW engine 1024 at the American Smelting and Refining Company Plant at Garfield, Utah. March 25, 1944, as follows:

Commenced tour of duty at 3:30, moved light to whiskers track at 3:36 p. m., and at 3:40 p. m. picked up and set to No. 5 track at 4:00 p. m. the following car:
 DRGW 43055 gon load

Picked up at Store House at 3:43 p. m., and set to No. 5 track at 4:00 p. m. the following car:
 HCRR 859 box car load

Picked up on house track at 3:46 p. m., and set to middle track at 3:49 p. m. the following cars:
 I&N 90137 empty box
 UP 75507 empty box
 ATSF 146772 empty box
 NKI 15571 empty box

Picked up on bullion track at 3:50 p. m., set to No. 5 track at 4:00 p. m. the following cars:

SLSF 160536 box load bullion
 B&O 381580 box load bullion
 UP 305114 box load bullion

Picked up on No. 2 track at 4:01 p. m., and set to No. 10 track at 4:07 p. m. the following empty gons:

BG 2014
 BG 2000
 BG 2041
 BG 2082
 BG 2040
 BG 2039
 BG 2076
 BG 2094
 BG 2006
 BG 2031
 BG 2134

Moved lite to No. 7 track, and at 4:10 p. m. picked up the following cars:

DRGW 45308 gon load, set back to No. 7 track at 4:12 p. m.
 " 42192 gon load, set back to No. 7 track at 4:12 p. m.
 " 42422 gon load, set back to No. 7 track at 4:12 p. m.
 " 40566 gon load, set back to No. 7 track at 4:12 p. m.
 ITC 12255 gon load, set back to No. 7 track at 4:15 p. m.
 UCR 21188 gon load, set back to No. 7 track at 4:15 p. m.
 WP 5315 gon load, set to "D" line at 4:40 p. m.
 DRGW 40230 gon load, set to "D" line at 4:40 p. m.
 " 45006 gon load, set to "D" line at 4:40 p. m.

1751 Assignment No. 3

Page 10

Moved lite to No. 8 track and at 4:16 p. m. picked up the following cars:

DRGW 41082 gon load, set to No. 7 track at 4:22 p. m.
 UCR 21061 gon load, set to No. 7 track at 4:22 p. m.
 UP 87184 hopper load, set to No. 7 track at 4:22 p. m.
 UP 64223 gon load, set to No. 7 track at 4:22 p. m.
 UP 64938 gon load, set to No. 7 track at 4:22 p. m.
 UP 64991 gon load, set to No. 7 track at 4:22 p. m.
 UCR 20404 gon load, set to No. 7 track at 4:22 p. m.
 UCR 21249 gon load, set to No. 7 track at 4:22 p. m.
 BG 3047 gon load, set to No. 7 track at 4:22 p. m.
 BG 3000 gon load, set to "D" line at 4:40 p. m.
 BG 3001 gon load, set to "D" line at 4:40 p. m.
 BG 3009 gon load, set to "D" line at 4:40 p. m.
 UCR 2056 gon load, set to "B" line at 4:59 p. m.

UP 63101 gon load, set to "B" line at 4:59 p. m.
 UP 63182 gon load, set to "B" line at 4:59 p. m.

Moved lite from No. 7 track to No. 2 track, and at 4:25 p. m. picked up the following cars:

UP 62558 gon load, set to No. 7 track at 4:32 p. m.
 UP 63507 gon load, set to No. 7 track at 4:32 p. m.
 UP 63077 gon load, set to No. 7 track at 4:32 p. m.
 UP 62598 gon load, set to No. 7 track at 4:30 p. m.
 UP 62544 gon load, set to No. 7 track at 4:30 p. m.
 IC 83602 gon load, set to No. 7 track at 4:30 p. m.
 UCR 20710 gon load, set to No. 7 track at 4:30 p. m.
 UCR 20209 gon load, set to No. 9 track at 4:31 p. m.

Moved lite from No. 7 to No. 2 and at 4:36 p. m. picked up the following cars, and set to "D" line at 4:40 p. m.

DRGW 43186

" 43091

" 40387

" 45372

" 41034

" 45263

" 41391

D&SL 34095

Picked up from No. 2 at 4:36 p. m. and set to No. 10 at 4:51 p. m.

UCCX 1816 empty gon

Moved lite from "D" line to No. 1 thaw house and at 4:52 p. m. picked up the following cars, and set to "C" line at 4:56 p. m.

BG 3214 gon load

BG 3218 gon load

Moved lite from "B" line to Rip track No. 2, picked up at 5:05 p. m., and set to No. 7 track at 5:07 p. m. the following cars:

NP 50115 empty gon

IC 84323 empty gon

IC 85372 empty gon

1752 Assignment No. 3

Page 11

Picked up on Rip track No. 1 at 5:10 p. m. the following cars:

DRGW 41316 empty gon, set to No. 6 at 5:13 p. m.

UP 85338 empty hopper, set to No. 6 at 5:15 p. m.

DRGW 40865 empty gon, set to No. 7 at 5:14 p. m.

DRGW 41320 empty gon, set to No. 7 at 5:14 p. m.
 " 41157 empty gon, set to No. 7 at 5:14 p. m.
 " 71534 empty gon, set to No. 7 at 5:14 p. m.
 " 42343 empty gon, set to No. 7 at 5:16 p. m.
 " 42199 empty gon, set to No. 7 at 5:16 p. m.
 UCR 20779 empty gon, set to No. 8 at 5:21 p. m.
 " 20830 empty gon, set to No. 8 at 5:21 p. m.
 SP 91451 empty gon, set to No. 8 at 5:21 p. m.
 SP 91979 empty gon, set to No. 8 at 5:21 p. m.

Moved lite from Rip No. 1 to track No. 8 picked up at 5:17 p. m., and set to No. 10 track at 5:19 p. m. the following empty gondolas:

DRGW 43050
 " 43147
 " 43121

Moved lite to No. 9 track, picked up at 5:28 p. m. and set to Rip track No. 1 at 5:31 p. m. the following empty gondolas:

UCR 21623
 " 21337
 " 21200
 UP 201057
 UP 62175
 UP 62012
 DRGW 43057
 " 70057
 " 40682
 " 43326
 C&W 74219

Picked up on No. 9 track at 5:28 p. m., and set to Rip Track No. 2 at 5:30 p. m. the following car:
 UCR 20209 gon load

Moved lite from Rip track to Engels track and at 5:36 p. m. picked up the following loaded cars and set to Pest House track at 5:38 p. m.

BG 2034
 " 2079
 " 2033
 " 2053
 " 2019
 " 2115
 " 2045
 " 2070
 " 2009

AT THE

1753 Assignment No. 3

Page 12

Moved lite from test house track to coal trestle track, and at 5:45 p. m. picked up the following cars:

C&O 11303 empty box, set to Middle track at 5:50 p. m.

NKP 17312 empty box, set to house track at 5:51 p. m.

RI 145882 empty box, set to house track at 5:51 p. m.

RI 145597 empty box, set to house track at 5:51 p. m.

C&O 2255 empty box, set to house track at 5:51 p. m.

CBQ 33617 empty box, set to house track at 5:51 p. m.

Picked up on bullion track at 5:52 p. m., and set to No. 5 track at 5:59 p. m. the following cars:

C&O 4464 box load bullion

PM 91095 box load bullion

Departed for Garfield at 6:01 p. m.

1754 Assignment No. 2 Garfield, Utah Page 13

Report of Inspector McCormick observing switching performance of D&RGW engine 1024 at the American Smelting and Refining plant at Garfield, Utah. March 26, 1944

Engine 1024 commenced tour of duty at 3:30 p. m., and at 3:45 p. m. departed from Store House track for Long House track.

Picked up on long house track at 3:51 p. m., and set to Middle track at 3:53 p. m. the following empty cars.

Erie 76647 empty box

P&LE 35484 empty box

NYC 157329 empty box

MP 30473 empty box

NYC 107791 empty box

Erie 76311 empty box

Picked up on Bullion track at 3:55 p. m., and set to track #5 at 4:07 p. m. the following loaded box cars.

RI 145597 CB&Q 22617

RI 145882 C&O 2255

Moved lite from track No. 5 to Rip tracks and at 4:12 p. m. picked up the following cars on Rip 1:

UCR 20209 gon load, set to track 3 at 4:17 p. m.

DRGW 67366 mty box, set to track 3 at 4:17 p. m.

DRGW 40487 mty gon, set to track 3 at 4:18 p. m.

Picked up on Rip No. 2 at 4:23 p. m. the following mty gons:

D&RGW	43326	set to track 6 at 4:24 p. m.
UP	62012	set to track 6 at 4:24 p. m.
UP	62175	set to track 8 at 4:25 p. m.
DRGW	40682	set to track 8 at 4:25 p. m.
UCR	21290	set to track 8 at 4:25 p. m.
DRGW	70057	set to track 8 at 4:25 p. m.
DRGW	43057	set to track 6 at 4:26 p. m.
C&NW	74219	set to track 3 at 4:27 p. m.
UCR	21237	set to track 8 at 4:28 p. m.
UCR	21623	set to track 8 at 4:28 p. m.
UP	201057	set to track 8 at 4:28 p. m.

Picked up on Track No. 7 at 1:29 p. m. and set to track No. 6 at 4:31 p. m.

DRGW	43055	loaded gon
"	42343	empty gon
"	42199	" "
"	40865	" "
"	41320	" "
"	41157	" "
"	71554	" "
NP	50115	" "
IC	84323	" "
IC	85372	" "

1755 Assignment No. 2 Garfield, Utah. Page 14

Lite to track No. 9 picked up at 4:41 p. m. and set to Rip No. 2 at 4:42 the following mty gons.

D&RGW	41391	D&RGW	42111
"	45263	"	40209
"	41034	"	45006
"	45372	D&SL	34095
"	40387	WP	5315
"	43091	WP	5783
"	43186	UCR	20638
"	40230		

Lite to Engles track and at 4:47 p. m., picked up the following loaded gons.

BS	2130	set to Pest House track at 4:50 p. m.
BS	2142	set to Pest House track at 4:50 p. m.
"	2035	set to Pest House track at 4:50 p. m.
"	2122	set to Pest House track at 4:50 p. m.
"	2069	set to Pest House track at 4:50 p. m.
"	2005	set to track No. 1 at 4:55 p. m.
"	2044	set to track No. 1 at 4:55 p. m.

Picked up on Pocket track and set to Track No. 1 the following loaded gon.

BS 2017

Lite to West end of track No. 3, and picked up at 4:59 p. m. the following cars:

C&NW 74219 mty gon set to track No. 6 at 5:02 p. m.

UCR 20209 loaded gon, set to track No. 5 at 5:03 p. m.

DRGW 67366 mty box, set to track No. 8 at 5:04 p. m.

WP 64991 loaded gon, set to track No. 5 at 5:14 p. m.

WP 64938 loaded gon, set to track No. 7 at 5:15 p. m.

Lite from No. 8 to No. 7 track, picked up at 5:06 p. m., and set to No. 5 track at 5:09 p. m., the following loaded gon:

UCR 21188

The 10 loaded cars ahead of this car were set back to Track No. 7 at 5:11 p. m.

Picked up on No. 5 track at 5:17 p. m. the following loaded gons:

UCR 20209 set to "D" line at 5:19 p. m.

UCR 21188 set to "D" line at 5:19 p. m.

UP 64991 set to "C" line at 5:21 p. m.

Lite to "F" line and picked up at 5:24 p. m. 3 empty gons as follows:

AS&R 102 set to Mill at 5:41

AS&R 221 set to Mill at 5:41

AS&R 220 set to Mill at 5:41

These cars shunted toward No. 8 later picked up and set as shown.

Lite to No. 1, picked up at 5:28 p. m. the following empty gons.

BS 2106 BS 2118

BS 2048 BS 2099

Doubled the above cars to Pest house and at 5:30 p. m. picked up 2 empty gons as follows:

BS 2023 BS 2080

1756 Assignment No. 2 Garfield, Utah Page 15

Then pulled all 6 cars over No. 1 switch points and were left on No. 1 track at 5:37 p. m.

Lite to No. 8 and picked up at 5:34 p. m. the following cars:

DRGW 67366 mty box, set to Store House at 6:02 p. m.

UP 64586 mty gon, set to Wall track at 5:57 p. m.

UP 63101 mty gon, set to Wall track at 5:57 p. m.

UCR 20560 mty gon, set to Wall track at 5:57 p. m.
 UP 63182 mty gon, set to Wall track at 5:57 p. m.
 UCR 21573 mty gon, set to Wall track at 5:57 p. m.

Picked on coal trestle track at 5:46 p. m. the following empty box cars.

NYC 110953 set to Long House at 5:52 p. m.
 BA 36253 set to Long House at 5:52 p. m.
 Erie 70507 set to Long House at 5:52 p. m.
 DRGW 66851 set to Long House at 5:52 p. m.
 DRGW 66604 set to Long House at 5:52 p. m.
 ATSF 135109 set to Long House at 5:52 p. m.
 ISN 17009 set to Store House at 6:02 p. m.

Lite from Wall track to Bullion track picked up at 6:05 p. m., and set to No. 5 at 6:12 p. m. the following loaded box cars.

Soo 20048
 RI 146152
 RI 148295

Departed for Garfield at 6:15 p. m.

1757

Exhibit No. 7

Assignment No. 2 Garfield, Utah Page 1

Assignment No. 2 C. B. Higgins on D&RGW Railway at American Smelting and Refining Company Plant at Garfield, Utah. Hours of work 8:00 a. m. to 4:00 p. m. March 23, 1944.

DRGW Engine 1016

ENGINE FOREMAN G. C. Phillips

Engineer H. B. Rugg

Fireman C. W. Parker

Helpers J. W. Koer and W. W. Asper

Crew called for 7:30 a. m. at Garfield, station about 2 miles from the Garfield Smelter Yards. Engines tie up here to be coaled and watered by a hostler

Departed Garfield at 7:40 a. m. lite, arrived Garfield Smelter Yards at 7:53 a. m. lite. Went lite to Pest House track, and picked up B&G 2130 empty, weighed, and set to track 9 8:49 a. m.

B&G 2044 empty, weighed, and set to track 9 8:49 a. m.

" 2099 empty, weighed, and set to track 9 8:49 a. m.

" 2142 empty, weighed, and set to track 9 8:49 a. m.

B&G 2000 empty, weighed, and set to track 9 8:49 a. m.
 " 2041 empty, weighed, and set to track 9 8:49 a. m.
 " 2082 empty, weighed, and set to track 9 8:49 a. m.
 " 2022 empty, weighed, and set to track 9 8:49 a. m.

Then to track 1, and picked up

BG 2008 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2104 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2015 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2007 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2020 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2116 empty, weighed, set to track No. 9 8:49 a. m.
 BG 2024 empty, weighed, set to track No. 9 8:49 a. m.

BG 2031 load, set to Old Pest House

BG 2060 load, set to Old Pest House

BG 2012 empty, not weighed, set to track 9 8:49 a. m.
 BG 2063 empty, not weighed, set to track 9 8:49 a. m.
 BG 2014 empty, not weighed, set to track 9 8:49 a. m.
 BG 2076 empty, not weighed, set to track 9 8:49 a. m.
 BG 2094 empty, not weighed, set to track 9 8:49 a. m.
 BG 2006 empty, not weighed, set to track 9 8:49 a. m.
 BG 2072 empty, not weighed, set to track 9 8:49 a. m.
 BG 2066 empty, not weighed, set to track 9 8:49 a. m.
 BG 2062 empty, not weighed, set to track 9 8:49 a. m.
 BG 2059 empty, not weighed, set to track 9 8:49 a. m.
 BG 2056 empty, not weighed, set to track 9 8:49 a. m.
 BG 2043 empty, not weighed, set to track 9 8:49 a. m.
 BG 2103 empty, not weighed, set to track 9 8:49 a. m.
 BG 2009 empty, not weighed, set to track 9 8:49 a. m.

Then to lower dock "4" and picked up

AS&R 225 empty, set to track No. 1

AS&R 252 empty, weighed, set to track No. 1

AS&R 303 empty, weighed, set to track No. 1

DRGW 45386 empty, weighed, set to track No. 1

UP 85338 empty, weighed, set to track No. 1

AS&R 226 empty, not weighed and set to track No. 1

1758 Assignment No. 2

Page 2

AS&R 221 empty, not weighed, set to track 1
 9:33 a. m.

UCR 20414 mty, weighed, set to track 1 9:33 a. m.

UP 62666 mty, weighed, set to track 2 9:33 a. m.

DRGW 42383 mty, weighed, set to track 2 9:33 a. m.

DRGW 41157 mty, not weighed, set to track 2 9:33 a. m.

UP 62201 mty, weighed, set to track 2 9:33 a. m.

UP 63992 mty, weighed, set to track 2 9:33 a. m.
 UP 63502 mty, weighed, set to track 2 9:33 a. m.
 DRGW 45276 mty, weighed, set to track 2 9:33 a. m.
 " 71554 mty, weighed, set to track 2 9:33 a. m.
 " 40865 mty, not weighed, set to track 2 9:33 a. m.
 " 41320 mty, weighed, set to track 2 9:33 a. m.
 AS&R 11 mty, not weighed, set to track 2 9:33 a. m.
 AS&R 204 mty, not weighed, set to track 2 9:33 a. m.
 " 10 mty, not weighed, set to track 2 9:33 a. m.
 " 4 mty, not weighed, set to track 2 9:33 a. m.
 UP 88806 mty, weighed, set to track 2 9:33 a. m.
 UP 62290 mty, weighed, set to track 2 9:33 a. m.
 UP 63257 mty, weighed, set to track 2 9:33 a. m.
 BG 3220 mty, not weighed, set to track 2 9:33 a. m.
 BG 3217 mty, not weighed, set to track 2 9:33 a. m.
 BG 3215 mty, not weighed, set to track 2 9:33 a. m.

Then to track No. 4, and picked up

BG 3200 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3219 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3222 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3203 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3211 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3209 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3205 sand, weighed, and set on track 1 west of scales
 9:54 a. m.
 BG 3216 sand, weighed, and set on track 1 west of scales
 9:54 a. m.

Then back to track 4 and picked up

UCCX 1801 concentrates, weighed, set on track 1 west of
 scales 10:17 a. m.
 " 1804 " " set on track 1 west of
 scales 10:17 a. m.
 " 1816 " " set on track 1 west of
 scales 10:17 a. m.
 " 1805 " " set on track 1 west of
 scales 10:17 a. m.
 " 1811 " " set on track 1 west of
 scales 10:17 a. m.

UCCX 1806 concentrates, weighed set on track 1 west of scales 10:17 a. m.
 BG 2112 " " set on track 1 west of scales 10:17 a. m.
 BG 2092 " " set on track 1 west of scales 10:17 a. m.
 BG 2025 " " set on track 1 west of scales 10:17 a. m.
 BG 2061 " " set on track 1 west of scales 10:17 a. m.
 BG 2038 " " set on track 1 west of scales 10:17 a. m.

1759 Assignment No. 2 Garfield, Utah Page 3
 BG 2052 concentrates, weighed, set on track 1 west of scales 10:17 a. m.
 BG 2084 " " set on track 1 west of scales 10:17 a. m.

Then back to track No. 3 and picked up

BG 2097 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2068 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2013 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2069 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2122 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2080 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2032 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2091 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2036 concentrates, weighed, set to track 1 10:35 a. m.
 BG 2003 concentrates, weighed, set in pocket account of track No. 1 full

Then went to track 5, and picked up

GATX 38278 sulphuric acid, weighed, set to track 2 10:51 a. m.
 CGA 57098 bullion weighed, set to track 2 10:51 a. m.
 NYC 123694 bullion weighed, set to track 2 10:51 a. m.
 Son 340133 bullion weighed, set to track 2 10:51 a. m.
 NYC 147113 bullion weighed, set to track 2 10:51 a. m.
 ACL 56865 bullion weighed, set to track 2 10:51 a. m.

Then to track 5, and picked up

D&RGW 67183 bullion, weighed, set to track 2 11:13 a. m.
 SSW 38924 bullion, weighed, set to track 2 11:13 a. m.
 DRGW 67383 bullion, weighed, set to track 2 11:13 a. m.
 " 66041 bullion, weighed, set to track 2 11:13 a. m.
 " 66238 bullion, weighed, set to track 2 11:13 a. m.

Then back to track 3 and picked up

BG 2002 concentrates, weighed, set to Old Pest House 11:39 a. m.

BG 2089 concentrates, weighed, set to Old Pest House 11:39 a. m.

BG 2022 concentrates, weighed, set to Old Pest House 11:39 a. m.

BG 2008 concentrates, weighed, set to Old Pest House 11:39 a. m.

BG 2104 concentrates, weighed, set to Old Pest House 11:39 a. m.

1765 Assignment No. 2 Garfield, Utah Page 9

BG 2015 concentrates, weighed, set to Old Pest House 11:39 a. m.

BG 207 concentrates, weighed, set to Old Pest House 11:39 a. m.

Tied up for lunch

Then went to track 3, picked up

UP 63354 scrap, weighed, set to track 2 2:24 p. m.

BG 2003 empty weighed, set to track 2 2:24 p. m.

BG 2111 empty weighed, set to track 2 2:24 p. m.

BG 2004 empty weighed, set to track 2 2:24 p. m.

BG 2057 empty weighed, set to track 2 2:24 p. m.

BG 2106 empty weighed, set to track 2 2:24 p. m.

BG 2048 empty weighed, set to track 2 2:24 p. m.

BG 2129 empty weighed, set to track 2 2:24 p. m.

UP 63101 stock ore, weighed, set to track 2 2:24 p. m.

UCR 20560 stock ore, weighed, set to track 2 2:24 p. m.

" 21573 stock ore, weighed, set to track 2 2:24 p. m.

" 21260 stock ore, weighed, set to track 2 2:24 p. m.

UP 63183 stock ore, weighed, set to track 2 2:24 p. m.

UP 62012 ore weighed, set to track 2 2:24 p. m.

DRGW 42111 ore weighed, set to track 2 2:24 p. m.

DRGW 43326 ore weighed, set to track 2 2:24 p. m.

Departed Garfield Smelter Yards 2:40 p. m. Arrived Garfield 2:52 p. m. tied up 3:30 p. m.

1766 Assignment No. 2 Garfield, Utah Page 10

Assignment No. 2 C. B. Higgins of D&RGW Railway at American Smelting and Refining Company Plant at Garfield, Utah. Hours of work 8:00 a. m. to 4:00 p. m. March 25, 1944

Same engine and same crew as previously reported:

Departed Garfield engine track at 7:45 a. m. with CNW 74219, empty coal, arrived Garfield Smelter yards 8:55 a. m. and weighed lite for D&RG, Company convenience, for lite weight and set to track No. 2 9:09 a. m.

Then to track 1, and picked up BG 2006, concentrates, set to old Pest House at 8:07 a. m.

BG 2094 concentrates, set to Old Pest House at 8:07 a. m.

BG 2076 concentrates, set to Old Pest House at 8:07 a. m.

BG 2039 concentrates, set to Old Pest House at 8:07 a. m.

BG 2040 concentrates, set to Old Pest House at 8:07 a. m.

BG 2082 concentrates, set to Old Pest House at 8:07 a. m.

BG 2041 concentrates, set to Old Pest House at 8:07 a. m.

BG 2001 concentrates, set to Old Pest House at 8:07 a. m.

Then run around to west end of Old Pest House, and picked up and weighed

BG 2063 empty, set to track 9 8:42 a. m.

" 2012 empty, set to track 9 8:42 a. m.

" 2024 empty, set to track 9 8:42 a. m.

" 2116 empty, set to track 9 8:42 a. m.

" 2020 empty, set to track 9 8:42 a. m.

" 2007 empty, set to track 9 8:42 a. m.

" 2015 empty, set to track 9 8:42 a. m.

" 2104 empty, set to track 9 8:42 a. m.

" 2008 empty, set to track 9 8:42 a. m.

Then to track 1, and picked up and weighed

BG 2127 empty, set to track 9 8:42 a. m.

BG 2143 empty, set to track 9 8:42 a. m.

" 2137 empty, set to track 9 8:42 a. m.

" 2035 empty, set to track 9 8:42 a. m.

" 2142 empty, set to track 9 8:42 a. m.

" 2130 empty, set to track 9 8:42 a. m.

" 2044 empty, set to track 9 8:42 a. m.

" 2099 empty, set to track 9 8:42 a. m.

BG 2005 empty, not weighed, set to track 9 8:42 a. m.

BG 2077 empty, not weighed, set to track 9 8:42 a. m.

BG 2071 empty, not weighed, set to track 9 8:42 a. m.

BG 2002 empty, not weighed, set to track 9 8:42 a. m.

BG 2089 empty, not weighed, set to track 9 8:42 a. m.

BG 2022 empty, not weighed, set to track 9 8:42 a. m.

BG 2109 empty, not weighed, set to track 9 8:42 a. m.

BG 2121 empty, not weighed, set to track 9 8:42 a. m.

BG 2030 empty, not weighed, set to track 9 8:42 a. m.

BG 2055 empty, not weighed, set to track 9 8:42 a. m.

CC&StL S-58404 bullion, weighed, set to track 2 11:13 a. m.
 Wab 82177 bullion, weighed, set to track 2 11:13 a. m.
 NYC 103685 bullion, weighed, set to track 2 11:13 a. m.
 IC 38552 bullion, weighed, set to track 2 11:13 a. m.
 SLSF 160193 bullion, weighed, set to track 2 11:13 a. m.
 PRR 83774 bullion, weighed, set to track 2 11:13 a. m.
 GATX 39465 acid weighed, set to track 2 11:13 a. m.

Then to track No. 6, coupled into 7 cars, and pulled east about 10 car lengths making up a train for the D&RGW Main Line.

DRGW 41677

" 40279

" 40097

" 40162

UCR 21179

D&RGW 419884

UP 88806

Completed this move at 11:25 a. m.

Then cut-off and went to track 3, picked up

BG 2111 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2004 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2057 concentrates, weighed, set to New Pest House track 11:46 a. m.

1760 Assignment No. 3 Garfield, Utah Page 4

BG 2106 concentrates, weighed, set to New Pest House track, 11:46 a. m.

BG 2048 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2129 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2005 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2077 concentrates, weighed, set to New Pest House track 11:46 a. m.

BG 2071 concentrates, weighed, set to New Pest House track 11:46 a. m.

Then to lunch

After lunch went to track 3 and picked up

BG 2118 concentrates, weighed, set to Old Pest House track 1:16 p. m.

BG 2108 concentrates, weighed, set to Old Pest House track 1:16 p. m.

BG 2148 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2067 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2070 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2045 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2115 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2019 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2053 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2033 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2079 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2034 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.
 BG 2023 concentrates, weighed, set to Old Pest House
 track 1:16 p. m.

Then to Lower Dock 4 and picked up UCCX 1807 empty,
 and set to track 2 2:00 p. m.

UCCX 1808 empty, set to track 2 2:00 p. m.

UCCX 1812 empty, set to track 2 2:00 p. m.

Then to track 4, and picked up

C 11522 lumber, set to track 2 2:00 p. m.

HCRR 859 mdse, set to track 2 2:00 p. m.

CR 20404 ore, set to track 2 2:00 p. m.

UP 64991 ore, set to track 2 2:00 p. m.

Then to track 5 and picked up

DRGW 43147 mty, set to track 2 2:00 p. m.

" 43050 mty, set to track 2 2:00 p. m.

" 43186 mty, set to track 2 2:00 p. m.

" 40209 ore weighed, set to track 2 2:00 p. m.

" 43057 ore weighed, set to track 2 2:00 p. m.

" 67366 ore weighed, set to track 2 2:00 p. m.

" 43091 ore weighed, set to track 2 2:00 p. m.

C 85372 ore weighed, set to track 2 2:00 p. m.

C 84323 ore weighed, set to track 2 2:00 p. m.

Then to track 5, and picked up

BG 2031 empty, weighed, set to track 2 2:15 p. m.

BG 2060 empty, weighed, set to track 2 2:15 p. m.

BG 2083 empty, weighed, set to track 2 2:15 p. m.

BG 2112 empty, weighed, set to track 2 2:15 p. m.

BG 2092 empty, weighed, set to track 2 2:15 p. m.

BG 2025 empty, weighed, set to track 2 2:15 p. m.

BG 2061 empty, weighed, set to track 2 2:15 p. m.

1761 Assignment No. 2 Garfield, Utah Page 5

BG 2038 empty, weighed, set to track 2 2:15 p. m.

BG 2052 empty, weighed, set to track 2 2:15 p. m.

BG 2084 empty, weighed, set to track 2 2:15 p. m.

BG 2097 empty, weighed, set to track 2 2:15 p. m.

Departed Garfield Smelter Yards at 2:20 p. m., arrived
Garfield 2:30 p. m. Tied up 3:30 p. m.

1762 Assignment No. 2 Garfield, Utah Page 6

Assignment No. 2 C. B. Higgins of D&RGW Railway
at American Smelting and Refining Company Plant at
Garfield, Utah. Hours of work 8:00 a. m. to 4:00 p. m.
March 24, 1944

Same engine and crew as of March 23, 1944

Called 7:30 a. m., left Garfield engine house track 7:40 a. m.
arrived Garfield Smelter Yards 7:55 a. m.

Went to track 1, picked up

BG 2003 concentrates, and doubled over and set out on
Old Pest House Track for railroad convenience
to save switching.

Then to New Pest House Track, picked up

B&G 2071 load, set to Old Pest House Track 8:13 a. m.
concentrates

B&G 2077 concentrates, set to Old Pest House Track
8:13 a. m.

" 2005 concentrates, set to Old Pest House Track
8:13 a. m.

" 2129 concentrates, set to Old Pest House Track
8:13 a. m.

" 2048 concentrates, set to Old Pest House Track
8:13 a. m.

" 2106 concentrates, set to Old Pest House Track
8:13 a. m.

" 2057 concentrates, set to Old Pest House Track
8:13 a. m.

" 2004 concentrates, set to Old Pest House Track
8:13 a. m.

" 2111 concentrates, set to Old Pest House Track
8:13 a. m.

Then run around to west end of Old Post House track and picked up

BG 2023 empty, weighed, set to Track 9 8:41 a. m.
 BG 2034 empty, weighed, set to Track 9 8:41 a. m.
 BG 2079 empty, weighed, set to Track 9 8:41 a. m.
 BG 2033 empty, weighed, set to Track 9 8:41 a. m.
 BG 2053 empty, weighed, set to Track 9 8:41 a. m.
 BG 2019 empty, weighed, set to Track 9 8:41 a. m.
 BG 2115 empty, weighed, set to Track 9 8:41 a. m.
 BG 2045 empty, weighed, set to Track 9 8:41 a. m.
 BG 2070 empty, weighed, set to Track 9 8:41 a. m.

Then to Track 1 and picked up

BG 2080 empty, weighed, set to Track 9 8:41 a. m.
 BG 2032 empty, weighed, set to Track 9 8:41 a. m.
 BG 2091 empty, weighed, set to Track 9 8:41 a. m.
 BG 2036 empty, weighed, set to Track 9 8:41 a. m.
 BG 3210 empty, not weighed, set to Track 9 8:41 a. m.
 BG 3200 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2118 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2018 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2148 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2067 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2068 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2013 empty, not weighed, set to Track 9 8:41 a. m.
 BG 2069 empty, not weighed, set to Track 9 8:41 a. m.

BG 2122 empty, not weighed, set to Track 9 8:41 a. m.

1763 Assignment No. 2 Garfield, Utah Page 7

Then to Lower Dock 4 and picked up

DRGW 43091 empty, weighed set to track 2 9:21 a. m.

" 67366 empty, weighed set to track 2 9:21 a. m.

IC 85372 empty, weighed set to track 2 9:21 a. m.

IC 84232 empty, weighed set to track 2 9:21 a. m.

UCR 20432 empty, weighed set to track 2 9:21 a. m.

UCR 21485 empty, weighed set to track 2 9:21 a. m.

UCR 20830 empty, weighed set to track 2 9:21 a. m.

DRGW 45272 empty, weighed for railroad (DRGW) for
 lite weight, company convenience, set to
 track 2 9:21 a. m.

DRGW 40387 empty, weighed for railroad (DRGW) for
 lite weight company convenience, set to track
 2 9:21 a. m.

ASR 14 empty, not weighed, set to track 2 9:21 a. m.
 15 empty, not weighed, set to track 2 9:21 a. m.
 13 empty, not weighed, set to track 2 9:21 a. m.

BG 3219 empty, not weighed, set to track 2 9:21 a. m.
 BG 3222 empty, not weighed, set to track 2 9:21 a. m.
 DRGW 45263 empty, not weighed, set to track 2 9:21 a. m.
 DRGW 45146 empty, not weighed, set to track 2 9:21 a. m.
 " 41034 empty, not weighed, set to track 2 9:21 a. m.
 BSL 34095 empty, not weighed, set to track 2 9:21 a. m.
 BG 3208 empty, not weighed, set to track 2 9:21 a. m.
 BG 3207 empty, not weighed, set to track 2 9:21 a. m.
 BG 3206 empty, not weighed, set to track 2 9:21 a. m.
 ASR 105 empty, not weighed, set to track 1 9:21 a. m.
 " 217 empty, not weighed, set to track 1 9:21 a. m.
 " 9 empty, not weighed, set to track 1 9:21 a. m.
 UCR 20779 empty, weighed, set to track 1 9:21 a. m.
 SP 91979 empty, weighed, set to track 1 9:21 a. m.
 DRGW 41391 empty, weighed, set to track 1 9:21 a. m.
 SP 91451 empty, weighed, set to track 1 9:21 a. m.

Then to track 4, picked up

BG 3047 ore, weighed, set to track 1 9:44 a. m.
 " 3016 ore, weighed, set to track 1 9:44 a. m.
 " 3024 ore, weighed, set to track 1 9:44 a. m.
 " 3044 ore, weighed, set to track 1 9:44 a. m.
 " 3008 ore, weighed, set to track 1 9:44 a. m.
 " 3021 ore, weighed, set to track 1 9:44 a. m.
 BG 2109 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2121 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2030 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2055 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2127 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2143 concentrates, weighed, set to track 1 9:44 a. m.
 BG 2137 concentrates, weighed, set to track 1 9:44 a. m.

Then to track 3 and picked up

BG 2035 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2142 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2130 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2044 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2099 concentrates, weighed, set to track 1 10:10 a. m.

1764 Assignment No. 2 Garfield, Utah Page 8

BG 2000 concentrates, weighed, set to track 1 10:10 a. m.

BG 2041 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2082 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2040 concentrates, weighed, set to track 1 10:10 a. m.
 BG 2039 concentrates, weighed, set in Pocket account of track 1 filled

Then to track 4 and picked up

UCR 20494 converter pipe dust, set to track 2 10:37 a. m.
 GATX 39592 acid, weighed, set to track 2 10:37 a. m.
 C&NW 46516 sulphur weighed, set to track 2 10:37 a. m.
 NYC 117155 bullion weighed, set to track 2 10:37 a. m.
 WRT 917 bullion weighed, set to track 2 10:37 a. m.
 SAL 16114 bullion weighed, set to track 2 10:37 a. m.
 GMO 6488 bullion weighed, set to track 2 10:37 a. m.
 MEC 4889 bullion weighed, set to track 2 10:37 a. m.
 NYC 11569 bullion weighed, set to track 2 10:37 a. m.
 NYC 99777 bullion weighed, set to track 2 10:37 a. m.
 DRGW 67413 bullion weighed, set to track 2 10:37 a. m.

Then to track 4, and picked up

C&O 11481 bullion, weighed, set to track 2 10:54 a. m.
 NYC 117205 bullion, weighed, set to track 2 10:54 a. m.
 PRR 78546 bullion, weighed, set to track 2 10:54 a. m.
 Erie 78595 bullion, weighed, set to track 2 10:54 a. m.
 CBQ 31301 bullion, weighed, set to track 2 10:54 a. m.
 Sou 22403² bullion, weighed, set to track 2 10:54 a. m.
 NYC 133156 bullion, weighed, set to track 2 10:54 a. m.
 NYC 120524 bullion, weighed, set to track 2 10:54 a. m.
 NYC 277314 bullion, weighed, set to track 2 10:54 a. m.
 DRGW 19102 acid weighed, set to track 6 10:56 a. m.

When shoved acid to track No. 6 coupled into 4 empty coal and picked up-D&RGW 45299, empty, and set to track No. 7

D&RGW 19102 acid, was also set to track No. 7 11:05 a. m.
 D&RGW 45146 empty, set to track No. 7 11:05 a. m.
 " 45401 empty, set to track No. 7 11:05 a. m.
 NP 50115 empty, set to track No. 9 11:03 a. m.

Then to track 3 and picked up

BG 2020 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2116 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2024 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2012 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2063 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2014 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2076 concentrates, weighed, set to Old Pest House 11:20 a. m.
 BG 2094 concentrates, weighed, set to Old Pest House 11:20 a. m.

1767. Assignment No. 2 Garfield, Utah

Page 11

Then to Lower Dock 4 and picked up

BG 3016 empty, weighed, set to track 2 9:09 a. m.
 " 3204 empty, weighed, set to track 2 9:09 a. m.
 " 3044 empty, weighed, set to track 2 9:09 a. m.
 " 3008 empty, weighed, set to track 2 9:09 a. m.
 " 3021 empty, weighed, set to track 2 9:09 a. m.
 UP 201057 empty, weighed, set to track 2 9:09 a. m.
 UP 64775 empty, weighed, set to track 2 9:09 a. m.
 UCCX 1801 empty, weighed, set to track 2 9:09 a. m.
 ASR 11 empty, not weighed, set to track 2 9:09 a. m.
 " 16 empty, not weighed, set to track 2 9:09 a. m.
 " 105 empty, not weighed, set to track 2 9:09 a. m.
 " 217 empty, not weighed, set to track 2 9:09 a. m.
 " 9 empty, not weighed, set to track 2 9:09 a. m.
 " 14 empty, not weighed, set to track 2 9:09 a. m.
 " 15 empty, not weighed, set to track 2 9:09 a. m.
 " 13 empty, not weighed, set to track 2 9:09 a. m.
 UP 63502 empty, weighed in error, set to track 2 9:09 a. m.

Then back to Lower Dock 4 to get second cut and picked up

UCCX 1804 mty, weighed, set to track 2 9:37 a. m.
 BG 3010 mty, weighed, set to track 2 9:37 a. m.
 UCR 21337 mty, weighed, set to track 2 9:37 a. m.
 UCR 21623 mty, weighed, set to track 2 9:37 a. m.
 DRGW 43057 mty, not weighed, set to track 2 9:37 a. m.
 BG 3203 empty, not weighed, set to track 1 9:37 a. m.
 BG 3211 empty, not weighed, set to track 1 9:37 a. m.
 BG 3209 empty, not weighed, set to track 1 9:37 a. m.
 USSR 224 load, weighed, set to track 1 9:37 a. m.
 DRGW 43326 empty, weighed, set to track 1 9:37 a. m.
 UP 62273 empty, weighed, set to track 1 9:37 a. m.
 UP 62012 empty, weighed, set to track 1 9:37 a. m.
 UP 62175 empty, weighed, set to track 1 9:37 a. m.
 DRGW 40682 empty, weighed, set to track 1 9:37 a. m.
 UCR 21200 empty, weighed, set to track 1 9:37 a. m.
 DRGW 71116 empty, weighed, set to track 1 9:37 a. m.
 DRGW 70057 empty, weighed, set to track 1 9:37 a. m.

Then to track 4, and picked up

DRGW 41082 ore, weighed, set to track 1 at 9:56 a. m.
 BG 3220 sand, weighed, set to track 1 at 9:56 a. m.
 " 3214 sand, weighed, set to track 1 at 9:56 a. m.
 " 3218 sand, weighed, set to track 1 at 9:56 a. m.
 " 3204 sand, weighed, set to track 1 at 9:56 a. m.

BG 3213 sand, weighed, set to track 1 at 9:56 a. m.
 " 3202 sand, weighed, set to track 1 at 9:56 a. m.
 " 3221 sand, weighed, set to track 1 at 9:56 a. m.
 " 3201 sand, weighed, set to track 1 at 9:56 a. m.
 " 3212 sand, weighed, set to track 1 at 9:56 a. m.

Then to track 4 and picked up

BG 3000 ore, weighed, set to track 1 at 10:18 a. m.
 BG 3001 ore, weighed, set to track 1 at 10:18 a. m.
 BG 3009 ore, weighed, set to track 1 at 10:18 a. m.
 UCCX 1810 precipitate, weighed, set to track 1 10:18 a. m.
 " 1863 precipitate, not weighed, set in Pocket (account wet)

1768 Assignment No. 2 Garfield, Utah Page 12

BG 2031 concentrates, weighed, set to track 1 10:18 a. m.
 BG 2134 concentrates, weighed, set to track 1 10:18 a. m.
 " 2060 concentrates, weighed, set to track 1 10:18 a. m.
 " 2083 concentrates, weighed, set to track 1 10:18 a. m.
 " 2112 concentrates, weighed, set to track 1 10:18 a. m.

Then lite to track 5, and picked up

UP 4959 acid, weighed, set to track 2 10:35 a. m.
 DRGW 66874 bullion, weighed, set to track 2 10:35 a. m.
 PRR 596204 bullion, weighed, set to track 2 10:35 a. m.
 NYC 146493 bullion, weighed, set to track 2 10:35 a. m.
 PM 86278 bullion, weighed, set to track 2 10:35 a. m.
 C&O 4388 bullion, weighed, set to track 2 10:35 a. m.

Then back to track 5 and picked up

NYC 110694 bullion, weighed, and set to track 2 11:00 a. m.
 Milw 701456 bullion, weighed, and set to track 2 11:00 a. m.
 WLE 25044 bullion, weighed, and set to track 2 11:00 a. m.
 DRGW 67098 bullion, weighed, and set to track 2 11:00 a. m.
 I&N 90888 bullion, weighed, and set to track 2 11:00 a. m.
 Milw 712277 bullion, weighed, and set to track 2 11:00 a. m.
 RI 146973 bullion, weighed, and set to track 2 11:00 a. m.
 SSW 32432 bullion, weighed, and set to track 2 11:00 a. m.
 NYC 111562 bullion, weighed, and set to track 2 11:00 a. m.
 PLE 33120 bullion, weighed, and set to track 2 11:00 a. m.
 NKP 15556 bullion, weighed, and set to track 2 11:00 a. m.
 PRR 70051 bullion, weighed, and set to track 2 11:00 a. m.
 GATX 38279 acid, weighed, set to track 7 11:08 a. m.

Then to Track 6 and picked up

DRGW 41822 empty coal, not weighed, set to track 7 11:08 a. m.

DRGW 45386 empty coal, not weighed, set to track 7 11:08
a. m.

" 42383 empty coal, not weighed, set to track 7 11:08
a. m.

" 45276 empty coal, not weighed, set to track 7 11:08
a. m.

Then lite to track 3, and picked up

BG 2092 concentrates, weighed, set to track 1 11:23 a. m.

BG 2097 concentrates, weighed, set to track 1 11:23 a. m.

" 2054 concentrates, weighed, set to track 1 11:23 a. m.

" 2124 concentrates, weighed, set to track 1 11:23 a. m.

" 2046 concentrates, weighed, set to track 1 11:23 a. m.

" 2058 concentrates, weighed, set to track 1 11:23 a. m.

" 2025 concentrates, weighed, set to track 1 11:23 a. m.

" 2061 concentrates, weighed, set to track 1 11:23 a. m.

" 2038 concentrates, weighed, set to track 1 11:23 a. m.

" 2052 concentrates, weighed, set to track 1 11:23 a. m.

Then lite to track No. 4 and picked up

BG 2009 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2070 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2045 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2115 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2019 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2053 concentrates, weighed, set to New Pest House
11:50 a. m.

BG 2053 concentrates, weighed, set to New Pest House
11:50 a. m.

1769 Assignment No. 2 Garfield, Utah Page 13

BG 2079 concentrates, weighed, set to New Pest
House 11:50 a. m.

BG 2034 concentrates, weighed, set to New Pest House
11:50 a. m.

Then went to lunch

After lunch went to Track 4 and picked up

BG 2103 concentrates, weighed, set to Old Pest House
1:04 p. m.

" 2043 concentrates, weighed, set to Old Pest House
1:04 p. m.

BG 2056 concentrates, weighed, set to Old Pest House
1:04 p. m.
 " 2059 concentrates, weighed, set to Old Pest House
1:04 p. m.
 " 2062 concentrates, weighed, set to Old Pest House
1:04 p. m.
 " 2066 concentrates, weighed, set to Old Pest House
1:04 p. m.
 " 2072 concentrates, weighed, set to Old Pest House
1:04 p. m.

Then lite to track 5 and picked up

UCR 21188 ore, weighed, set to track 2 1:37 p. m.
 WP 5315 ore, weighed, set to track 2 1:37 p. m.
 DRGW 40230 ore, weighed, set to track 2 1:37 p. m.
 " 45308 ore, weighed, set to track 2 1:37 p. m.
 " 42192 ore, weighed, set to track 2 1:37 p. m.
 " 42422 ore, weighed, set to track 2 1:37 p. m.
 " 40566 ore, weighed, set to track 2 1:37 p. m.
 " 45006 ore, weighed, set to track 2 1:37 p. m.
 ITC 12255 ore, weighed, set to track 2 1:37 p. m.
 GATX 38614 empty tank, weighed, set to track 2 1:37 p. m.

Lite to track 3, and picked up

BG 2014 empty, weighed, set to track 2 2:07 p. m.
 " 2000 empty, weighed, set to track 2 2:07 p. m.
 " 2041 empty, weighed, set to track 2 2:07 p. m.
 " 2082 empty, weighed, set to track 2 2:07 p. m.
 " 2040 empty, weighed, set to track 2 2:07 p. m.
 " 2039 empty, weighed, set to track 2 2:07 p. m.
 " 2076 empty, weighed, set to track 2 2:07 p. m.
 " 2094 empty, weighed, set to track 2 2:07 p. m.
 " 2006 empty, weighed, set to track 2 2:07 p. m.
 " 2031 empty, weighed, set to track 2 2:07 p. m.
 " 2134 empty, weighed, set to track 2 2:07 p. m.
 UP 62558 ore, weighed, set to track 2 2:07 p. m.
 UP 63507 ore, weighed, set to track 2 2:07 p. m.
 UP 63077 ore, weighed, set to track 2 2:07 p. m.
 UCR 20209 ore, weighed, set to track 2 2:07 p. m.
 IC 83602 ore, weighed, set to track 2 2:07 p. m.
 UCR 20710 ore, weighed, set to track 2 2:07 p. m.
 UP 62544 ore, weighed, set to track 2 2:07 p. m.
 UP 62958 ore, weighed, set to track 2 2:07 p. m.

Then to Lower Dock 4 and picked up

UCCX 1816 empty, weighed, set to track 2 2:32 p. m.

Then to Stock Ore track and picked up

DRGW 43186 ore, weighed, set to track 2 2:32 p. m.

" 43091 ore, weighed, set to track 2 2:32 p. m.

DSL 34095 ore, weighed, set to track 2 2:32 p. m.

DRGW 40387 ore, weighed, set to track 2 2:32 p. m.

45372 ore, weighed, set to track 2 2:32 p. m.

41034 ore, weighed, set to track 2 2:32 p. m.

1770 Assignment No. 2 Garfield, Utah Page 14

DRGW 45263 ore, weighed, set to track 2 2:32 p. m.

DRGW 41391 ore, weighed, set to track 2 2:32 p. m.

Departed Garfield Smelter Yards 2:35 p. m. Arrived Garfield station 2:47 p. m. Tied up 3:30 p. m.

1771 Assignment No. 2 Garfield, Utah Page 15

Assignment of J. J. Mallaney and C. B. Higgins of D&RGW Railway at American Smelting and Refining Company Plant at Garfield, Utah. Hours of work 8:00 a. m. to 4:00 p. m. March 26, 1944.

Same engine and same crew as previously reported:

Drew was called at 7:30 a. m. Left Garfield engine track at 7:45 a. m., arrived Garfield Smelter Yards at 8:00 a. m. Then went lite to west end of Old Post House Track picked up

BG 2045 empty, weighed, set to track No. 9 9:01 a. m.

" 2070 empty, weighed, set to track No. 9 9:01 a. m.

" 2009 empty, weighed, set to track No. 9 9:01 a. m.

" 2103 empty, weighed, set to track No. 9 9:01 a. m.

" 2043 empty, weighed, set to track No. 9 9:01 a. m.

" 2056 empty, weighed, set to track No. 9 9:01 a. m.

" 2059 empty, weighed, set to track No. 9 9:01 a. m.

" 2062 empty, weighed, set to track No. 9 9:01 a. m.

" 2066 empty, weighed, set to track No. 9 9:01 a. m.

" 2072 empty, weighed, set to track No. 9 9:01 a. m.

Then to track 1, picked up

BG 2060 empty, weighed, set to track No. 9 9:01 a. m.

" 2083 empty, weighed, set to track No. 9 9:01 a. m.

" 2112 empty, weighed, set to track No. 9 9:01 a. m.

" 2092 empty, weighed, set to track No. 9 9:01 a. m.

" 2097 empty, weighed, set to track No. 9 9:01 a. m.

" 2054 empty, weighed, set to track No. 9 9:01 a. m.

" 2124 empty, weighed, set to track No. 9 9:01 a. m.

" 2046 empty, weighed, set to track No. 9 9:01 a. m.

" 2058 empty, weighed, set to track No. 9 9:01 a. m.

" 2025 empty, weighed, set to track No. 9 9:01 a. m.

- 2061 empty, weighed, set to track No. 9 9:01 a. m.
- 2038 empty, weighed, set to track No. 9 9:01 a. m.
- 2052 empty, weighed, set to track No. 9 9:01 a. m.

The lite to Lower Dock 4, and picked up

- WP 5315 empty, weighed, set to track 2 9:30 a. m.
- DRG 40230 empty, weighed, set to track 2 9:30 a. m.
- WP 5783 empty, weighed, set to track 2 9:30 a. m.
- UP 62617 empty, weighed, set to track 2 9:30 a. m.
- UCCX 1805 empty, weighed, set to track 2 9:30 a. m.
- DRG 42111 empty, weighed, set to track 2 9:30 a. m.
- DRG 43186 empty, not weighed, set to track 2 9:30 a. m.
- " 43091 empty, not weighed, set to track 2 9:30 a. m.
- DSL 34095 empty, not weighed, set to track 2 9:30 a. m.
- DRG 40387 empty, not weighed, set to track 2 9:30 a. m.
- " 45372 empty, not weighed, set to track 2 9:30 a. m.
- " 41034 empty, not weighed, set to track 2 9:30 a. m.
- " 45263 empty, not weighed, set to track 2 9:30 a. m.
- " 41301 empty, not weighed, set to track 2 9:30 a. m.
- ASR 102 empty, not weighed, set to track 2 9:30 a. m.
- ASR 221 empty, not weighed, set to track 2 9:30 a. m.
- ASR 220 empty, not weighed, set to track 2 9:30 a. m.
- " 200 empty, not weighed, set to track 2 9:30 a. m.
- " 112 empty, not weighed, set to track 2 9:30 a. m.
- " 106 empty, not weighed, set to track 2 9:30 a. m.

1772 Assignment No. 2 Garfield, Utah Page 16

Then lite to Lower Dock 4 for a second cut, and picked up

- UP 63101 empty, not weighed, to track 2 10:00 a. m.
- UCR 20560 empty, not weighed, to track 2 10:00 a. m.
- UP 63182 empty, not weighed, to track 2 10:00 a. m.
- UCR 21573 empty, not weighed, to track 2 10:00 a. m.
- UCR 21260 empty, not weighed, to track 2 10:00 a. m.
- BG 3214 empty, not weighed, to track 2 10:00 a. m.
- BG 3218 empty, not weighed, to track 2 10:00 a. m.
- BG 3205 empty, not weighed, to track 2 10:00 a. m.
- BG 3216 empty, not weighed, to track 2 10:00 a. m.
- BG 3220 empty, not weighed, to track 2 10:00 a. m.
- DRGW 40209 empty, weighed, for lite weight D&RGW, Company convenience, set to track 2 10: a. m.
- BG 3009 empty, weighed, set to track 2 10:00 a. m.
- DRG 45006 empty, weighed, set to track 2 10:00 a. m.
- UP 64580 empty, weighed, set to track 2 10:00 a. m.
- UCR 20638 empty, weighed, set to track 2 10:00 a. m.
- ASR 251 empty, weighed, set to track 2 10:00 a. m.

Then lite to track 4, and picked up

BG 3049 ore, weighed, set to track 1 10:17 a. m.

BG 3023 ore, weighed, set to track 1 10:17 a. m.

" 3019 ore, weighed, set to track 1 10:17 a. m.

" 2084 concentrates, weighed, set to track 1 10:17 a. m.

" 2003 concentrates, weighed, set to track 1 10:17 a. m.

" 2111 concentrates, weighed, set to track 1 10:17 a. m.

" 2004 concentrates, weighed, set to track 1 10:17 a. m.

" 2057 concentrates, weighed, set to track 1 10:17 a. m.

" 2106 concentrates, weighed, set to track 1 10:17 a. m.

Then lite to track 3, and picked up

BG 2048 concentrates, weighed, set to track 1 10:39 a. m.

" 2118 concentrates, weighed, set to track 1 10:39 a. m.

" 2029 concentrates, weighed, set to track 1 10:39 a. m.

" 2008 concentrates, weighed, set to track 1 10:39 a. m.

" 2104 concentrates, weighed, set to track 1 10:39 a. m.

" 2015 concentrates, weighed, set to track 1 10:39 a. m.

" 2007 concentrates, weighed, set to track 1 10:39 a. m.

" 2020 concentrates, weighed, set to track 1 10:39 a. m.

" 2129 concentrates, weighed, set to track 1 10:39 a. m.

" 2081 concentrates, weighed, set to track 1 10:39 a. m.

" 2017 concentrates, weighed, set in Pocket

Then lite to track 5, and picked up

HCRR 859 mdse, not weighed, set to track 2 11:28 a. m.

UP 64938 ore, weighed, set to track 2 11:28 a. m.

UP 64991 ore, weighed, set to track 2 11:28 a. m.

CBQ 30599 bullion, weighed, set to track 2 11:28 a. m.

UP 75507 bullion, weighed, set to track 2 11:28 a. m.

ATSF 146772 bullion, weighed, set to track 2 11:28 a. m.

C&O 11303 bullion, weighed, set to track 2 11:28 a. m.

N&W 46628 bullion, weighed, set to track 2 11:28 a. m.

Soo 44106 bullion, weighed, set to track 2 11:28 a. m.

NKP 15571 bullion, weighed, set to track 2 11:28 a. m.

L&N 90137 bullion, weighed, set to track 2 11:28 a. m.

NKP 17312 bullion, weighed, set to track 2 11:28 a. m.

C&O 4464 bullion, weighed, set to track 2 11:28 a. m.

1773 Assignment No. 2 Garfield Utah Page 17

PM 91095 bullion, weighed, set to track 2 11:28 a. m.

SLSF 160536 bullion, weighed, set to track 2 11:28 a. m.

B&O 381580 bullion, weighed, set to track 2 11:28 a. m.

UP 305114 bullion, weighed, set to track 2 11:28 a. m.

D&RG 43055 flue dust, weighed, set to track 7 11:32 a. m.

Then lite to track 4, and picked up

BG 2069 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2122 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2035 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2142 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2130 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2044 concentrates, weighed, set to New Pest House
11:35 a. m.

" 2005 concentrates, weighed, set to New Pest House
11:35 a. m.

Then lite to track 4, for second cut and picked up

BG 2023 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2080 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2032 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2091 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2036 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2018 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2148 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2067 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2068 concentrates, weighed, set to Old Pest House
12:10 p. m.

" 2013 concentrates, weighed, set to Old Pest House
12:10 p. m.

Then to lunch

After lunch, lite to west end of Old Pest House, and picked up

BG 2034 empty, weighed, set to track 1 2:00 p. m.

" 2079 empty, weighed, set to track 1 2:00 p. m.

" 2033 empty, weighed, set to track 1 2:00 p. m.

" 2053 empty, weighed, set to track 1 2:00 p. m.

" 2019 empty, weighed, set to track 1 2:00 p. m.

" 2115 empty, weighed, set to track 1 2:00 p. m.

Then west end of Track 1, and picked up

BG*2084 empty, weighed, set east of scales on track 1
2:00 p. m.

" 2003 empty, weighed, set east of scales on track 1
2:00 p. m.

" 21114 empty, weighed, set east of scales on track 1
2:00 p. m.

" 2004 empty, weighed, set east of scales on track 1
2:00 p. m.

" 2057 empty, weighed, set east of scales on track 1
2:00 p. m.

" 2106 empty, weighed, set east of scales on track 1
2:00 p. m.

Departed from Garfield Smelter Yards at 2:15 p. m. Arrived Garfield Station 2:25 p. m. Tied up at 2:30 p. m.

1774

Exhibit No. 8

Assignment No. 1

Page 1

March 23, 1944

Report of Inspector Morris observing switching performed by D&RGW engine 1024 at the American Smelting and Refining Company Plant at Garfield, Utah. March 23, 1944, as follows:

Engine 1024 departed from Garfield, Utah, 7:30 a. m. arrived at the plant yard 7:45 a. m.

Picked up from extension at 8:00 a. m.

UP 4958 empty tank, spotted on acid plant, track 2, pipe 2 at 8:15 a. m.

Picked up from Long House at 8:25 a. m. and set to center track, all empty box cars

NYC 99777 ° NYC 117155

GMO 6488

MEC 4889

WRT 917

SAL 46114

Went to bullion load track, and picked up at 8:27 a. m.

D&RGW 66041 Box loaded bouillon

CCC&StL S-58404 Box load of bouillon

D&RGW 66338 Box load of bouillon

WAB 82177 Box load of bouillon

These cars placed on track No. 5 yard at 8:40 a. m.

Moved light to yard track No. 4, and at 8:42 a. m., picked up

P&LE 33120 Box empty
 NYC 146493 Box empty
 PM 86278 Box empty
 D&RGW 66874 Box empty
 NYC 277314 Box empty
 PRR 596204 Box empty
 Erie 78595 Box empty
 NYC 120524 Box empty

and placed all on Dock A at 8:50 a. m.

At 8:42 a. m. track No. 4 yard

PRR 78546 Box empty
 NYC 117205 Box empty
 NYC 133156 Box empty
 C&O 11481 Box empty
 CB&Q 31301 Box empty

and set to Long House at 9:01 a. m.

Picked up from Short House

Sou. 22403 Box empty
 NYC 111569 Box empty

and set to Long house at 9:05 a. m.

1775 Assignment No. 1 Report of Inspector Morris

AM&S Plant Garfield, Utah

Page 2

Picked up from Bouillon load track 9:07 a. m., and set to yard track No. 5 at 9:15 a. m. as follows:

D&RGW 67183 Box load of bouillon
 SLSW 38924 Box load of bouillon
 D&RGW 67383 Box load of bouillon

Moved light to yard track No. 1 at 9:17 a. m., picked up

UCR 20414 gon empty, set to No. 9.
 UP 85338 Hopper empty set to No. 9.
 D&RG 45386 gon empty
 Time 9:18 a. m.

From yard track No. 1 at 9:17 a. m., picked up and set to yard track No. 4

AS&R 221 gon empty
 AS&R 220 gon empty
 " 303 Flat empty
 " 252 gon empty
 " 255 gon empty

Time 9:17 a. m.

Moved light to yard track No. 2, picked up and set to track No. 4 at 9:20 a. m.

AS&R 111 gon empty

" 204 gon empty
at 9:22 a. m.

From track No. 2, picked up and set to track No. 6

UP 88806 Hopper empty, at 9:23 a. m.

From track No. 2 to track No. 4 at 9:25 set

D&RGW 71554 gon Empty

AS&R 10 Composite empty

" 4 Composite empty

Time 9:32 a. m.

From track No. 2 set to No. 7 at 9:26

UP 62290 gon empty

" 63257 gon empty

From track No. 2 to track No. 9

DRGW 40865 gon empty

" 41320 gon empty

D&RGW 71554 gon empty

" 45276 gon empty

" 41157 gon empty

" 42383 gon empty

UP 62666 gon empty

Time 9:44 a. m.

From track No. 2, and set to track No. 10 at 9:55 a. m.

BG 3220 Hopper empty

" 3217 Hopper empty

BG 3215 Hopper empty

1776 Assignment No. 1

AS&R Plant, Garfield, Utah—

Page 3

From track No. 2 at 9:35 a. m., set to track No. 7 at 9:44 a. m.

UP 63502 gon empty

UP 63992 gon empty

UP 62201 gon empty

Moved light to thaw house track No. 1, and picked up

BG 3206 Hopper of sand

BG 3207 Hopper of sand

BG 3208 Hopper of sand

Placed on Dock C at 10:10 a. m.

From thaw house No. 1, placed on test house spot 10 at 10:15 a. m.

BG 3210 hopper load sand

BG 3200 hopper load sand

From Track No. 1 picked up at 10:25 a. m., and set to thaw house No. 1 at 10:30 a. m.

BG 3219 hopper of sand

BG 3222 hopper of sand

BG 3203 hopper of sand

BG 3211 hopper of sand

BG 3209 hopper of sand

BG 3205 hopper of sand

BG 3216 hopper of sand

From track No. 1, set to lower dock No. 1 at 10:45 a. m.

UCCX 1806 gon load of precipitate

" 1811 gon load of precipitate

" 1805 gon load of precipitate

" 1816 gon load of precipitate

" 1804 gon load of precipitate

" 1801 gon load of precipitate

From yard track No. 8 picked up at 10:50 a. m. and set as follows:

Dock "B"

D&SL 34095 gon load of ore

DRGW 4387 gon load of ore

" 45372 gon load of ore

Time 10:55 a. m.

To Dock "C"

UCR 20830 gon ore

" 21485 gon ore

" 20432 gon ore

Time 11:05 a. m.

To Dock "D"

SP 91451 gon ore

" 91979 gon ore

D&RGW 41391 gon ore

UCR 20779 gon ore

Time 11:20 a. m.

Moved light to track No. 1, and set to No. 7 at 11:30 a. m.

GATX 38278 load acid

1777 Assignment No. 1

AS&R Plant Garfield, Utah—

Page 4

At 12:30 p. m.

UP Extra West engine 2201, picked up from track No. 7

GATX 38278 tank acid

UP	63992	gon empty	UP	63511	gon empty
"	62290	gon empty	UCR	21323	gon empty
UCR	20526	gon empty	UCR	20165	gon empty
SP	93111	gon empty	IC	83250	gon empty
UP	63037	gon empty	UCR	20798	gon empty
SP	92430	gon empty	"	21743	gon empty
SP	94871	gon empty	UP	63943	gon empty
UCR	21293	gon empty			

At 1:40 p. m. doubled from Pest House

BG 2031 gon empty

BG 2060 gon empty

BG 2083 gon empty

To track No. 1, and picked up

BG 2112 gon empty

BG 2092 gon empty

BG 2025 gon empty

BG 2061 gon empty

BG 2038 gon empty

BG 2052 gon empty

BG 2084 gon empty

BG 2097 gon empty

Set all to track No. 5 at 1:55 p. m. and quit.

Handled ~~99~~ cars.

1778 Assignment No. 1

Page 5

Report of Inspector Morris observing switching performed by D&RGW engine 1024 at the American Smelting and Refining Company Plant at Garfield, Utah, March 24, 1944, as follows:

Engine departed from Garfield, Utah, at 7:30 a. m., arrived at the AS&R Plant 7:50 a. m., picked up from the extension track at 8:01 a. m.

GATX 38279 tank empty, spotted south side of Acid plant, spot 5 at 8:12 a. m.

Moved up and spotted on track 2 spot at 8:07 a. m.

UP 4958 empty tank

Took from track No. 2, spot 2

DRGW 1901 tank load acid

Took from spot 5, south side acid plant, 8:15 a. m.

GATX 39592 load acid

Set on track 5 in the yard at 9:05 a. m.

DRGW 19102 Load acid

GATX 39592 Load acid

Moved light to Bouillon plant at 8:25 a. m., and picked up

CBQ 31301 Box load bouillon
 Sou. 22403 Box load bouillon
 NYC 133156 Box load bouillon
 C&O 11481 Box load bouillon
 NYC 120524 Box load bouillon
 Set to No. 5 track at 9:07 a. m.

At 8:30 a. m. picked up from Long House, and set to center track, Bouillon plant

P&LE 33120 Empty box
 NYC 146493 Empty box
 PM 86278 Empty box
 DRGW 66874 Empty box
 Placed at 8:45 a. m.

At 9:10 a. m., picked up from track 3 in the yard

D&RGW 67098 and doubled to track No. 4, and picked up

C&O 4464 empty box
 SLSF 160536 empty box
 B&O 381580 empty box
 L&N 90888 empty box
 W&LE 25044 empty box
 NYC 110694 empty box
 NYC 111562 empty box

These cars were set to Dock "A" at 9:30 a. m.

From Track No. 4 at 9:10 a. m., picked up and set to Long House at 9:35 a. m.

Milw. 701458 Empty box
 SLSW 32432 Empty box
 RI 146973 Empty box
 NKP 15556 Empty box

1779 Assignment No. 1
 PRR 70051 Empty box
 C&O 4388 Empty box

Page 6

Picked up from bouillon track at 9:00 a. m. and set to No. 5 at 10:01 a. m.

NYC 277314 box load bouillon
 Erie 78595 box load bouillon
 PRR 78546 box load bouillon
 NYC 117205 box load bouillon
 C&O 11481 box load bouillon

At 10:10 a. m. picked up from track No. 2 and set as follows:

Track No. 7

UCR 20432 gon empty

" 21485 gon empty

Track No. 9, at 10:13 a. m.

D&RGW 43091 gon empty

IC 85372 gon empty

IC 84323 gon empty

D&RGW 45263 gon empty

D&RGW 41034 gon empty

D&RGW 45372 gon empty

" 40387 gon empty

" 34095 gon empty

To track No. 6 at 10:15 a. m.

D&RGW 45146 gon empty

To track No. 1 at 10:30 a. m.

BG 3219 hop empty

BG 3222 hop empty

BG 3208 hop empty

BG 3207 hop empty

BG 3206 hop empty

To Dock "F" 10:15 a. m.

AS&R 14 gon empty

" 15 gon empty

" 13 gon empty

From Track No. 1 at 10:50 a. m., picked up and set cars as follows:

BG 3047 gon ore, track 8 at 10:55 a. m.

To Dock "D" at 11:25 a. m.

BG 3044 gon of ore

BG 3024 gon of ore

BG 3016 gon of ore

BG 3021 gon of ore

BG 3008 gon of ore

BG 3047 gon of ore

To Dock "F" at 10:57 a. m.

ASR 105 gon empty

" 217 gon empty

" 9 hop empty

1780 Assignment No. 1

AS&R Plant

Page 7

From track No. 1 at 10:50, set to track No. 9 at 11:01 a. m.

UCR 20779 gon empty

SP 91979 gon empty

D&RGW 41391 gon empty

SP 91451 gon empty

From Thaw House No. 1, picked up at 11:30 a. m., and spotted on Dock "C" at 11:35 a. m.

BG 3208 hopper load of sand

BG 3211 hopper load of sand

BG 3209 hopper load of sand

Picked up from track No. 8 at 11:37 a. m., and spotted as follows:

Dock "B" at 11:45 a. m.

BG 3047 gon load ore

DRGW 40209 gon load ore

DRGW 43057 gon load ore

Dock "D" at 11:50 a. m.

UP 201057 gon load ore

UP 64775 gon load ore

To Dock "C" at 11:55 a. m.

BG 3010 gon load ore

UCR 21337 gon load ore

UCR 21623 gon load ore

Picked up from Track No. 2 at 12:01 p. m., placed on track 7 at 12:15 p. m.

UCR 20497 gon load lead dust

CNW 46516 box load sulphur

GATX 39592 tank acid

At 1:05 p. m., picked up from Wall Track and Hole yard at 1:05 p. m., and placed on track 3 in the yard at 1:20 p. m.

UP 63182 gon ore

UCR 21260 gon ore

UCR 21573 gon ore

UCR 20560 gon ore

UP 63101 gon ore

Picked up from Pest House at 1:25 p. m., and placed on No. 3 at 1:28 p. m.

BG 2003 gon empty

BG 2129 gon empty

BG 2111 gon empty

BG 2004 gon empty

BG 2057 gon empty

BG 2106 gon empty

BG 2048 gon empty

1781 Assignment No. 1 AS&R Plant, Garfield, Utah Page 8

From extension track picked up at 1:35 p. m.

UP 63354 gon load scrap iron, set to track No. 3 at 1:37 p. m.

Picked up UP 6354 from No. 3 at 1:45 p. m., and placed on No. 7 at 1:47 p. m.

When crew of engine 1024 was relieved from duty, the following cars on track No. 7 for the Union Pacific to pick up

UP 63354 gon scrap
 UCR 20497 gon lead dust
 GATX 39592 Tank acid
 CNW 46516 box sulphur
 UCR 20432 gon empty
 UCR 21485 gon empty
 UP 62073 gon empty
 T&NO 42254 gon empty
 UCR 21344 gon empty
 Handled 95 cars

1782 Assignment No. 1 AS&R Plant Garfield, Utah Page 9

Observations of Inspector Morris at Garfield Plant of the American Smelting and Refining Company, Salt Lake City Utah. March 25, 1944. Engine No. 1024.

Departed from Garfield 7:30 a. m., arrived at plant 7:45 a. m.

At 7:58 a. m., picked up from extension track and spotted as follows:

GATX 39448 tank empty
 UP 4950 tank empty

Spotted at spots Nos. 5 and 6, two and one-half track at 8:07 a. m.

UP 4959 tank empty

Spotted at Brick Spur 8:12 a. m.

At 8:30 a. m. picked up from Long House, and set on center track at 8:32 a. m.

B&O 381580 Box empty
 SLSF 160536 Box empty
 C&O 4464 Box empty

At 8:45 a. m. picked bullion, and placed on No. 5 at 8:50 a. m.

Milw. 712277 box bullion
 RI 146973 box bullion
 SLSW 32432 box bullion
 NYC 111562 box bullion

At 8:55 a. m. picked up from track 4, and placed as follows:

CB&Q 33617 box empty
 C&O 2255 box empty
 RI 145597 box empty
 RI 145882 box empty

NKP 17312 box empty
 C&O 11303 box empty
 Set to Dock A at 9:07 a. m.
 I&N 90137 box empty
 UP 75507 box empty
 ATSF 146772 box empty
 NKP 15571 box empty
 Set to Long House 9:12 a. m.
 CB&Q 30599 box empty
 Soo 44106 box empty
 PM 91095 box empty
 N&W 46628 box empty
 UP 305114 box empty
 Set to center track at 9:14 a. m.

At 9:17 a. m. picked up from buillon track and set on No. 5 at 9:25 a. m.

NYC 110694 box buillon
 Milw. 701546 box buillon
 WLE 25044 box buillon
 I&N 90888 box buillon

1783 Assignment 1

Page 10

At 9:35 a. m. picked up from No. 2, and placed as follows:

ASR 11 gon empty
 ASR 16 gon empty
 ASR 105 gon empty
 ASR 217 gon empty
 ASR 9 composite empty
 ASR 14 gon empty
 ASR 15 gon empty
 ASR 13 gon empty
 UP 63502 gon empty
 Placed on Dock "F" 9:50 a. m.
 BG 3016 gon empty
 BG 3024 gon empty
 BG 3044 gon empty
 BG 3008 gon empty
 BG 3021 gon empty
 UCCX 1801 gon empty
 UCCX 1804 gon empty
 BG 3010 gon empty
 Placed on No. 10 at 10:01 a. m.
 UP 201057 gon empty
 Placed on No. 7 9:37 a. m.

UP 64775 gon empty
 CNW 74219 gon empty
 D&RGW 43057 gon empty
 UCR 21337 gon empty
 Placed on No. 9 at 9:55 a. m.

Picked up from No. 1 10:02 a. m. as follows:
 UCR 21623 gon empty

UP 62012 empty gon
 UP 62175 empty gon
 DRGW 70057 empty gon
 DRGW 43326 empty gon
 Set to No. 9 at 10:10 a. m.
 D&RGW 71116 gon empty
 UP 62773 gon empty
 Set to No. 7 at 10:21 a. m.
 D&RGW 41082 gon ore
 Set to No. 8 at 10:19 a. m.

ASR 224 gon load dirt set to extension track 10:23 a. m.

At 11:01 a. m. picked up from No. 1, and placed at Thaw house at 11:04 a. m.

BG 3214 hopper sand
 BG 3218 hopper sand
 BG 3204 hopper sand
 BG 3216 hopper sand
 BG 3202 hopper sand
 BG 3221 hopper sand and BG 3201 hopper sand

1784 Assignment No. 1

Page 11

At 11:15 a. m. picked up from No. 8 and placed as follows:

UP 62617 gon ore
 WP 5783 gon ore
 DRGW 42111 gon ore
 Placed on Dock "D" at 11:31 a. m.

UCR 20638 gon ore
 UP 64580 gon ore
 Placed on Dock "C" at 11:37 a. m.

At 11:40 a. m. picked up from No. 1, and placed as follows:

BG 3000 gon ore
 BG 3001 gon ore
 BG 3009 gon ore
 Placed on No. 8 at 11:50 a. m.

UCCX 1810 gon precipitate

Placed on lower dock No. 1 at 1:45 a. m.

At 11:55 a. m., picked up from No. 2, and placed on No. 7 at 11:57 a. m.

UP 4959 tank acid

Picked up from Pest House at 1:40 p. m., and placed on No. 3 at 1:55 p. m.

BG 2014 gon empty

BG 2000 gon empty

BG 2041 gon empty

BG 2082 gon empty

BG 2040 gon empty

BG 2039 gon empty

BG 2076 gon empty

BG 2094 gon empty

BG 2006 gon empty

At 1:57 p. m. picked up from No. 1, and placed on No. 3 at 1:59 p. m.

BG 2031 gon empty

BG 2134 gon empty

At 1:43 p. m. entered No. 1, and pulled down and spotted at the Pest-House Cranes

BG 2060 gon concentrates

BG 2083 gon concentrates

BG 2112 gon concentrates

BG 2092 gon concentrates

At 2:00 p. m., picked up from No. 2, and set to No. 7

UCR	2118 gon ore	DRGW 42422 gon ore
-----	--------------	--------------------

WP	5315 gon ore	" 40566 gon ore
----	--------------	-----------------

DRGW 40230 gon ore	" 45006 gon ore
--------------------	-----------------

DRGW 45308 gon ore	ITC 12255 gon ore
--------------------	-------------------

DRGW 42192 gon ore

Placed on No. 7 at 2:05 p. m.

1785 Assignment No. 1

Page 12

At 2:00 p. m. picked up from No. 2, and set to No. 3 at 2:07 p. m.

GATX 38614 tank empty

At 12:30 p. m. Union Pacific Extra West 2201 picked up from No. 7

UP 4959 tank acid

UP 62773 gon empty

DRGW 71416 gon empty
 UP 64775 gon empty
 UP 62201 gon empty
 UP 62666 gon empty
 UCR 20414 gon empty

Handled 112 cars; off duty at 3:30 p. m.

1786 Assignment No. 1

AS&R Plant Garfield, Utah—

Page 13

Observations of Inspector Morris at Garfield Plant of the American Smelting and Refining Company, Salt-Lake City, Utah. March 26, 1944. Engine No. 1024

Departed from Garfield at 7:30 a. m., arrived at plant 7:45 a. m.

At 8:20 a. m. picked up from thaw house track 1, and placed on Dock "C" at 8:30 a. m.

BG 3204 hopper sand

BG 3216 hopper sand

BG 3202 hopper sand

At 8:35 a. m. picked up from buillon and placed on track No. 5 at 8:55 a. m.

N&W 46628 box buillon

Soo. 4406 box buillon

NKP 15571 box buillon

CBQ 30599 box buillon

UP 75507 box buillon

At 10:30 a. m., picked up from buillon track and placed on track 5 at 10:35 a. m.

ATSF 146772 box buillon

L&N 90137 box buillon

C&O 19303 box buillon

NKP 17312 box buillon

At 9:05 a. m., picked up from track No. 4 and placed as follows:

IGN 17009 box empty

ATSF 135109 box empty

DRGW 66604 box empty

DRGW 66851 box empty

Erie 70507 box empty

B&A 36253 box empty

NYC 110953 box empty

Placed on Dock "A" at 9:15 a. m.

Erie 76647 box empty
 P&LE 35484 box empty
 NYC 157329 box empty
 MP 30473 box empty
 NYC 107791 box empty
 Erie 76311 box empty
 Placed on Long House at 9:20 a. m.
 RI 148295 box empty
 N&W 49996 box empty
 RU 146152 box empty
 Soa. 20048 box empty
 Placed on center track 9:25 a. m.

At 10:05 a. m. picked up from extension track, set on track 2
 at spot 2 at 10:07 a. m.
 UP 4974 tank empty

1787 Assignment No. 1

AS&R Plant Garfield, Utah—

Page 14

At 10:15 a. m., picked up from No. 2 and placed as follows:

WP 5315 gon empty
 DRGW 40230 gon empty
 DRGW 43186 gon empty
 DRGW 43091 gon empty
 D&SL 34095 gon empty
 DRGW 40387 gon empty
 DRGW 45372 gon empty
 DRGW 41634 gon empty
 DRGW 45263 gon empty
 DRGW 41391 gon empty
 WP 5783 gon empty
 DRGW 42111 gon empty

Placed on No. 9 at 10:31 a. m.

ASR 102 gon empty
 ASR 221 gon empty
 ASR 220 gon empty
 ASR 200 gon empty
 ASR 112 gon empty
 ASR 106 gon empty

Placed on Dock "F" at 10:41 a. m.

UP 62617 gon empty, placed on No. 8 at 10:43 a. m.

UCCX 1805, gon empty, placed on No. 10 at 10:31 a. m.

At 10:47 a. m. picked up from No. 2 and placed as follows:

UP 63101 gon empty
 UCR 20560 gon empty

UP 63102 gon empty
 UCR 21573 gon empty
 UCR 21260 gon empty
 UP 64560 gon empty

Placed on No. 8 at 10:51 a. m.

DRGW 40209 gon empty

DRGW 45006 gon empty

UCR 20638 gon empty

Placed on No. 9 at 10:48 a. m.

BG 3214 hopper empty

BG 3218 hopper empty

BG 3009 gon empty

BG 3265 hopper empty

BG 3216 hopper empty

BG 3220 hopper empty

Placed on No. 10 at 10:58 a. m.

ASR 251 gon empty

Placed on Dock "F" at 10:56 a. m.

At 11:05 a. m. picked up from No. 7 and placed as follows:

DRGW 41082 gon ore

UP 62558 gon ore

UP 63077 gon ore

UP 63507 gon ore

DRGW 40566 gon ore

" 42422 gon ore

BG 3023 gon ore

BG 3019 gon ore

Placed on Dock "D" at 11:50 a. m.

1788 Assignment No. 1

Page 15

Picked up at 11:05 a. m. from No. 7, and placed on Dock D at 11:31 a. m.

UP 87184 hopper ore

At 11:05 a. m. picked up from No. 7, Placed on Dock "C" at 11:40 a. m.

UCR 20404 hopper ore

At 12:30 p. m. picked up from No. 3, and placed on No. 7 at 12:35 p. m.

GATX 38614 tank empty

Off duty at 12:40 p. m.

Handled 77 cars.

1789

Exhibit No. 9

SWITCHING OPERATIONS OBSERVED BY
 REPRESENTATIVES OF THE INTERSTATE COMMERCE COMMISSION
 ON MARCH 23, 24, 25 AND 26, 1944,
 AT THE PLANT OF
 AMERICAN SMELTING & REFINING COMPANY
 GARFIELD, UTAH.

1790

INTRA-PLANT SWITCHING

Car Initial &
 Number
 UCR 21260

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23/44	6:33p	Empty	3	Track 3	Wall track
3/24/44	1:20p	Load	1	Wall track	Track 3
"	2:24p	"	2	Track 3	Scales & weighed
"	"	"	2	Scales	Track 2
"	4:20p	"	3	Track 2	B Line
		By AS&R car mover		B Line	Lower Dock 4
3/26/44	10:00a	Empty	2	Lower Dock 4	Track 2
"	10:51a	"	1	Track 2	Track 8

Switching charges:

Intra-plant: \$2.70
 Empty weigh: None

1791

INTRA-PLANT SWITCHING

Car Initial &
 Number
 UP 63101

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23/44	6:04p	Empty	3	Track 3	Wall track
3/24/44	1:20p	Load	1	Wall track	Track 3
"	2:24p	"	2	Track 3	Scales & weighed
"	"	"	2	Scales	Track 2
"	6:14p	"	3	Track 2	Track 8
3/25/44	4:59p	"	3	Track 8	B Line
		By AS&R car mover		B Line	Lower Dock 4
3/25/44	10:00a	Empty	2	Lower Dock 4	Track 2
"	10:51a	"	1	Track 2	Track 8
"	5:57p	"	3	Track 8	Wall track

Switching charges:

Intra-plant: \$2.70
 Empty weigh: None

1792

- 3 -

Car Initial &
Number
B&G 3211

Date Contents Via
1944
Car in: 3/23 Load B&G
Car out: 3/26 Empty B&G
Commodity: Sand
Origin: Sand Spur B/A Magna, Utah
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	9:54a	Load	2	Track 4	Scales & weighed
"	"	"	2	Scales	Track 1
"	10:30a	"	1	Track 1	Thaw House 1
3/24	11:35a	"	1	Thaw House 1	Dock C
		By AS&R car mover		Dock C	Lower Dock 4
3/25	9:37a	Empty	2	Lower Dock 4	Track 1

Switching charges:

Intra-plant: \$2.25 (Includes weighing)
Empty weigh: None

1793

- 4 -

Car Initial &
Number
D&RGW 42111

Date Contents Via
1944
Car in: 3/24 Load D&RGW
Car out: — — —
Commodity: Ore, copper
Origin: Wabuska, Nev.
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/24	2:24p	Load	2	Track 3	Scales & weighed
"	"	"	2	Scales	Track 2
"	6:12p	"	3	Track 2	Track 8
3/25	11:15a	"	1	Track 8	Dock D
		By AS&R car mover		Dock D	Lower Dock 4
3/26	9:30a	Empty	2	Lower Dock 4	Scales & weighed
"	"	"	2	Scales	Track 2
"	10:31a	"	1	Track 2	Track 9

Switching charges:

Intra-plant: None
Empty weigh: 50 cents

794

- 5 -

Car Initial &
Number
Pa 70051

Date Contents Via
1944
Car in: 3/24 Empty D&RGW
Car out: 3/25 Load B&G
Commodity: Copper bullion
Origin: Garfield, Utah
Destination: Baltimore, Md.
Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24	9:35a	Empty	1	Track 4	Long house
		By AS&R car mover		Long house	Bullion track
"	6:55p	Bullion	3	Bullion track	Track 5
3/25	11:00a	"	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2

Switching charges:

Intra-plant: None

Empty weigh: None

\$3.96 paid by B&G to D&RGW on outbound load.

795

- 6 -

Car Initial &
Number
IC 11522

Date Contents Via
1944
Car in: 3/23 Lumber UP
Car out: — — —
Commodity: Lumber
Origin: McCloud, Calif.
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23	2:00p	Load	2	Track 4	Track 2
"	5:27p	"	3	Track 2	Track 3
"	6:04p	"	3	Track 3	Track 5
"	6:27p	"	3	Track 5	Ping Pong track

Switching charges:

Intra-plant: None

Empty weigh: None

1796

- 7 -

Car Initial &
Number
UP 4952

Date 1944
Car in: 3/24 Empty Via UP
Car out: — — —
Commodity: Empty
Origin: Royson, Nev.
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/24	4:28p	Empty	3	Track 3	Scales & weighed
"	6:30p	"	3	Scales	Extension track

Switching charges:

Intra-plant: None

Empty weight: 50 cents (Inbound light)

1797

- 8 -

Car Initial &
Number
IC 85372

Date 1944
Car in: 3/23 Load Via DARGW
Car out: — — —
Commodity: Matte
Origin: Federal, Ill.
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	2:00p	Load	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2
"	5:58p	"	3	Track 2	C Line
		By AS&R car mover		C Line	Lower Dock 4
3/24	9:21a	Empty		Lower Dock 4	Scales & weighed
"	"	"	2	Scales	Track 2
"	10:13a	"	1	Track 2	Track 9

Switching charges:

Intra-plant: None

Empty weight: 50 cents

1798

INTRA-PLANT SWITCHING

Car Initial &
Number
D&RGW 45372

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24/44	5:21p	Empty	3	Track 9	Track 6
"	5:44p	"	3	Track 6	Wall track
3/25/44	2:32p	Load	2	Stock Ore track	Scales & weighed
"	2:32p	"	2	Scales	Track 2
"	4:40p	"	3	Track 2	D Line
		By AS&R car mover		D Line	Lower Dock 4
3/26/44	9:30a	Empty	2	Lower Dock 4	Track 2
"	10:31a	"	1	Track 2	Track 9

Switching charges:

Intra-plant: \$2.70
Empty weigh: None

1799

INTRA-PLANT SWITCHING

Car Initial &
Number
UP 63182

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23/44	6:33p	Empty	3	Track 3	Wall Track
3/24/44	1:20p	Load	1	Wall Track	Track 3
"	2:24p	"	2	Track 3	Scales & weighed
"	"	"	2	Scales	Track 2
"	6:14p	"	3	Track 2	Track 8
3/25/44	4:59p	"	3	Track 8	B Line
		By AS&R car mover		B Line	Lower Dock 4
3/26/44	10:00a	Empty	2	Lower Dock 4	Track 2
"	10:51a	"	1	Track 2	Track 8
"	5:57p	"	3	Track 8	Wall Track

Switching charges:

Inter-plant: \$2.70
Empty weigh: None

8800

-11-

Car Initial &
Number

GATX 39592

	Date	Contents	Via
	1944		
Car in:	3/21	Empty	UP
Car out:	3/24	Acid	UP
Commodity:	Acid		
Origin:	Garfield, Utah		
Destination:	Trona, Calif.		

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23	6:54p	Empty	3	Extension track	5 Line
3/24	9:05a	Acid	1	5 Line	5 Track
"	10:37a	"	2	5 track	Scales & weighed
"	"	"	2	Scales	Track 2
"	12:15p	"	1	Track 2	Track 7

Switching charges:

Intra-plant: None

Empty weigh: 50 cents (Inbound light)

1801

-12-

Car Initial &
Number

IC 84323

	Date	Contents	Via
	1944		
Car in:	3/23	Load	D&RGW
Car out:	—	—	—
Commodity:	Matte		
Origin:	Federal, Ill.		
Destination:	Garfield, Utah		

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/23	2:00p	Load	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2
"	5:55p	"	3	Track 2	C Line
		By AS&R car mover		C Line	Lower Dock 4
3/24	9:21a	Empty	2	Lower Dock 4	Scales & weighed
"	"	"	2	Scales	Track 2
"	10:13a	"	1	Track 2	Track 9

Switching charges:

Intra-plant: None

Empty weigh: 50 cents

1235

1802

- 13 -

Car Initial &
Number
B&G 2033

Date Contents Via
1944
Car in: 3/23 Load B&G
Car out: 3/24 Empty B&G
Commodity: Concentrates
Origin: Arthur Mill, Magna, Utah
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	1:16p	Load	2	Track 3	Scales & weighed
"	"	Load	2	Scales	Old Pest House
3/24	8:41a	Empty	2	Old Pest House	Scales & weighed
"	"	Empty	2	Scales	Track 9

Switching charges:

Intra-plant: \$2.25 (Including weighing)
Empty weigh: None

1803

- 14 -

Car Initial &
Number
B&G 2033

Date Contents Via
1944
Car in: 3/25 Load B&G
Car out: 3/26 Empty B&G
Commodity: Concentrates
Origin: Arthur Mill, Magna, Utah
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/25	11:50a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	New Pest House
"	5:38p	Load	3	New Pest House	Old Pest House
3/26	2:00p	Empty	2	Old Pest House	Scales & weighed
"	"	Empty	2	Scales	Track 1

Switching charges:

Intra-plant: \$2.25 (Includes weighing)
Empty weigh: None

1804

- 15 -

Car Initial &
Number
UP 62773

Date: Contents Via
1944
Car in: 3/24 Copper, Crude UP
Car out: 3/25 Empty
Commodity: Copper, crude
Origin: Imlay, Nev.
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/24	4:28p	Load	3	Track 3	Scales & weighed
"	6:25p	"	3	Scales	D Line
		By AS&R car mover		D Line	Lower Dock 4
3/25	9:37a	Empty	2	Lower Dock 4	Scales & weighed
"	"	Empty	2	Scales	Track 1
"	10:02a	Empty	1	Track 1	Track 7

Switching charges:

Intra-plant: None
Empty weigh: 50 cents 3/25

1805

- 16 -

Car Initial &
Number
NYC 146493

Date: Contents Via
1944
Car in: 3/23 Empty D&RGW
Car out: 3/25 Load B&G
Commodity: Copper Bullion
Origin: Garfield, Utah
Destination: Baltimore, Md.
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	8:42a	Empty	1	Track 4	Coal Trestle Dock A
"	4:27p	"	3	Coal Trestle	Long House
3/24	8:45a	"	1	Long House	Center House
		By AS&R car puller		Center Track	Bullion Track
3/24	4:04p	Bullion	3	Bullion Track	Track 5
3/25	10:35a	"	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2

Switching charges:

Intra-plant: None
Weigh empty: None
\$3.96 paid by B&G to D&RGW on outbound load.

1806

— 17 —

Car Initial &
Number
Pa 596204

Date Contents Via
1944
Car in: 3/23 Empty D&RGW
Car out: 3/25 Load B&G
Commodity: Copper bullion
Origin: Garfield, Utah
Destination: Baltimore, Md.

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	8:42a	Empty	1	Track 4	Coal Trestle Dock A
"	4:27p	"	3	Coal Trestle Long house	Long house Bullion track
		By AS&R car mover			
3/24	4:04p	Bullion	3	Bullion track	Track 5
3/25	10:35a	"	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2

Switching charges:

Intra-plant: None

Empty weigh: None

\$3.96 paid by B&G to ~~D&RGW~~ on outbound load.

1807

— 18 —

INTRA-PLANT SWITCHING

Car Initial &
Number
D&RGW 41034

Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/24/44	5:21p	Empty	3	Track 9	Track 6
"	5:44p	"	3	Track 6	Wall track
3/25/44	2:32p	Load	2	New Yard stock ore track	Scales & weighed
"	"	"	2	Scales	Track 2
"	4:40p	"	3	Track 2	D Line
		By AS&R car mover		D Line	Lower Dock 4
3/26/44	9:30a	Empty	2	Lower Dock 4	Track 2
"	10:31a	"	1	Track 2	Track 9

Switching charges:

Intra-plant: \$2.70

Empty weigh: None

1808

— 19 —

Car Initial &
Number
B&G 3044

Date Contents Via
1944
Car in: 3/24 Load B&G
Car out: 3/25 Empty B&G
Commodity: Crude copper ore
Origin: Highland Boy Spur B/A Bingham, Utah
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24	9:44a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	Track 1
"	11:25a	Load	1	Track 1	Dock D
		By AS&R car mover		Dock D	Lower Dock 4
3/25	09a	Empty	2	Lower Dock 4	Scales & weighed
"	"	Empty	2	Scales	Track 2
"	10:01a	Empty	1	Track 2	Track 10

Switching charges:

Intra-plant: None

Empty weigh: 50 cents

\$3.60 paid by B&G to D&RGW on inbound load.

1809

— 20 —

Car Initial &
Number
NYC 110694

Date Contents Via
1944
Car in: 3/24 Empty D&RGW
Car out: 3/25 Load B&G
Commodity: Copper bullion
Origin: Garfield, Utah
Destination: Baltimore, Md.
Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24	9:30a	Empty	1	Track 4	Coal Trestle Dock A
"	6:51p	"	3	Coal Trestle	Middle track
		By AS&R car mover		Middle track	Bullion track
3/25	9:25a	Bullion	1	Bullion track	Track 5
"	11:00a	"	2	Track 5	Scales & weighed
"	"	"	2	Scales	Track 2

Switching charges:

Intra plant: None

Empty weigh: None

\$3.96 paid by B&G to D&RGW on outbound load.

1810

— 21 —

Car Initial &
Number
UP 4965

Date Contents Via
1944
Car in: 3/24 Empty UP
Car out: — — —
Commodity: Empty
Origin: Los Angeles, Calif.
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24	4:28p	Empty	3	Track 3	Scales & weighed
"	6:30p	"	3	Scales	Extension track

Switching charges:

Intra-plant: None
Empty weigh: 50 cents (Inbound light)

1811

— 22 —

Car Initial &
Number
B&G 3016

Date Contents Via
1944
Car in: 3/24 Load B&G
Car out: 3/25 Empty B&G
Commodity: Crude copper ore
Origin: Highland Boy Spur R/A Bingham, Utah
Destination: Garfield, Utah

Switching performed:

Date	Time	Contents	Assignment No.	From	To
3/24	9:44a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	Track 1
"	11:25a	Load	1	Track 1	Dock D
		By AS&R car mover		Dock D	Lower Dock 4
3/25	9:09a	Empty	2	Lower Dock 4	Scales & weighed
"	"	Empty	2	Scales	Track 2
"	10:01a	Empty	1	Track 2	Track 10

Switching charges:

Intra-plant: None
Empty weigh: 50 cents
\$3.60 paid by B&G to D&RGW on inbound load.

1812

- 23 -

Car Initial &
Number
PM 86278

Date Contents Via
1944
Car in: 3/23 Empty D&RGW
Car out: 3/25 Load B&G
Commodity: Copper bullion
Origin: Garfield, Utah
Destination: Baltimore, Md.
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/23	8:42a	Empty	1	Track 4	Coal Trestle Dock A
"	4:27p	Empty	3	Coal Trestle	Long House
3/24	8:45a	Empty	1	Long House	Center track
		By AS&R car mover		Center track	Bullion track
3/24	4:04p	Bullion	3	Bullion track	Track 5
3/25	10:35a	Bullion	2	Track 5	Scales & weighed
"	"	Bullion	2	Scales	Track 2

Switching charges:

Intra-plant: None

Empty weigh: None

\$3.96 paid by B&G to D&RGW on outbound load.

1813

- 24 -

Car Initial &
Number
B&G 3009

Date Contents Via
1944
Car in: 3/25 Load B&G
Car out: 3/26 Empty B&G
Commodity: Crude copper ore
Origin: Highland Roy Spur B/A Bingham, Utah
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/25	10:18a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	Track 1
"	11:40a	Load	1	Track 1	Track 8
"	4:40p	Load	3	Track 8	D Line
		By AS&R car mover		D Line	Lower Dock 4
3/26	10:00a	Empty	2	Lower Dock 4	Scales & weighed
"	"	Empty	2	Scales	Track 2
"	10:58a	Empty	1	Track 2	Track 10

Switching charges:

Intra-plant: None

Empty weigh: 50 cents

\$3.60 paid by B&G to D&RGW on inbound load

1814

— 25 —
*Car Initial &
 Number*
 B&G 3209

Date *Contents* *Via*
 1944
Car in: 3/23 Load B&G
Car out: 3/26 Empty B&G
Commodity: Sand
Origin: Sand Spur B/A Magna, Utah
Destination: Garfield, Utah
Switching performed:

<i>Date</i>	<i>Time</i>	<i>Contents</i>	<i>Assign- ment No.</i>	<i>From</i>	<i>To</i>
3/23	9:54a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	Track 1
3/23	10:30a	Load	1	Track 1	Thaw House 1
3/24	11:35a	Load	1	Thaw House 1	Dock C
		By AS&R car mover		Dock C	Lower Dock 4
3/25	9:37a		2	Lower Dock 4	Track 1

Switching charges:

Intra-plant: \$2.25 (Includes weighing)
 Empty weigh: None

1815

— 26 —
*Car Initial &
 Number*
 B&G 2019

Date *Contents* *Via*
 1944
Car in: 3/23 Load B&G
Car out: 3/26 Empty B&G
Commodity: Concentrates
Origin: Arthur Mill, Magna, Utah
Destination: Garfield, Utah
Switching performed:

<i>Date</i>	<i>Time</i>	<i>Contents</i>	<i>Assign- ment No.</i>	<i>From</i>	<i>To</i>
3/23	1:16p	Load	2	Track 3	Scales & weighed
"	"	Load	2	Scales	Old Pest House
3/24	8:41a	Empty	2	Old Pest House	Scales & weighed
"	"	Empty	2	Scales	Track 9

Switching charges:

Intra-plant: \$2.25 (Includes weighing)
 Empty weigh: None

1242

1816

- 27 -

Car Initial &
Number
B&G 2019

Date Contents Via
1944
Car in: 3/25 Load B&G
Car out: 3/26 Empty B&G
Commodity: Concentrates
Origin: Arthur Mill Magna, Utah
Destination: Garfield, Utah
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/25	11:50a	Load	2	Track 4	Scales & weighed
"	"	Load	2	Scales	New Pest House
"	5:38p	Load	3	New Pest House	Old Pest House
"	2:00p	Empty	2	Old Pest House	Scales & weighed
"	"	Empty	2	Scales	Track 1

Switching charges:

Intra-plant: \$2.25 (Includes weighing)
Empty weigh: None

1817

- 28 -

Car Initial &
Number
UP 4950

Date Contents Via
1944
Car in: 3/11 Empty UP
Car out: 3/25 Acid UP
Commodity: Acid
Origin: Garfield, Utah
Destination: Trona, Calif.
Switching performed:

Date	Time	Contents	Assign- ment No.	From	To
3/24	7:02p	Acid	3	5 Line	5 Track
3/25	10:35a	Acid	2	5 Track	Scales & weighed
"	"	"	2	Scales	Track 2
"	11:55a	"	1	Track 2	Track 7

Switching charges:

Intra-plant: None
Empty weigh: 50 cents (Inbound light)

1818

Exhibit No. 10

Exhibit No. 10

Page No. 1

Witness: O. W. TUCKWOOD

I. C. C. EX PARTE 104 PART II INVESTIGATION

American Smelting and Refining Company
Garfield, Utah SmelterHISTORY OF SWITCHING RATES AT GARFIELD, UTAH SMELTER
DENVER & RIO GRANDE WESTERN RAILROAD
1905-1908

From 1905 to 1908 switching within the Garfield Plant was performed free by the D&RGW in accordance with agreement reached at time construction of the plant was discussed.

EFFECTIVE APRIL 16, 1908

Effective April 16, 1908 on intrastate traffic, and on May 23, 1908 on interstate traffic, Supplement 12, D&RG Tariff 132-A, ICC 1763, provided:

"Switching from track to track within smelter plants served by the Denver and Rio Grande Railroad all cars containing freight which has paid transportation charges to the plant . . . free."

This wording continued in effect until February 25, 1920.

EFFECTIVE FEBRUARY 25, 1920

Effective February 25, 1920 in D&RGW Tariff 4486-E, ICC 2770, the following provisions were first incorporated in the tariffs:

"Item #10—SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as otherwise provided)

At points not specifically provided for herein the rate on Intra-plant switching (see Item No. 50 or as amended) will be \$2.50 per car for each movement of switching service performed. (see Item No. 20)."

"Item #15—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a Line Haul carload shipment destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah will include one movement of Commodity within a smelter

plant over track scales to and from smelter sampler-(or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company." (Italics supplied).

(Item #15 changed November 27, 1920. See below—page 2)

"Item #20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (see also Item No. 10).

(Item #20 changed November 14, 1920 and November 27, 1920. See page 2)

1819

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 2

EFFECTIVE NOVEMBER 14, 1920

Effective November 14, 1920, Item No. 20, D&RGW tariff 4486-E, ICC 2770, was changed to read as follows:

"APPLICATION OF RATES

SWITCHING CHARGE

Item #20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN UTAH—

Coal and Ore—\$2.50 per car—All other freight \$3.00 per car.

For each additional movement not provided for in Item No. 15, from track to track, within smelter plant (including weighing over scales within plant) See also Item No. 10."

EFFECTIVE NOVEMBER 27, 1920

Effective November 27, 1920, in Supplement 7 to D&RGW Tariff 4486-E, ICC 2770, the following was published:

"Item #15-A—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville,

Pueblo, Blende, and Salida, Colorado. Garfield, Murray and Midvale, Utah will include *movement* of a commodity within a smelter plant over track scales. To and From THAW-HOUSE, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company."

Item #20-A.—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

APPLICATION OF RATES

SWITCHING CHARGE

For each additional movement not provided for in Item No. 15-A from track to track within smelter plant (including weighing over scales within plant).—See also Item No. 10."

Coal and Ore—\$2.50 per car. All other freight \$3.00 per car.

EFFECTIVE DECEMBER 1923

Effective December 1923 in D&RGW Tariff 4486-G, ICC 143, P.U.C.U. 64, Colo. P.U.C. 81, the following was published:

Item:	Stations:	APPLICATION OF RATES
30	All stations on D&RGW & RGS	All carload rates published or concurred in by the D&RGW or RGS covering traffic on which these carriers or either one of them, receive a line haul include the switching service to and from the D&RGW or RGS side tracks, warehouse tracks and industry tracks within the switching limits (both at point of origin and destination) except as otherwise provided.

1820

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.

Page No. 3

D&RGW Tariff 4486-G, ICC 143, P.U.C.U. 64, Colo. P.U.C.
SI (Cont'd.)

Item:	Stations:	APPLICATION OF RATES
40	All stations on D&RGW & RGS	<p>SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as Otherwise Provided)</p> <p>At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 120 or as amended) will be \$3.15 per car for each movement of switching service performed at all points named in Item No. 10, and \$2.70 per car at all other points. (See Item No. 60).</p>
50	Blende, Colo. Durango, Colo. Garfield, Utah Leadville, Colo. Midvale, Utah Murray, Utah Pueblo, Colo. Salida, Colo.	<p>INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH</p> <p>Delivery of a line haul carload ship- ment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah, will in- clude movement of a commodity within a smelter plant over track scales, TO AND FROM THAW-HOUSE, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.</p>
Item:	Stations:	SWITCHING MOVEMENT RATE
60	Blende, Colo. Durango, Colo. Garfield, Utah Leadville, Colo. Midvale, Utah Murray, Utah	<p>Intra-Plant or Inter- nal Switching at Smel- ters in Colorado and Utah. For each addi- tional movement not provided for in Item</p>

Pueblo, Colo. 50, or as amended, \$2.70 per car
 Salida, Colo. from track to track
 within Smelter Plant
 (including weighing
 over scales within
 plant). See also item
 No. 40.

120 Explanation of
 Intra-Plant, In-
 tra-Terminal
 and Inter-Ter-
 minal Switching

INTRA-PLANT SWITCHING

A switching movement from one track to another within the same plant or industry.

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

1821

American Smelting & Refining Company
 Garfield, Utah Smelter

Exhibit No.
 Page No. 4

D&RGW Tariff 4486-G, ICC 143, P.U.C.U. 64, Colo. P.U.C.
 81 (Cont'd.)

Item:	Stations:	APPLICATION OF RATES
-------	-----------	----------------------

130	Application of rates named in Columns Nos. 1 and 2 of this tariff.	APPLICATION OF RATES NAMED IN COLUMN #1 OF RATE TABLE The rates named in Column No. 1 of this tariff (pages 5 to 12), apply only on traffic which has been or will be handled in road service, that is, traffic moved from or to a point within one switching limit, from or
-----	--	---

to a point outside the same switching limit, and on which a charge, other than a switching charge, has been or will be assessed.

140

APPLICATION OF RATES NAMED IN COLUMN #2 OF RATE TABLE

The rates named in Column No. 2 of this tariff (pages 5 to 12), apply only to cars handled in Intra-Plant, Intra-Terminal and Inter-Terminal switching service (see Item No. 120) and will be assessed only when the cars have not or will not be handled in road service as described in Item No. 130.

SWITCHING CHARGES			
Column No. 1 (See Item 130 of tariff or as Amended)		Column No. 2 (See Item 140 of tariff or as Amended)	
Rates in cents per ton of 2,000 pounds (except as otherwise provided)			
Item	Station	Switching Movement	
590	Garfield, Magna & Arthur, Utah	On cars loaded with con- centrates received from the B&G Ry. and switch- ed to Garfield Smelting Company's plant.	\$2.70 per car (See Item # 30) \$5.85 per car (See Item # 120)
		(Changed 6/23/24, Suppl. 3, D&RGW Tariff 4486-G. See page 6)	
		Gravel and Sand from the east end of the Gar- field Smelting Com- pany's Yard to the Gar- field Smelting Co.'s Prop- erty Post. (Exception to Item #650).	\$1.35 per car \$2.70 per car
		(Cancelled 6/23/24, Suppl. 3, D&RGW Tariff 4486-G. See page 6)	
610		On cars loaded with Sand received from the Bingham & Garfield Ry. and switched to Garfield Smelting Co's plant. (Ex- ception to Item #640).	\$2.70 per car \$5.85 per car (See Item # 120)
		(Changed 6/23/24, Suppl. 3, D&RGW Tariff 4486-G. See page 6)	

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.

Page No. 5.

D&RGW Tariff 4486-G, ICC 143, P.U.C.U. 64, Colo. P.U.C. 81 (Cont'd)

			8. SWITCHING CHARGES	
			Column No. 1 (See Item 139 of tariff or as Amended)	Column No. 2 (See Item 140 of tariff or as Amended)
			Rates in cents per ton of 2,000 pounds (except as otherwise provided)	
Item	Station	Switching Movement		
0	Garfield, Magna & Arthur, Utah	All carload freight be- tween transfer tracks with Bingham & Gar- field Ry., at Garfield, Utah, and points within the yards of the Garfield Smelting Co. (See Item #630)	\$3.60 per car	\$5.85 per car
		(Changed 6/23/24, Suppl. 3, D&RGW Tariff 4486-G. See page 6)		
0	" "	All carload freight be- tween the D&RGW con- nection with the Garfield Smelting Co.'s plant and Garfield Townsite.	22¢ Min. Charge \$3.60 per car	34¢ Min. Charge \$5.85 per car
		(Cancelled 5/17/24, Suppl. 2, D&RGW Tariff 4486-G. See page 6)		
0	" "	Between Garfield Smelt- er Plant, Garfield Town- site, Magna and Arthur and Garfield Smelter Plant, Garfield Townsite, Magna and Arthur, all carload freight. Applies only on shipments orig- inating at the above named points.	\$2.25 per car	\$5.85 per car
		(Cancelled 5/17/24, Suppl. 2, D&RGW Tariff 4486-G. See page 6)		
0	" "	All carload freight be- tween the D&RGW con- nection with the Garfield Smelter Plant and Mag- na and Arthur, Utah	28¢ Min. Charge \$5.85 per car	34¢ Min. Charge \$7.20 per car
		(Cancelled 5/17/24, Suppl. 2, D&RGW Tariff 4486-G. See page 6)		

1823

American Smelting and Refining Company
Garfield, Utah SmelterExhibit No.
Page No. 6

EFFECTIVE MAY 17, 1924

Effective May 17, 1924, Supplement 2, D&RGW Tariff 4486-G, ICC 143, PUCU 64, Items 630-A, 640-A, and 650-A (these items cancelled account obsolete). For charges see:

B&G Tariff 25-A, ICC 17, PUCU 24

B&G " 121, PUCU 33

EFFECTIVE JUNE 23, 1924

Effective June 23, 1924, Supplement 3, D&RGW Tariff 4486-G ICC 143, PUCU 64.

SWITCHING CHARGES

Column No. 1 (See Item 130 of tariff or as Amended)	Column No. 2 (See Item 140 of tariff or as Amended)
--	--

Rates in cents per ton of 2,000
pounds (except as otherwise
provided)

Item	Station	Switching Movement	
590-A Cancels 590	Garfield, Magna and Arthur, Utah	On cars loaded with Concentrates, originating at Magna and Arthur, Utah, received from the Bingham & Garfield Railway, and switched to the Garfield Smelter Un- loading Bins, including the movement within the Smelter Plant Yards over track scales to and from the Thaw House, and to and from the Smelter Sampler.	\$2.25 per car
600-A	" "	Gravel and Sand from the East end of the Garfield Smelting Co.'s Yard to the Garfield Smelting Co.'s Prop- erty Post. (Exception to Item #650 of tariff or as amended) (Note for Item 600-A—Not printed in tariff. The item in the supplement reads "Cancelled. For rates see Item 750 of tariff or as amended." This apparently in error; Item 60 would apparently apply. Tariff contains no Item 750).	
610-A Cancels 610	" "	On cars loaded with Sand received from the Bingham & Garfield Railway and switched to the Garfield Smelting Co.'s plant yards.	\$2.25 per car

620-B	All other carload freight	
Cancels " "	between transfer tracks	
620A	with the Bingham &	
	Garfield Railway at Gar-	\$1.60 per car
	field and points within	
	the yards of the Garfield	
	Smelting Co.	

1824

American Smelting & Refining Company
Garfield, Utah Smelter

Exhibit No.

Page No. 7

EFFECTIVE SEPTEMBER 10, 1931

D&RGW Tariff 6600, ICC 429, P.U.C.U. 161 cancelled
D&RGW Tariff 4486-G, III 143, P.U.C.U. 64

SWITCHING SERVICE INCLUDED IN PUBLISHED RATES VIA D&RGW

Item #140 Unless otherwise specifically provided herein, or in other tariffs lawfully on file with the Interstate Commerce or State Public Utilities Commissions, all carload rates published or concurred in by the D&RGW RR covering traffic on which it receives a line or road haul, include the switching service to and from the side tracks, warehouse tracks or industry tracks within the switching limits on the D&RGW RR.

SWITCHING CHARGES COVER MOVEMENT OF BOTH EMPTY AND LOADED CARS

Item #150 Switching charges named (unless otherwise specifically provided) will cover the handling of cars loaded inbound and empty outbound, or vice versa. If cars are handled loaded in both directions, switching charge will be assessed for each loaded movement.

INTRA-PLANT SWITCHING

A switching movement from one track to another within the same plant or industry.

Item #180

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT

Item #250

(Except as Otherwise Provided)

At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 180) will be \$3.15 per car for each switching movement performed at all points named in Item No. 130, and \$2.70 per car at all other points.

(Item #130 refers to list of stations other than smelters)

Item No.	Switching Movement Garfield, Utah	Switching rates in cents per ton of 2,000 lbs.	Minimum charge in dollars and cents per car (See Item #135)
1670	Delivery of a line-haul carload shipment, destined to smelter at Garfield, Utah.		

1825

American Smelting & Refining Company
Garfield, Utah Smelter

Exhibit No.

Page No. 8

Item No.	Switching Movement Garfield, Utah	Switching rates in cents per ton of 2,000 lbs.	Minimum charge in dollars and cents per car (See Item #135)
1670 (Cont'd)	will include movement within smelter plant over track scales, to and from thaw-house to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company. For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant)		\$2.70

1680	Concentrates, carloads, originating at Magna or Arthur, Utah on B. & G. switched to Garfield Smelter unloading bins, including service designated in Item No. 1670	\$2.25
1690	Sand, carloads, received from B.&G. and switched to Garfield Smelting Co.'s plant yards	\$2.25
1700	All carload freight not provided for above, between track connection with B.&G. and points within yards of the Garfield Smelting Co.	\$3.60

EFFECTIVE JANUARY 4, 1932

In Supplement 4, D&RGW Tariff 6600:

All Interstate switching charges increased 10%
Supp. 4, *Ex Parte* 103.

EFFECTIVE NOVEMBER 12, 1932

In Supp. I, Agent Boyds Tariff 252-A, ICC A-2277
(Emergency Charges):Intrastate switching charges on all shipments except ores and concentrates increased 10% *Ex Parte* 103.

1826

American Smelting & Refining Company
Garfield, Utah SmelterExhibit No.
Page No. 9.

EFFECTIVE APRIL 1, 1933

Supp. 7, Boyds Tariff 252-A, ICC A-2277 (Emergency Charges):

10% *Ex Parte* 103 increase removed on Lead, Copper, Zinc and Silver Ores and Concentrates.

EFFECTIVE OCTOBER 1, 1933

10% *Ex Parte* 103 increase expired on all switching.

EFFECTIVE DECEMBER 15, 1933

D&RGW Tariff 6600-A, ICC 489, P.U.C.U. 183 cancelled
D&RGW Tariff 6600.

Item 2280—Reissue of Item 1670 .	
“ 2290— “ “ “ 1680	
“ 2300— “ “ “ 1690	
“ 2310— “ “ “ 1700	

EFFECTIVE APRIL 18, 1935

Supp. 11, D&RGW Tariff 6600-A.

Interstate Switching charges on all shipments except Lead, Copper and Zinc. Ores and Concentrates increased 10% *Ex Parte* 115.

EFFECTIVE JANUARY 15, 1936

Intrastate Switching charges on all shipments except Lead, Copper and Zinc Ore and Concentrates increased 10% *Ex Parte* 115.

EFFECTIVE JULY 1, 1936

Ex Parte 10% increase expired.

EFFECTIVE OCTOBER 17, 1936

Amendment 17, D&RGW Tariff 6600-A:

TABLE OF SWITCHING CHARGES

Switching Movement	Minimum Charge in Dollars and cents per car (see item #195)
Garfield, Utah	
Item 2300-A Clay and Sand, carloads, received from B&G, and switched to Garfield Smelting Co.'s (Intra-state plant yards. (23-803) only)	\$2.25

1827

American Smelting & Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 10

EFFECTIVE FEBRUARY 23, 1937

Supp. 16, D&RGW Tariff 6600-A.

Switching Movement	Minimum Charge in Dollars and cents per car (see item #195 of Tariff or as Amended)
Garfield, Utah	
Item 2300-A Clay and Sand, carloads, received from B&G, and switched to American Smelting and Refining Company plant yards. (23-803) (317. 6-8A4)	\$2.25

EFFECTIVE MAY 21, 1937

Amendment 19, D&RGW Tariff 6600-A.

SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT

(Except as otherwise provided)

Item 250-A At points not specifically provided for herein
 Cancels° the rate on Intra-Plant Switching (see Item
 250 No. 180) will be \$3.15 per car for each switching
 movement performed at all points named in
 Item No. 130 of Tariff or as amended and
 \$2.70 per car at all other points.

At points not specifically provided for in Tariff
 or as amended, the rate on Intra-Plant ship-
 ments of Coal in Utah will be \$5.85 per car for
 switch movement when no further rail haul
 service is performed.

EFFECTIVE JULY 20, 1937

D&RGW Tariff 6600-B, ICC 577, P.S.C.U. 217 cancelled
 D&RGW Tariff 6600-A.

Item 250 Same as in previous issue except that the words
 "in tariff or as amended" were deleted in the
 second paragraph thereof.

Item 2300 Same as last quoted except restricted to intra-
 state traffic only.

EFFECTIVE MARCH 28, 1938

Supp. 7, D&RGW Tariff 6600-B:

All interstate switching charges increased 10%
Ex Parte 123.

EFFECTIVE MAY 27, 1938

Amendment 7, D&RGW Tariff 6600-B:

Intrastate rates in Item 250-A increased 10%,
Ex Parte 123.

1828

American Smelting and Refining Company
 Garfield, Utah Smelter

Exhibit No.
 Page No. 11

EFFECTIVE JULY 5, 1938

Supp. 10 D&RGW Tariff 6600-B:

Item 2280-A *Cancel.* After date of cancellation rates
 cancels named in Item 2322 or as amended will apply.
 2280

EFFECTIVE JUNE 25, 1938 (INTRASTATE, JULY 5, 1938)

(INTERSTATE)

Supp. 10, D&RGW Tariff 6600-B:

Garfield, Midvale and Murray, Utah

Item 2322

- (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (*see note*); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per-car for each such movement. (*Italics supplied.*)

Note—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter. (Italics supplied.)

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.
-
- (c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service will be charged for at \$2.70 per car for each movement.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

- (e) The line haul rate will also include the out-bound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.
(Not subject to *Ex Parte* 123 increase).

1829

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 12

EFFECTIVE OCTOBER 30, 1938

Supp. 12, D&RGW Tariff 6600-B:

Switching Movement
Garfield, Utah

Minimum charge in
dollars and cents per
car. (See Item No. 186
of Tariff, or as
amended.)

- Item 2290-A Concentrates, carloads, originating at Magna or Arthur, Utah, on B&G, switched to Garfield Smelter unloading bins, including service designated in Item No. 2322-A, or as amended. \$2.25
- Canals
2290
- Item 2322-A Same as Item 2322 except for the addition of "or other commodities." added in Paragraph B after the word "concentrates" both times "Concentrates" appears.

EFFECTIVE NOVEMBER 6, 1938

Supp. 13, D&RGW Tariff 6600-B:

- Item 2322-B Same as Item 2322-A with the addition of "(including weighing over scales within plant)" after the word "service" in Paragraph C.

EFFECTIVE NOVEMBER 29, 1938

Supp. 14, D&RGW Tariff 6600-B:

- Item 2322-C Same as Item 2322-B with the addition of:
- (f) Open top cars loaded with Arsenical Dust will be switched without charge from scales to carpenter shop for construction of top covers.

EFFECTIVE MARCH 9, 1939

Supp. 16, D&RGW Tariff 6600-B:

Item 2322-D Same as Item 2322-C except for revised paragraph (f) viz.

Open top cars loaded with Baghouse Fume or Arsenical Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

1830

American Smelting & Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 13

EFFECTIVE MARCH 1, 1940

D&RGW Tariff 6600-C, ICC 667, P. S. C. U. 257 cancelled
D&RGW Tariff 6600-B. (Not subject to *Ex Parte* 123 increase).

Item 250 Same as previously quoted except for the inclusion of the *Ex Parte* 123 increases in the rates—\$3.15 increased to \$3.47, \$2.70 increased to \$2.97, \$5.85 increased to \$6.44.

Switching Movement
Garfield, Utah

Minimum charges
in dollars and cents
per car (See Item 195)

Item 2310	All carload freight not provided for above, between track connection with B&G, and points within yards of the American Smelting and Refining Company.	Intrastate \$3.60 Intrastate \$3.96
-----------	---	--

EFFECTIVE APRIL 11, 1941

Supp. 6, D&RGW Tariff 6600-C.

Item 250-A Same as before with the addition of the following paragraph:

Exception—At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

EFFECTIVE MARCH 18, 1942

Supp. 21, D&RGW Tariff 6600-C:

All Interstate switching charges increased 6%.—*Ex Parte* 148.

EFFECTIVE MAY 1, 1942

Intrastate switching charges on all shipments except ores and concentrates (including precipitates, matte, slag, speiss and fine dust) not exceeding \$25. per ton of 2,000 lbs., also beets, sugar; beet pulp; coal, coking; coke, lime rock and molasses, increased 10%, *Ex Parte* 148.

1831

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 14

EFFECTIVE JUNE 10, 1942

(Present Rates)

D&RGW Tariff 6600-D, ICC 736, P.S.C.U. 289 cancelled
D&RGW Tariff 6600-C—Subject to 6% increase, *Ex Parte* 148, now under suspension until July 1, 1944. Supps. 8 and 13.

Item:

SWITCHING SERVICE INCLUDED IN PUBLISHED
RATES VIA D.&R.G.W.

140

Unless otherwise specifically provided herein, or in other tariffs lawfully on file with the Interstate Commerce or State Public Utilities Commissions, all carload rates published or concurred in by the D.&R.G.W. R.R. covering traffic on which it receives a line or road haul, include the switching service to and from the side tracks, warehouse tracks or industry tracks within the switching limits on the D.&R.G.W. R.R.

SWITCHING CHARGES COVER MOVEMENT OF BOTH EMPTY AND LOADED CAR

150

Switching charges named (unless otherwise specifically provided) will cover the handling of cars loaded inbound and empty outbound, or vice versa. If cars are handled loaded in both directions, switching charge will be assessed for each loaded movement.

INTRA-PLANT SWITCHING

A switching movement from one track to another within the same plant or industry.

180

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

Item	Switching Movement	Switching rates in cents per ton of 2,000 lbs.	Minimum charge in dollars and cents per car (See Item 185)
------	--------------------	--	--

SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT

At points not specifically provided for in Tariff, the rate on Intra-Plant Switching (see Item 180) will be \$3.47 per car for each switching movement performed at all points named in Item 130, and \$2.97 per car at all other points. (See Exception.)

250

At points not specifically provided for, the rate on Intra-Plant shipments of Coal in Utah will be \$6.44 per car for each switch movement when no further rail haul service is performed.

832

American Smelting and Refining Company
Garfield, Utah Smelter

Exhibit No.

Page No. 15

D&RGW Tariff 6600-C, ICC 736, P.S.C.U. 289 (Cont'd.)

Switching Movement	Switching rates in cents per ton of 2,000 lbs.	Minimum charge in dollars and cents per car (See Item 195)
--------------------	--	--

50
Cont'd.) EXCEPTION — At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

GARFIELD, UTAH

2290 Concentrates, carloads, originating at Magna or Arthur, Utah, on B. & G., switched to Garfield Smelter unloading bins, including service designated in Item No. 2320.

\$2.25

2300 (Applies only on intrastate traffic). Clay and Sand, carloads, received from B. & G. and switched to American Smelting and Refining Co. plant yards.

\$2.25

2310 All carload freight not provided for above, between track connection with B. & G. and points within yards of the American

(\$3.60 Intrastate

(\$3.96 Interstate)

GARFIELD, MIDVALE AND MURRAY, UTAH

2320 (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted be

low will be charged for at \$1.00 per car for each such movement.

NOTE—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore, concentrates or other commodities are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore,

1833

American Smelting & Refining Company
Garfield, Utah Smelter

Exhibit No.
Page No. 16

Item:

GARFIELD, MIDVALE AND MURRAY, UTAH

2320

(Cont'd.)

concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the car will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within plant) will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

(5) Open top cars loaded with Baghouse Fume or Arsenical Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

NOTE:—Due to the complexities of the Ex Parte increases, there are some slight variations on various commodities from the data shown.

May 10, 1944.

134

Exhibit No. 11

Exhibit No. 11

Page No. 1

Witness: O. W. TUCKWOOD

**I.C.C. EX PARTE 104 PART II INVESTIGATION
American Smelting & Refining Company
Murray, Utah Smelter**

**HISTORY OF SWITCHING RATES AT MURRAY, UTAH SMELTER
DENVER & RIO GRANDE WESTERN RAILROAD**

EFFECTIVE MAY 23, 1908

In Supplement 12, D&RG Railroad Tariff 132-A, I. C. C. 763, the following rule was first published:

"Switching from track to track within smelter plants served by the D&RG Railroad of cars containing freight which has paid transportation charges to the plant—FREE."

EFFECTIVE FEBRUARY 25, 1920

Effective February 25, 1920 the rule quoted above and which was effective May 23, 1908 continued in effect until February 25, 1920, when in D&RGW Tariff 4486-E, I. C. C. 770, the following provisions were first incorporated in the tariffs:

Item #10—SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as otherwise provided)

At points not specifically provided for herein the rate on Intra-plant switching (see Item No. 50 or as amended) will be \$2.50 per car for each movement of switching service performed. (See Item No. 20)

Item #15—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a Line Haul carload shipment destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield,

Murray and Midvale, Utah, will include one movement of commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company.

Item #20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

From track to-track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (See also Item No. 10).

EFFECTIVE NOVEMBER 14, 1920

Effective November 14, 1920 Item No. 20 was changed to read as follows:

APPLICATION OF RATES

SWITCHING CHARGE

INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

For each additional movement not provided for in Item No. 15, from track to track, within the smelter plant (including weighing over scales within plant) See also Item No. 10.

Coal and Ore—\$2.50 per car—All other freight \$3.00 per car.

1835

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 2

EFFECTIVE NOVEMBER 27, 1920

Effective November 27, 1920 Supplement 7 of D&RGW Tariff 4486-E, I. C. C. 2270, contained the following changes:

Item #15-A—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line-haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield, Murray and Midvale, Utah will include movement of a commodity within a smelter plant over track scales, To AND FROM THAW-

House, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

Item #20-A—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

APPLICATION OF RATES	SWITCHING CHARGE
For each additional movement not provided for in Item No. 15-A, from track to track, within smelter plant (including weighing over scales within plant) See also Item No. 10.	Coal and Ore—\$2.50 per car—All other freight \$3.00 per car.

EFFECTIVE DECEMBER 1923 -

Effective December 1923 D&RGW Tariff 4486-G, I. C. C. 43 and P. U. C. U. 64 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following:

Item:	Stations:	APPLICATION OF RATES
30	All stations on D&RGW & RGS	All carload rates published or concurred in by the D&RGW or RGS covering traffic on which these carriers or either one of them, receive a line haul include the switching service to and from the D&RGW or RGS side tracks, warehouse tracks and industry tracks within the switching limits (both at point of origin and destination) except as otherwise provided.
40	All stations on D&RGW & RGS	<p>SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as Otherwise Provided) At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 120 or as amended) will be \$2.15 per car for each movement of switching service performed at all points named in Item No. 10, and \$2.70 per car at all other points. (See Item No. 60)</p>

1836

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 3

Effective December 1923 D&RGW Tariff 4486-G, I. C. C. 143 and P. U. C. U. 64 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following: (con'td. from Page 2)

Item:	Stations:	APPLICATION OF RATES	
50	Durango, Leadville, Pueblo, Blende and Salida, Colo. Garfield, Murray and Midvale, Utah	INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH	
		Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales, To AND FROM THAW-HOUSE, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.	
60	Durango Leadville, Pueblo, Blende and Salida, Colo. Garfield, Murray and Midvale, Utah	SWITCHING MOVEMENT	RATE
		Intra-plant or Internal Switching at Smelters in Colorado and Utah. For each additional movement not provided for in Item No. 50 or as amended, Per Car from track to track within Smelter Plant (including weighing over scales within plant). See also Item No. 40.	\$2.70
120	Explanation of Intra-Plant, Intra-Terminal and Inter-Terminal Switching	INTRA-PLANT SWITCHING A switching movement from one track to another within the same plant or industry.	
		INTRA-TERMINAL SWITCHING A switching movement (other than Intra-plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.	

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

- 130 Application of rates named in Column Nos. 1 & 2 of this tariff
- APPLICATION OF RATES NAMED IN COLUMN #1 OF RATE TABLE
- The rates named in Column No. 1 of this tariff (pages 5 to 12), apply only on traffic which has been or will be handled in road service, that is, traffic moved from or to a point within one switching limit, from or to a point outside the same switching limit, and on which a charge, other than a switching charge, has been or will be assessed.

1837

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.

Page No. 4

Effective December 1923 D&RGW Tariff 4486-G, I.C.C. 443 and P.U.C.U. 64 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following: (cont'd from Page 3)

Item:	Stations:	APPLICATION OF RATES
140	Application of rates named in Column Nos. 1 and 2 of this tariff	APPLICATION OF RATES NAMED IN COLUMN #2 OF RATE TABLE The rates named in Column No. 2 of this tariff (pages 5 to 12), apply only to cars handled in Intra-Plant Intra-Terminal and Inter-Terminal switching service (see Item No. 120) and will be assessed only when the cars have not or will not be handled in road service as described in Item 130.

SWITCHING CHARGES

Column No. 1 (See Item No. 130)	Column No. 2 (See Item No. 140)
--	--

Rate in Cents Per Ton of 2,000 Pounds (Except as Otherwise Provided)
--

Item	Station	Switching Movement	Rate in Cents Per Ton of 2,000 Pounds (Except as Otherwise Provided)	
905	Murray, Utah Note- The switching limits at Murray, Utah, extend from Mile Post 739 to Big Cottonwood Creek	Between D&RGW Con- nections with the LA& SL R. R. and the Utah Consolidated Smelting Co. Between D&RGW Con- nections with OSL R. R. and points within D&RGW Yard limits.	\$3.60 per car	\$5.85 per car
910			\$3.60 per car	\$5.85 per car

EFFECTIVE SEPTEMBER 10, 1931

Effective September 10, 1931 D&RGW Tariff 6600,
I.C.C. 429, P.U.C.U. 161 canceled D&RGW Tariff 4486-G,
I.C.C. 143, P.U.C.U. 64.

MURRAY, UTAH ON D&RGW

Item #100 The switching limits at Murray, Utah, extend
from Mile Post 739 to Big Cottonwood Creek

SWITCHING SERVICE INCLUDED IN PUBLISHED
RATES VIA D&RGW

Item #140 Unless otherwise specifically provided herein,
or in other tariffs lawfully on file with the In-
terstate Commerce or State Public Utilities
Commissions, all carload rates published or con-
curred in by the D&RGW R.R. covering traffic
on which it receives a line or road haul, include
the switching service to and from the side
tracks, warehouse tracks or industry tracks
within the switching limits on the D&RGW
R.R.

SWITCHING CHARGES COVER MOVEMENT OF
BOTH EMPTY AND LOADED CAR

Item #150 Switching charges named (unless otherwise
specifically provided) will cover the handling
of cars loaded inbound and empty outbound, or
vice versa. If cars are handled loaded in both
directions, switching charge will be assessed for
each loaded movement.

1838

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 5

Effective September 10, 1931 D&RGW Tariff 6600, I.C.C.
429, P.U.C.U. 161 (cont'd.)

**APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM**

Item #160 Rates, in connection with which reference is made to this Item, apply only on traffic which has been or will be handled in road or line service, that is, traffic moved between a point within one switching district (or limits), and a point outside of the same switching district (or limits), and on which a charge, other than a switching charge, has been or will be assessed. **NOTE**—Carload shipments entitled to rates made subject to this Item, may also be defined as those switched to connections for forwarding beyond switching limits without change in contents; or, loaded cars received from connections, having their origin beyond the switching limits at the point of delivery, and switched to unloading point within the switching limits without change in contents.

**APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM**

Item #170 Rates, in connection with which reference is made to this Item, apply only in traffic handled in intra-plant, intra-terminal or inter-terminal switching service (See Item No. 180), and will be assessed only when the traffic has not or will not be handled in road or line service, as described in Item No. 160.

INTRA-PLANT SWITCHING

Item #180 A switching movement from one track to another within the same plant or industry.

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

ALL STATIONS ON D&RGW
SWITCHING CARLOAD FREIGHT IN
INTRA-PLANT MOVEMENT
(Except as Otherwise Provided)

Item #250 At point not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 180) will be \$3.15 per car for each switching movement performed at all points named in Item No. 130, and \$2.70 per car at all other points.

1839

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 6

Effective September 10, 1931 D&RGW Tariff 6600, I.C.C.
429. P.U.C.U. 161 (cont'd)

MURRAY, UTAH
(See Item 100)

Switching
rates in cents
per ton of
2,000 pounds

Minimum charge
in dollars and
cents per car
(See Item
No. 195)

Item #1710 Delivery of a line-haul carload shipment, destined to smelter at Murray, Utah, will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant).

\$2.70

MURRAY, UTAH
(See Item 100)

Item #1720 All carload freight switched between track connection with O. S. L. and points within D&RGW switching limits (See Item No. 100)

Charge when shipment is subject to Item No. 160

\$3.60

Charge when shipment is subject to Item No. 170

\$5.85

EFFECTIVE JANUARY 4, 1932

Effective January 4, 1932, Supp. 4, D&RGW Tariff 6600:
—All Interstate switching charges increased 10%, *Ex Parte* 103.

EFFECTIVE NOVEMBER 12, 1932

Effective November 12, 1932, Supp. L., Agent Boyds Tariff 252-A, I.C.C. A-2277 (Emergency Charges):—Intrastate switching charges on all shipments except ores and concentrates increased 10%, *Ex Parte* 103.

EFFECTIVE APRIL 1, 1933

Effective April 1, 1933, Supp. 7, Boyds Tariff 252-A, I.C.C. A-2277 (Emergency Charges):—10% *Ex Parte* 103 increase removed on Lead, Copper, Zinc and Silver Ores and Concentrates.

-1840

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 7

EFFECTIVE OCTOBER 1, 1933

Effective October 1, 1933 10% *Ex Parte* 103 increase expired on all switching.

EFFECTIVE DECEMBER 15, 1933

D&RGW Tariff 6600-A, I.C.C. 489, P.U.C.U. 185 canceled
D&RGW Tariff 6600.

Item #2320 Reissue of Item 1710

Item #2330 Reissue of Item 1720

EFFECTIVE APRIL 18, 1935

Effective April 18, 1935, Supp. 11, D&RGW Tariff 6600-A:—Interstate Switching charges on all shipments except Lead, Copper and Zinc Ores and Concentrates increased 10% *Ex Parte* 115.

EFFECTIVE JANUARY 15, 1936

Effective January 15, 1936 Intrastate Switching Charges on all shipments except Lead, Copper and Zinc Ores and Concentrates increased 10%, *Ex Parte* 115.

EFFECTIVE JULY 1, 1936

Effective July 1, 1936 10% increase expired, *Ex Parte* 115.

EFFECTIVE MAY 21, 1937

Effective May 21, 1937, Amendment 19, D&RGW Tariff 6600-A:

**Item 250-A SWITCHING CARLOAD FREIGHT IN INTRA-PLANT
Cancels. MOVEMENT**

250

(Except as otherwise provided)

At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 180) will be \$3.15 per car for each switching movement performed at all points named in Item No. 130 of Tariff or as amended and \$2.70 per car at all other points.

At points not specifically provided for in Tariff or as amended, the rate on Intra-Plant shipments of Coal in Utah will be \$5.85 per car for switch movement when no further rail haul service is performed.

EFFECTIVE JULY 20, 1937

Effective July 20, 1937, D&RGW Tariff 6600-B, I.C.C. 577, P.S.C.U. 217 canceled D&RGW Tariff 6600-A.

Item #250 Same as in previous issue except that the words "in tariff or as amended" were deleted in the second paragraph thereof.

1841

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 8

EFFECTIVE MARCH 28, 1938

Effective March 28, 1938, Supp. 7 D&RGW Tariff 6600-B.
—All Interstate switching rates increased 10%, *Ex Parte* 123.

EFFECTIVE MAY 27, 1938

Effective May 27, 1938, Amendment 7, D&RGW Tariff 6600-B:—Intrastate rates in Items 250-A and 2330 increased 10%, *Ex Parte* 123.

EFFECTIVE JULY 5, 1938

Effective July 5, 1938, Supplement 10, D&RGW Tariff 6600-B:—

Item # *Cancel*. After date of cancellation rates named in 2320-A Item 2322 or as amended will apply.

Cancels
2320

EFFECTIVE JUNE 25, 1938 (INTRASTATE) JULY 5, 1938
(INTERSTATE)

Effective June 25, 1938 (Intrastate), July 5, 1938 (Interstate), Supplement 10, D&RGW Tariff 6600-B

GARFIELD, MIDVALE AND MURRAY, UTAH

- Item #2322 (a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement. NOTE—By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from or requirements of, the smelter.
- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ores or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.
- (c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the services will be charged for at \$2.70 per car for each movement.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(Item #2322 continued on Page 9)

1847

Exhibit No. 12

Exhibit No. 12

Page No. 1

Witness O. W. TUCKWOOD

I.C.C. EX PARTE 104 PART II INVESTIGATION

American Smelting and Refining Company
Murray, Utah SmelterHISTORY OF SWITCHING RATES AT MURRAY, UTAH SMELTER
OREGON SHORT LINE RAILROAD
UNION PACIFIC RAILROAD

PRIOR TO MAY 23, 1908

Prior to May 23, 1908, switching at the Murray Plant was performed free by the Oregon Short Line in accordance with the understanding reached with the carriers when the plant site was under consideration.

EFFECTIVE MAY 23, 1908

Effective May 23, 1908 on intrastate traffic, and on June 27, 1908 on interstate traffic, Supplement 6, Oregon Short Line Tariff 2029-B; ICC 1357, first published a rule reading:

"At Bingham Junction and Murray, Utah all cars containing freight which has paid transportation charges to the plant will be switched from track to track within smelter plants free."

EFFECTIVE AUGUST 20, 1913

Effective August 20, 1913 Oregon Short Line Tariff 2029-F, ICC 1879, provided:

"At Murray and Midvale, Utah from track to track within smelter plants served by the Oregon Short Line Railroad all cars containing freight which has paid transportation charges to plant—FREE."

The Correspondence files of the New York Traffic Department of the American Smelting and Refining Company indicate that the wording above quoted, which was published in Oregon Short Line Tariff 2029-F, ICC 1879, remained unchanged to February 25, 1920 when in an Oregon Short Line Tariff of the 2029 Series, the rules, quoted herein, as contained in Oregon Short Line Tariff 2029-K, ICC 2556, were first published. In a memorandum to Mr. E. Stone, Assistant to Vice-President in charge of traffic dated May 12, 1932, Chief Rate Clerk Baker stated that the Oregon Short Line Tariff 2029-J, ICC 2444, effective

November 2, 1922, contained the same provisions applicable at Murray as were in effect on the date of that memorandum, or May 12, 1932. Oregon Short Line Tariff 2029-K, ICC 2556 was in effect on May 12, 1932.

1848

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.

Page No. 2

EFFECTIVE AUGUST 22, 1927

O.S.L. Tariff 2029-K, ICC 2556

SWITCHING RULES AND CHARGES

Item

Rate per Car

Incl. movement
of Load and
Empty

CARLOAD RATES INCLUDE SWITCHING

- 5 Except as otherwise provided herein, carload freight rates carried in legally published Tariffs to which the Oregon Short Line R.R. is party, applying from any point on its lines, include switching from industrial warehouse or team tracks, within established yard limits where carload freight is received at point of origin

Free

AND

Except as otherwise provided herein, carload freight rates carried in legally published Tariffs to which the Oregon Short Line R.R. is party, applying to any point on its lines, include switching to industrial, warehouse or team tracks, within established yard limits, where carload freight is delivered at destination

Free

PROVIDED

That for each EXTRA SWITCH or RESET-
TING OF CAR upon request of consignor or
consignee, not for the convenience of
these companies, an additional charge of
Five Dollars and Eighty-five Cents per
car will be made

\$5.85

DEFINING MURRAY YARD

50 Murray Yard Limits terminate as follows:

South Mile Post 9.6 North

(South of Lake City)

(South of Salt Lake City)

Mile Post 6.1

The above yard does not include spur from Atwoods to the U. S. Smelter Co.'s property at Midvale, Utah.

INTRA-PLANT SWITCHING

At all stations on the O.S.L. R.R., for the movement of carload freight from one point to another plant within the same point or industry (other than original placing for loading or unloading) rate will be \$2.70 per day for each move.

1849

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 3

O.S.L. Tariff 2029-K, ICC 2556 (Cont'd.)

ITEM	AT	BETWEEN	AND	COMMODITY	
95	All Stations (Except as noted in Items 1-5 to 455)	One point within same yard limits	Another point within same yard limits	All cars load freight	Rate 1 st Car In Movemen. of load and Empty—\$8.55
	At	INITIAL OR DELIVERY SWITCH			Rate per car Incl. Movement of load and Empty
300	Murray, Utah	Delivery of a line haul carload shipment destined to smelters at Murray, Utah, will include movement of commodity within smelter plant, over track scales, to and from Thaw House and on ore or concentrates only to and from smelter sampler (or to and from combination sampler and concentrator) to a designated unloading point indicated by the smelting company.			Free
	At	BETWEEN	AND	COMMODITY	Applying on points beyond
305	Murray, Utah	D&RGW R.R. Transfer	Points within Murray O.S.L. R. R. Yard Limits	All Murray O.S.L. carload Freight	Utah, \$3.60

EFFECTIVE MAY 24, 1931

Effective May 24, 1931, Item 5 Series, Supplemental 16, O.S.L. Tariff 2029-K, ICC 2556, the Third paragraph was changed to read as follows:

*Rate per car
Incl. Movement
of load and
Empty*

SWITCHING RULES AND CHARGES

.....
.....

PROVIDED

That for each EXTRA SWITCH or RESETTING OF CAR upon request of consignor or consignee, not for the convenience of those companies, an additional charge of Three Dollars and Sixty Cents for account lines other than Southern Pacific Co. and Five Dollars and Eighty-Five Cents per car for account of the Southern Pacific Co. will be made.

\$5.85
\$1.60

1850

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 4

EFFECTIVE MAY 8, 1934

Effective May 8, 1934 the number of O.S.L. Tariff 2029-K was changed to 2000-E. (See Supplement 23.)

EFFECTIVE OCTOBER 16, 1935

Effective October 16, 1935 O.S.L. Tariff 2000-F cancelled Tariff 2000-E, ICC 2705 cancelled ICC 2556, PSCU 548 cancelled PSCU 403.

Item No. 5 of O.S.L. Tariff 2000-F reads the same as Item No. 5 of O.S.L. Tariff 2000-E.

Item No. 85 of O.S.L. Tariff 2000-F reads the same as Item No. 50 of O.S.L. Tariff 2000-E.

Item 125 of O.S.L. Tariff 2000-F reads the same as Item No. 80 of O.S.L. Tariff 2000-E.

Item No. 145 reads the same as Item No. 95, except that the first column under Item No. 145 of O.S.L. Tariff 2000-F reads:

"All Stations . . .
(Except as noted
in Items 155 to
505, inclusive)

Item No. 325 of O.S.L. Tariff 2000-F which supercedes Item No. 300 of O.S.L. Tariff 2000-E, reads:

1842

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 9

Effective June 25, 1938 (Intrastate), July 5, 1938 (Interstate), Supplement 10, D&RGW Tariff 6600-B: (Cont'd.)

Item #2322 (e) The line haul rate will also include the (Cont'd.) outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

Not subject to *Ex Parte* 123 increase.

EFFECTIVE OCTOBER 30, 1938

Effective October 30, 1938, Supplement 12, D&RGW Tariff 6600-B:

Item #2322-A Same as Item 2322 except for the addition of "or other commodities" added in Paragraph B after the word "concentrates" both times "concentrates" appears.

EFFECTIVE NOVEMBER 6, 1938

Effective November 6, 1938, Supplement 13, D&RGW Tariff 6600-B:

Item #2322-B Same as Item 2322-A with the addition of "(including weighing over scales within plant)" after the word "service" in Paragraph C.

EFFECTIVE NOVEMBER 29, 1938

Effective November 29, 1938, Supplement 14, D&RGW Tariff 6600-B:

Item #2322-C Same as Item 2322-B with the addition of:
(f) Open top cars loaded with Arsenical Dust will be switched without charge from scales to carpenter shop for construction of top covers.

EFFECTIVE MARCH 9, 1939

Effective March 9, 1939, Supplement 16, D&RGW Tariff 6600-B:

Item #2322-D Same as Item 2322-C except for a revised paragraph (f) viz.
Open top cars loaded with Baghouse Fume or Arsenical Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

EFFECTIVE MARCH 1, 1940

Effective March 1, 1940, D&RGW Tariff 6600-C, I.C.C. 667, P.S.C.U. 257 cancelled D&RGW Tariff 6600-B. (Not subject to *Ex Parte* 123 increase.)

1843

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 10

Effective March 1, 1940, D&RGW Tariff 6600-C, I.C.C. 667, P.S.C.U. 257 (cont'd.)

Item #250 Same as previously quoted except for the inclusion of the *Ex Parte* 123 increases in the rates—\$3.15 increased to \$3.47, \$2.70 increased to \$2.97, \$5.85 increased to \$6.44.

Item #2330 *Ex Parte* 123 increases included in the rates—\$3.60 increased to \$3.96, \$5.85 increased to \$6.00.

EFFECTIVE APRIL 11, 1941

Effective April 11, 1941, Supplement 6, D&RGW Tariff 6600-C

Item #250-A Same as before with the addition of the following paragraph:

Exception—At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

EFFECTIVE MARCH 18, 1942

Effective March 18, 1942, Supplement 21, D&RGW Tariff 6600-C:—All interstate switching charges increased 6%, *Ex Parte* 148.

EFFECTIVE MAY 1, 1942

Effective May 1, 1942, intrastate switching charges on all shipments except ores and concentrates (including precipitates, matte, slag, speiss and flue dust) not exceeding \$25.00 per ton of 2,000 lbs., also beets, sugar; beet pulp; coal, coking; coke, lime rock and molasses, increased 10%, *Ex Parte* 148.

PRESENT RATES

EFFECTIVE JUNE 10, 1942

Effective June 10, 1942, D&RGW Tariff 6600-D, I.C.C. 736, P.S.C.U. 289 canceled D&RGW Tariff 6600-C. Subject to 6% increase, *Ex Parte* 148, now under suspension until July 1, 1944, Supplements 8 and 13.)

Item
No.

APPLICATION OF RATES
DEFINITION OF SWITCHING LIMITS

- 100 The switching limits at Murray, Utah, extend from Mile post 739 to Big Cottonwood Creek.

1844

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.

Page No. 11

PRESENT RATES (CONT'D)

Effective June 10, 1942, D&RGW Tariff 6600-D, I.C.C. 736, P.S.C.U. 289: (continued from preceding page)

Item
No.

APPLICATION OF RATES
DEFINITION OF SWITCHING LIMITS

SWITCHING SERVICE INCLUDED IN PUBLISHED
RATES VIA D&RGW

- 140 Unless otherwise specifically provided herein, or in other tariffs lawfully on file with the Interstate Commerce or State Public Utilities Commissions, all carload rates published or concurred in by the D&RGW RR covering traffic on which it receives a line or road haul, include the switching service to and from the side tracks, warehouse tracks or industry tracks within the switching limits on the D&RGW RR.

SWITCHING CHARGES COVER MOVEMENT OF
BOTH EMPTY AND LOADED CAR

- 150 Switching charges named (unless otherwise specifically provided) will cover the handling of cars loaded inbound and empty outbound, or vice versa. If cars are handled loaded in both directions, switching charge will be assessed for each loaded movement.

APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM

- 160 Rates, in connection with which reference is made to this item, apply only on traffic which has been or will be handled in road or line service, that is, traffic moved between a point within one switching district (or limits), and a point outside of the same switching district (or limits), and on which a charge,

other than a switching charge, has been or will be assessed.

NOTE: Carload shipments entitled to rates made subject to this item, may also be defined as those switched to connections for forwarding beyond switching limits without change in contents; or loaded cars received from connections, having their origin beyond the switching limits at the point of delivery, and switched to unloading point within the switching limits without change in contents.

**APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM**

- 170 Rates, in connection with which reference is made to this item, apply only on traffic handled in intra-plant, intra-terminal or inter-terminal switching service (See Item 180), and will be assessed only when traffic has not or will not be handled in road or line service, as described in Item 160.

1845

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 12

PRESENT RATES (CONT'D)

Effective June 10, 1942, D&RGW Tariff 6600-D, I.C.C.
736, P.S.C.U. 289: (continued from preceding page)

Item No.	APPLICATION OF RATES DEFINITION OF SWITCHING LIMITS
-------------	--

INTRA-PLANT SWITCHING

A switching movement from one track to another within the same plant or industry.

INTRA-TERMINAL SWITCHING

- 180 A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

TABLE OF SWITCHING CHARGES

Item No.	SWITCHING MOVEMENT	Switching Rates in Cents Per Ton of 2,000 lbs.	Minimum Charge in Dollars and Cents Per Car (See Item 132)

ALL STATIONS ON D&RGW

SWITCHING CARLOAD FREIGHT IN
INTRA-PLANT MOVEMENT

At points not specifically provided for in Tariff, the rate on Intra-Plant Switching (see Item 180) will be \$3.47 per car for each switching movement performed at all points named in Item 130, and \$2.97 per car at all other points. (See Exception).

250

At points not specifically provided for, the rate on Intra-Plant shipments of Coal in Utah will be \$6.44 per car for each switch movement when no further rail haul service is performed.

EXCEPTION: At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

1846

American Smelting & Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 13

PRESENT RATES (CONT'D)

Effective June 10, 1942, D&RGW Tariff 6600-D, I.C.C. 736, P.S.C.U. 289: (continued from preceding page)

GARFIELD, MIDVALE AND MURRAY, UTAH

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note); from the road-haul point of delivery to the switching line. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE: By "uninterrupted movement" is meant one continuous movement of switching locomotive and crew without interruption, resulting from orders from, or requirements of, the smelter.

(b) During the winter months when ore, concentrates or other commodities are delivered to the

smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore, concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph 2320 (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to furnaces, the service (including weighing over scales within plant) will be charged for at \$2.70 per car for each movement.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of, the smelter.

(f) Open top cars loaded with Baghouse Fume or Arsenical Dust will be switched without charge, between scales and carpenter shop for construction or removal of top covers.

(345-307)

MURRAY, UTAH

Item No.	SWITCHING MOVEMENT	Switching Rates in Cents Per Ton of 2,000 lbs.	Minimum Charge in Dollars and Cents Per Car (See Item 195)
	All carload freight switched between track connection with U. P. R. R. and points within D&RGW switching limits. (See item 100)		
2330	Charge when shipment is subject to Item 160		\$3.06
	Charge when shipment is subject to Item 170		\$6.44

NOTE: Due to the complexities of the Ex Parte increases, there are some slight variations on various commodities from the data shown.

May 10, 1944

SWITCHING RULES AND CHARGES

ITEM No.	AT BETWEEN AND (Except as noted)	APPLYING ON		Rate per Car (Except as noted) Incl. Movement of Load and Empty
		COMMODITY	When Originating at or destined	

INITIAL OF DELIVERY SWITCH				
525	Murray, Utah	Delivery of a line haul carload shipment destined to smelters at Murray, Utah, will include movement of commodity within smelter plant, over track scales, to and from Thaw House and, on ore or concentrates only, to and from smelter sampler (or to and from combination sampler and concentrator) to a designated unloading point indicated by the smelting company.		Free

(See next Page (5) for balance of Item 325)

1851

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 5

Item No. 325 of O.S.L. Tariff 2000-F, ICC 2705, which supercedes Item No. 300 of O.S.L. Tariff 2000-E, reads:
(Cont'd from Page 4)

ITEM No.	AT BETWEEN AND (Except as noted)	APPLYING ON		Rate per Car (Except as noted) Incl. Movement of Load and Empty
		COMMODITY	When Originating at or destined	

INTRA-PLANT OR INTERNAL SWITCHING

325	Murray, Utah	For each additional movement not provided for above, from point to point within smelter plant (including weighing over scales within plant)		\$2.70
-----	--------------	---	--	--------

Item 330 of O.S.L. Tariff 2000-F, ICC 2705, is the same as Item 305 of Tariff 2000-E.

EFFECTIVE JUNE 25, 1938 AND JULY 25, 1938

Item 325 of O.S.L. Tariff No. 2000-F, ICC 2705, Supplement 13, effective June 25, 1938 on intrastate traffic and on July 25, 1938 on interstate traffic. Supplement reads:

"Item cancelled; for provisions to apply see Union Pacific R.R. Tariff 7114, ICC 565 (LA&SL Series) supplements thereto or successive issues thereof."

EFFECTIVE AUGUST 12, 1937

Item 5-A cancelled Item 5, per supplement 9 to Union Pacific Tariff 2000-F, ICC 2705. There is no change in the first two paragraphs of this item. The Third paragraph was changed to read:

CARLOAD RATES INCLUDE SWITCHING

PROVIDED

CARLOAD RATES INCLUDE SWITCHING

PROVIDED

Rate per Car
Incl. Movement of
Load and Empty

Item

No. That for each EXTRA SWITCH or RESETTING OF CAR upon request of consignor or consignee, not for the convenience of these companies, an additional charge of Three Dollars and Sixty Cents per car will be made \$3.60

1852

American Smelting and Refining Company •
Murray, Utah Smelter

Exhibit No.
Page No. 6

EFFECTIVE JUNE 25, 1938

Effective June 25, 1938 on Utah intrastate traffic and on July 25, 1938 on interstate traffic, as previously indicated, Item 325 of Union Pacific Tariff 2000-F, ICC 2705, was cancelled and reference made to Union Pacific Tariff 7114 for provisions to apply.

Union Pacific Tariff 7114, ICC 565, PSCU 144, as of those dates provided:

SWITCHING CHARGES

SWITCHING AT BAUER, GARFIELD, MIDVALE AND
MURRAY, UTAH

Item Delivery of a line haul carload shipment destined to smelters at Bauer, Garfield, Midvale and Murray, Utah, will include one movement of commodity within smelter plant over track scales, to and from Thaw House, to and from smelter sampler (or to and from combination concentrator and sampler) to a designated unloading point indicated by the smelting company.

	At	Movement	Commodity	Rate
920-B Cancels 920-A	Murray Utah	From track to track within smelter plant, for each movement not provided for in Item No. 520 Series includ- ing weighing over scales within plant).	Freight, Carloads	\$2.70 Per Car

Item 920-C, fifth revised page 35, contains present provisions and rates same as Item 920-B, quoted above.

EFFECTIVE JUNE 25, 1938 AND JULY 5, 1938

Effective June 25, 1938 on intrastate traffic and July 5, 1938 on interstate traffic Item 520 Series was changed as follows:

SWITCHING AT BAUER, GARFIELD, MIDVALE
AND MURRAY, UTAH

Item (a) The line-haul rate includes movement of
No. loaded cars to track scales and subsequent de-
520-B livery to any designated track within the plant
which can be accomplished by one uninterrupted
movement (see note), from the road-haul point
of delivery to the switching line. Any additional
movement within the plant (except as noted
below) will be charged for at \$1.00 per car for
each such movement.

NOTE: By "uninterrupted movement" is meant
one continuous movement of switching locomotive
and crew without interruption, resulting from
orders from or requirements of, the smelter.

(See Page 7, for balance of Item 520-B)

1853

American Smelting and Refining Company Exhibit No.
Murray, Utah Smelter Page No. 7

Effective June 25, 1938 on intrastate traffic and July 5, 1938 on interstate traffic, Item 520 Series was changed as follows: (Cont'd from Page)

SWITCHING AT BAUER, GARFIELD, MIDVALE
AND MURRAY, UTAH

Item (b) During the winter months when ore or con-
No. centrates are delivered to the smelting plants in
520-B a frozen condition, the switching carrier at the re-
quest of the smelting company will switch cars

containing frozen ore or concentrates to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to the furnaces, the service will be charged for as provided for in Items 733-1, 790, 900 and 920 Series.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from or requirements of, the smelter.

EFFECTIVE OCTOBER 30, 1938

Item No. 520-C Effective October 30, 1938 there was a minor change in Item 520 in the wording of Paragraph (b), that is:

“‘or other commodities’ was added to the first and third lines following the words ‘ore or concentrates’.”

EFFECTIVE NOVEMBER 29, 1938

520-D Effective November 29, 1938 Item 520 Series was changed by adding Paragraph (f) reading:

“Open top cars loaded with arsenical dust will be switched without charge from scales to carpenter shop for construction of top covers.”

Item 520-E, Seventh revised page 22, Union Pacific Tariff 7114, ICC 565, PSCE 144, contains present provisions and reads the same as Item 520-A, as amended by Items 520-C and D, quoted above.

1854

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 8

EFFECTIVE AUGUST 15, 1939

(Present Rules)

Union Pacific Tariff 2000-G cancelled 2000-F, ICC 4671
cancelled ICC 2705, PSCU 523 Series cancelled PSCU 548.
This Tariff contains the current rules as follows:

Item
No.

SECTION 1.

SWITCHING RULES AND CHARGES

Rate per Car
Incl. Movement of
Load and Empty

CARLOAD RATES INCLUDE SWITCHING

5. Except as otherwise provided herein, carload freight rates carried in legally published tariffs, to which the Southern Pacific Co. and Union Pacific R. R. are Parties, applying from any point on their lines, include switching from industrial, warehouse, or team tracks, within established yard limits, where carload freight is received at point of origin.

Free

AND

Except as otherwise provided herein, carload freight rates carried in legally published tariffs to which the Southern Pacific Co. and Union Pacific R. R. are Parties, applying to any point on their lines, include switching to industrial, warehouse, or team tracks, within established yard limits, where carload freight is delivered at destination.

PROVIDED

That for each EXTRA SWITCH or RESETTING OF CAR upon request of consignor or consignee, not for the convenience of these companies, an additional charge of Three Dollars and Ninety-Six Cents per car will be made.

\$3.96

(5406-2401-58)

DEFINING MURRAY YARD

85 Murray yard limits terminate as follows:

South Mile Post 9.6 North Mile Post 6.1
(South of Salt Lake City) (South of Salt Lake City)

The above yard does not include spur from Atwood to the U. S. Smelter Co.'s property at Midvale, Utah.

INTRA-PLANT SWITCHING

At all stations on the U. P. R.R., for the movement of carload freight from one point to another point within the same plant or industry (other than original placing for loading or unloading) rate will be \$2.97 per car for each move.

1855

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 9

PRESENT RULES

Union Pacific Tariff 2000-U, ICC 4671

SWITCHING RULES AND CHARGES

ITEM NO. AT	BETWEEN AND COMMODITY			APPLYING ON	Rate per Car (Except as Noted)
				When originating at or Destined	Incl. Movement of Load and Empty
150	All stations (Except within as noted in items 150 to 500, in- clusive)	One point within same yard limits	Another point within same yard limits	All carload Freight	\$2.41
205	Murray D&RGW Utah RR Transfer	Points within Murray U.P. R.R. yard limits	All carload Freight	Points beyond Murray, Utah	\$3.96

1856

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 10

PRESENT RULES

Union Pacific Tariff 2000-G—ICC 4671.

EFFECTIVE DECEMBER 11, 1940

Effective December 11, 1940, Item 5 was reissued in Supplement-6, by making an exception to the THIRD paragraph applicable only on Fruits and Vegetables.

EFFECTIVE DECEMBER 11, 1940

Effective December 11, 1940, in Supplement 6, Item 125-A cancelled Item 125, adding an exception applicable at Ogden and Salt Lake City, Utah.

EFFECTIVE FEBRUARY 5, 1941

Effective February 5, 1941, in Supplement 7, Item 125-B cancelled Item 125-A, making a minor change in the exception at Ogden and Salt Lake City, Utah.

EFFECTIVE APRIL 23, 1941

Effective April 23, 1941 in Supplement 10, Item 125-C cancelled Item 125-B and was made to read as follows:

INTER-PLANT SWITCHING

Item
No.

125-C At all stations on the U. P. R. R., for the movement
Cancels of carload freight from one point to another point
125-B within the same plant or industry (other than original placing for loading or unloading) rate will be \$2.97 per car for each move. (See Exception.)

EXCEPTION.—At stations on the U. P. R.R. in the states of Idaho, Nevada, Oregon, Utah and Wyoming, no charge will be made for shifting partly loaded or partly unloaded cars from one spot to another at the same shed or loading platform when the tracks are being switched to remove loaded or empty cars, or to place additional loaded or empty cars.

1857

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.
Page No. 11

PRESENT RULES

EFFECTIVE MARCH 9, 1939

Effective March 9, 1939, Item 520-E, Seventh revised page 22, Union Pacific Tariff 7114, ICC 565, PSCU 144: track within the plant which can be accomplished by one

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated

SWITCHING AT BAUER, GARFIELD, MIDVALE
AND MURRAY, UTAH

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), from the road-haul

point of delivery to the switching line. Any *additional* movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE: By "uninterrupted movement" is meant one, continuous movement of switching locomotive and crew without interruption, resulting from orders from or requirements of, the smelter.

(b) During the winter months when ores, concentrates or other commodities are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ores, concentrates or other commodities to and from thaw house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designation location within the plant as provided in Paragraph (a) hereof.

(c) When movements within the smelting plant are from stock piles to other designated location within the plant, or from the roaster to the furnaces, the service will be charged for as provided for in Items 733-1, 790, 900 and 920-Series.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car.

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from or requirements of, the smelter.

SWITCHING CHARGES

EFFECTIVE JUNE 18, 1941

Item 920-C, Fifth revised page 35, Union Pacific Tariff 7114, ICC 565, PSCU 144:

<i>At</i>	<i>Movement</i>	<i>Commodity</i>	<i>Rate</i>
	From track to track within smelter plant, for each movement not provided for in Item No. 520 Series including weighing over scales within plant).	Freight.	\$2.70
Murray, Utah		Carload	Per Car

1858

American Smelting and Refining Company
Murray, Utah Smelter

Exhibit No.

Page No. 12

The history of Inter-state Commerce Commission's *Ex Parte* increases since January, 1932 to date are the same as shown in American Smelting and Refining Company's exhibit for its Garfield smelter.

May 10, 1944.

1859

Exhibit No. 13

Exhibit No. 13

Witness: O. W. TUCKWOOD

I.C.C. EX PARTE 104 PART II INVESTIGATION
American Smelting and Refining Company
Leadville, Colorado Smelter

HISTORY OF SWITCHING RATES AT LEADVILLE,
COLORADO SMELTER

DENVER & RIO GRANDE WESTERN RAILROAD

EFFECTIVE MAY 23, 1908

In Supplement 12, D&RG Railroad Tariff 132-A, I.C.C. 1763, the following rule was first published:

"Switching from track to track within smelter plants served by the D&RG Railroad of cars containing freight which has paid transportation charges to the plant—FREE."

EFFECTIVE FEBRUARY 25, 1920

The rule quoted above and which was effective May 23, 1908 continued in effect until February 25, 1920, when in D&RGW Tariff 4486-E, I.C.C. 2770, the following provisions were first incorporated in the tariffs:

Item #10—SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as otherwise provided).

At points not specifically provided for herein the rate on Intraplant switching (see Item No. 50 or as amended) will be \$2.50 per car for each movement of switching service performed. (See Item No. 20.)

Item #15—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH.

Delivery of a Line Haul carload shipment destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield, Murray and Midvale, Utah, will include one movement of commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination sampler and concentrator), to a designated unloading point indicated by the Smelting Company.

Item #20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH
From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (See also Item No. 10).

1860

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 2

EFFECTIVE NOVEMBER 14, 1920

Effective November 14, 1920, Item No. 20 was changed to read as follows:

APPLICATION OF RATES	SWITCHING CHARGE
INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH	
For each additional movement not provided for in Item No. 15 from track to track, within smelter plant (including weighing over scales within plant). (See also Item No. 10.	Coal and Ore— \$2.50 per car— All other freight \$3.00 per car.

EFFECTIVE NOVEMBER 27, 1920

Effective November 27, 1920, Supplement 7 of D&RGW Tariff 4486-E, I.C.C. 2770, contained the following changes:

Item 15-A—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales, To AND FROM TRAW-HOUSE, to and from a smelter sampler or to and from a combination sampler and concentrator, to a designated unloading point, indicated by the sampling company.

Item 20-A—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

APPLICATION OF RATES

For each additional movement not provided for in Item No. 15-A from track to track within smelter plant (including weighing over scales within plant). See also Item No. 10.

SWITCHING CHARGE

Coal and Ore—
\$2.50 per car.
All other freight
\$3.00 per car.

EFFECTIVE DECEMBER, 1923

Effective December, 1923, D&RGW Tariff 4486-G, I.C.C. 143 and Colorado PUC 81 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following:

Item	Stations:	APPLICATION OF RATES
30	All stations on D&RGW & RGS	All carload rates published or concurred in by the D&RGW or RGS covering traffic on which these carriers or either one of them, receive a line haul include the switching service to and from the D&RGW or RGS side tracks, warehouse tracks and industry tracks within the switching limits (both at point of origin and destination) except as otherwise provided.

1861

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 3

EFFECTIVE DECEMBER, 1923

Effective December 1923, D&RGW Tariff 4486-G, I.C.C. 143 and Colorado PUC 81 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following: (continued from preceding sheet)

Item	Stations:	APPLICATION OF RATES
40	All stations on D&RGW & RGS	SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT (Except as Otherwise Provided) At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 120 or as

Item	Stations:	APPLICATION OF RATES
		amended) will be \$3.15 per car for each movement of switching service performed at all points named in Item No. 10, and \$2.70 per car at all other points. (See Item No. 60.)
50	Durango, Leadville, Pueblo, Blende and Salida, Colo. Garfield, Murray and Midvale, Utah	INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH Delivery of a line haul earload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado; Garfield, Murray and Midvale, Utah, will include movement of a commodity within a smelter plant over track scales, To AND FROM THAW-HOUSE, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.
60	Durango, Leadville, Pueblo, Blende and Salida, Colo. Garfield, Murray and Midvale, Utah	SWITCHING MOVEMENTS Intra-Plant or Internal Switching at Smelters in Colorado and Utah. For each additional movement not provided for in item \$2.70 No. 50, or as amended, Per Car from track to track within Smelter Plant (including weighing over scales within plant). See also Item No. 40.

1862

American Smelting and Refining Company
Leadville, Colorado SmelterExhibit No. 13
Page No. 4

EFFECTIVE DECEMBER, 1923

Effective December 1923, D&RGW-Tariff 4486-G, I.C.C. 143 and Colorado PUC 81 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following:—(continued from preceding sheets)

Item	Stations:	APPLICATION OF RATES
120	Explanation of Intra-Plant, Intra-Terminal and Inter-Terminal Switching.	<p data-bbox="559 239 921 265">INTRA-PLANT SWITCHING A switching movement from one track to another within the same plant or industry.</p> <p data-bbox="538 392 942 418">INTRA-TERMINAL SWITCHING A switching movement (other than Inter-plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.</p> <p data-bbox="527 644 953 670">INTER-TERMINAL SWITCHING A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.</p>
130	Application of rates named in Column Nos. 1 and 2 of this tariff.	<p data-bbox="495 887 985 956">APPLICATION OF RATES NAMED IN COLUMN #1 OF RATE TABLE The rates named in Column No. 1 of this tariff (pages 5 to 12), apply only on traffic which has been or will be handled in road service, that is, traffic moved from or to a point within one switching limit, from or to a point outside the same switching limit, and on which a charge, other than a switching charge, has been or will be assessed.</p>
140	Application of rates named in Column Nos. 1 and 2 of this tariff.	<p data-bbox="506 1303 974 1373">APPLICATION OF RATES NAMED IN COLUMN #2 OF RATE TABLE The rates named in Column No. 2 of this tariff (pages 5 to 12), apply only to cars handled in Intra-Plant, Intra-Terminal and Inter-Terminal switching service (see Item No. 120) and will be assessed only when the cars have not or will not be handled in road service as described in Item 130.</p>

1862-A

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 5

D&RGW Tariff 4486-G, I.C.C. 143, Colorado PUC 81 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following: (continued from preceding page)

		SWITCHING CHARGES	
		Column No. 1 (See Item #130)	Column No. 2 (See Item #140)
ITEM	STATION SWITCHING MOVEMENT	Rate in cents per ton of 2,000 lbs. except as otherwise provided	
740	On business switched for account of the Colorado & Southern Ry., the following charges will be assessed:		
	Leadville, Colo.	22 Minimum charge \$3.60 per car	34 Minimum charge \$4.50 per car
	To and from the side-tracks within the Leadville Yards, including Chrysolite Mill and Fuller's sawmill, including also A.S.&R. Co.'s Arkansas Valley Plant		
750	From Colorado & Southern Ry. Ore to Arkansas Valley Plant, when coming from mines located on Belt Lines around and about Leadville.	\$2.25 per car Empty Cars Returned Free (See Note)	\$2.70 per car Empty Cars Returned Free (See Note)
	NOTE:—When cars are weighed at request of shipper or consignee an additional charge of \$2.25 per car will be made.		
770	Leadville, Colo.	\$1.80 per car	\$5.85 per car
	On all carload freight between the Leadville District Mill and the Arkansas Valley Plant.		
775	Leadville, Colo.		\$5.85 per car
	Dump Ore Concentrates, from Norton Sampler to Arkansas Valley Plant.		

1862-B

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 6

D&RGW Tariff 4486-G, I.C.C. 143, Colorado PUC 81 (this actually effective between November 27, 1920 and December 1923 in previous issue of which copy not available) contained the following: (continued from preceding page)

		SWITCHING CHARGES	
		Column No. 1 (See Item 130)	Column No. 2 (See Item 140)
ITEM STATION		Rate in cents per ton of 2,000 lbs. except as otherwise provided	
780 Leadville, (23-909)	On Ore, carloads, from connecting lines when switched to Leadville District Mill, Arkansas Valley Plant, and Western Zinc Oxide Plant, and which originates at mines located on belt lines around and about Leadville, Colo. (23-427)	\$2.25 Per Car	\$5.85 Per Car
800 Leadville, Colo.	Freight, all kinds, between Graham Park Junction, El Paso Mine, Wolfstone Junction, Jamie Lee Sidetrack, Greenback Mine, Wolfstone Mine, Castle View or Mikado Switch, Tucson Mine, Eilers, Arkansas Valley Plant, and Western Zinc Oxide Plant, and Leadville, Colo. (23-511)	.34 Minimum Charge \$5.85 Per Car	.45 Minimum Charge \$7.20 Per Car
810 Leadville, Colo.	Less than carload shipments coming from points on D.&R.G.W. and switched to the Arkansas Valley Plant of the A.S.&R. Co., the Leadville District Mill, or Western Zinc Oxide Plant. (23-511)		\$5.85 Per Car.

1863-

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 7

EFFECTIVE APRIL 29, 1925

Effective April 29, 1925, Supplement 6, D&RGW Tariff
4486-G:

Item No.

780-A Cancels 780. For rates see Item 750 of tariff,
or as amended.

EFFECTIVE OCTOBER 26, 1928

Effective October 26, 1928, Amendment 24 of D&RGW
Tariff 4486-G reads as follows:

		SWITCHING CHARGES	
		Column No. 1 (See Item No. 130 of tariff or as amended)	Column No. 2 (See Item No. 140 of tariff or as amended)
ITEM STATION	SWITCHING MOVEMENT	Rate in cents per ton of 2,000 lbs.	
851 Leadville, (R) Colo.	Slag, minimum weight marked capacity of car, from UNION SLAG To A. V. PLANT	25	

EFFECTIVE MARCH 16, 1930

Effective March 16, 1930, Amendment 28 of D&RGW
Tariff 4486-G:

Item No.

770-A The following was added after the word
(intrastate "plant": "cars not to be loaded above marked
only) capacity."

EFFECTIVE APRIL 5, 1930

Effective April 5, 1930, Amendment 31 of D&RGW Tariff
4486-G:

		SWITCHING CHARGES	
		Rate in cents per ton of 2,000 lbs. (Except as Noted)	
		Column No. 1 (See Item No. 130 of tariff or as amended)	Column No. 2 (See Item No. 140 of tariff or as amended)
ITEM STATION	SWITCHING MOVEMENT		
770-B	On all carload freight		
amends Leadville,	between the Leadville		
770-A Colo.	District Mill and the	\$1.80 per	\$5.85 per
(intra-	Arkansas Valley Plant	car (See	car (See
state	when cars are not	Note)	Note)
only)	loaded above marked		
	capacity.		

NOTE:—When cars are loaded above marked capacity, an additional charge of double the proportionate excess will be assessed. For example: If car of 100,000 pounds capacity is loaded to 110,000 pounds the excess is 10%. Double this equals 20%. If rate for car not overloaded is \$5.85, the total rate would be 120% of \$5.85 or \$7.02.

1864

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 8

EFFECTIVE SEPTEMBER 10, 1931

Effective September 10, 1931, D&RGW Tariff 6600, ICC 429, CPUC 210 canceled D&RGW Tariff 4486-G:

SWITCHING SERVICE INCLUDED IN PUBLISHED RATES VIA D&RGW

Item No.

- 140 Unless otherwise specifically provided herein, or in other tariffs lawfully on file with the Interstate Commerce or State Public Utilities Commissions, all carload rates published or concurred in by the D&RGW RR. covering traffic on which it receives a line or road haul, include the switching service to and from the side tracks, warehouse tracks or industry tracks within the switching limits on the D&RGW RR.

SWITCHING CHARGES COVER MOVEMENT OF BOTH EMPTY AND LOADED CAR

Item No.

- 150 Switching charges named (unless otherwise specifically provided) will cover the handling of cars loaded inbound and empty outbound, or vice versa. If cars are handled loaded in both directions, switching charge will be assessed for each loaded movement.

APPLICATION OF RATES NAMED HEREIN MADE SUBJECT TO THIS ITEM

Item No.

- 160 Rates, in connection with which reference is made to this Item, apply only on traffic which has been or will be handled in road or line service, that is, traffic moved between a point within one switching district (or limits), and a point outside of the the same switching district (or limits), and on which a charge, other than a switching charge, has been or will be assessed.

NOTE: Carload shipments entitled to rates subject to this item, may also be defined as those switched to connections for forwarding beyond switching limits without change in contents; or, loaded cars received from connections, having their origin beyond the switching limits at the point of delivery, and switched to unloading point within the switching limits without change in contents.

**APPLICATION OF RATES NAMED HEREIN MADE
Item No. SUBJECT TO THIS ITEM**

- 170** Rates, in connection with which reference is made to this Item, apply only on traffic handled in intra-plant, intra-terminal or inter-terminal switching service (See Item No. 180), and will be assessed only when the traffic has not or will not be handled in road or line service, as described in Item No. 160.

1865

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 9

EFFECTIVE SEPTEMBER 10, 1931

**D&RGW Tariff 6600, ICC 429, CPUC 210 cancelled
D&RGW Tariff 4486-G (Cont'd.)**

Item No. INTRA-PLANT SWITCHING

- 180** A switching movement from one track to another within the same plant or industry.

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTER-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

1866

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 10

EFFECTIVE SEPTEMBER 10, 1931

Effective September 10, 1931, D&RGW Tariff 6600, ICC 429, CPUC 210 cancelled Tariff 4486-G (continued from preceding page)

SWITCHING CARLOAD FREIGHT IN INTRA-PLANT
MOVEMENT

Item No. (Except as Otherwise Provided)

250 At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 180) will be \$3.15 per car for each switching movement performed at all points named in Item No. 130, and \$2.70 per car at all other points.

Item No.	SWITCHING MOVEMENT	Minimum charge in dollars and cents per car (See Item No. 195)
----------	--------------------	--

Leadville, Colo.

1230	<p>Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.</p> <p>For each additional movement not provided for above, from track to track within smelter plant (including weighing over scales within plant)</p>	
------	--	--

\$2.70

Item No.	SWITCHING MOVEMENT Leadville, Colo.	Minimum charge in dol- lars and cents	
		Switching rates in cents per ton of 2,000 pounds	per car (See Item No. 195)
	All carload freight switched for ac- count of C&S., to and from side- tracks within the Leadville Yards, including the Crysolite Mill, Gul- ler's Sawmill and American Smelt- ing and Refining Co.'s Arkansas Valley Plant.		
	Charge when shipment is subject to Item No. 160	22	\$3.60
	Charge when shipment is subject to Item No. 170	34	4.50

Item No.

1260

(Intra-
state
only)All carload freight between Lead-
ville district mill and Arkansas
Valley Plant, when cars are not
loaded above marked capacity.Charge when shipment is subject to
Item No. 160

\$1.80 (4)

Charge when shipment is subject to
Item No. 170

5.85 (1)

(1) When cars are loaded above marked capacity, an additional charge of double the proportionate excess will be assessed. For example: If car of 100,000 pounds capacity is loaded to 110,000 pounds the excess is 10%. Double this equals 20%. If rate for car not overloaded is \$5.85, the total rate would be 120% of \$5.85 or \$7.02.

1867

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 11

EFFECTIVE SEPTEMBER 10, 1931

D&RGW Tariff 6600, ICC 429, CPUC 210 cancelled
D&RGW Tariff 4486-G (Cont'd.)

Item No.	SWITCHING MOVEMENT	Minimum charge in dollars and cents in cents per ton per car (See of 2,000 pounds Item No. 195)	
		Switching rates	charge in dol-
1280	All carload freight between Graham Park Junction, El Paso Mine, Wolfstone Junction, Jamie Lee Sidetrack, Greenback Mine, Wolfstone Mine, Castle View or Mikado Switch, Tucson Mine and Norton Mill, Eilers Arkansas Valley Plant, and Western Zinc Oxide Plant and Leadville, Colo.		
	Charge when shipment is subject to Item 160	34	\$5.85
	Charge when shipment is subject to Item 170	45	7.20
1330	Ore, Carloads, from C. & S. to Arkansas Valley Plant, when originating at mines located on Belt Lines around and about Leadville, Colo. NOTE--When cars are weighed at request of shipper or consignee an additional charge of \$2.25 per car will be made. Empty cars will be returned free.		
	Charge when shipment is subject to Item 160		\$2.25
	Charge when shipment is subject to Item 170		2.70
1340	Dump Ore Concentrates, switched from Norton sampler to Arkansas Valley Plant		\$5.85
1350	Less carload freight coming from points on or via D&RGW, switched to the Arkansas Valley Plant, Leadville district mill, or Western Zinc Oxide Plant		\$5.85
1360	Slag, carloads, minimum weight marked capacity of car, switched from Union Slag Dump to Arkansas Valley Plant	25	

1868

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 12

EFFECTIVE JANUARY 4, 1932

Supplement 4, D&RGW Tariff 6600

Interstate and Intrastate charges increased 10%, *Ex Parte* 103.

EFFECTIVE NOVEMBER 16, 1932

10% *Ex Parte* 103 increase removed on Intrastate shipments of copper, lead, zinc and silver ores and concentrates.

EFFECTIVE APRIL 1, 1933

Supplement 7, Boyds Tariff 252-A, I.C.C. A-2277 (Emergency Charges)

10% *Ex Parte* 103 increase removed on interstate shipments of copper, lead, zinc, and silver ores and concentrates.

EFFECTIVE OCTOBER 1, 1933

10% increase expired, *Ex Parte* 103.

EFFECTIVE DECEMBER 15, 1933

D&RGW Tariff 660-A, I.C.C. 489, Colorado P.U.C. 242 cancelled D&RGW Tariff 6600.

Item No.	SWITCHING MOVEMENT LEADVILLE, COLO.	Minimum charge in dol-	
		Switching rates in cents per ton of 2,000 pounds	cars and cents per car (See Item No. 186)

1620 APPLICATION OF SWITCHING CHARGES
IN ITEMS NOS. 1630 TO 1660.

INCLUSIVE

Switching rates named in Items Nos. 1630 to 1660, incl., will apply on all carload freight (except as otherwise provided herein) between industries named on D&RGW, tracks within the switching limits of Leadville, Colo., and track connections with connecting lines, when shipment is not to or from an industry on connecting line within the switching limits of Leadville, Colo.

(See Items Nos.
1630 to 1660, in-
clusive)

Note 1—Rates will not apply on shipments to be loaded or unloaded on team or truck delivery tracks, nor will they apply on shipments to be loaded or unloaded by parties or firms other than those having trackage locations on D&RGW, within the switching limits of Leadville, Colo.

1869

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 13

D&RGW Tariff 6600-A, I.C.C. 489, Colorado P.U.C. 242
(cont'd.)

Item No.	INDUSTRY	Minimum
		charge in dol.
		Switching rates lars and cents
		in cents per ton per car (See
		of 2,000 pounds Item No. 194)
1630	Arkansas Valley Smelter (Eilers)	(See Items Nos.
	1670 to 1800
	incl.)
	

- Item #1670—Reissue of Item 1230, D&RGW 6600.
 Item #1680—Reissue of Item 1240, D&RGW 6600.
 Item #1700—Reissue of Item 1260, D&RGW 6600.
 Item #1720—Reissue of Item 1280, D&RGW 6600.
 Item #1770—Reissue of Item 1330, D&RGW 6600.
 Item #1780—Reissue of Item 1340, D&RGW 6600.
 Item #1790—Reissue of Item 1350, D&RGW 6600.
 Item #1800—Reissue of Item 1360, D&RGW 6600.

EFFECTIVE APRIL 18, 1935

Supplement 11, D&RGW 6600-A

Interstate charges on all shipments except lead, copper
 and zinc ores and concentrates increased 10%, *Ex Parte*
 115.

EFFECTIVE APRIL 22, 1935

Supplement A, Kipps Tariff 333, P.U.C. Colorado 128
 (Emergency Charges)

Intrastate charges on all shipments except coal; coke;
 lead; copper and zinc ores and concentrates increased 10%,
Ex Parte 115.

1870

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 14

EFFECTIVE FEBRUARY 8, 1936

Amendment 16, D&RGW Tariff 6600-A

TABLE OF SWITCHING CHARGES

Item No.	Switching Movement	Minimum Charge in dollars and cents per car (see Item 195)
1675 (R) (intra-state only)	Ore and Concentrates, carloads, which have been handled in road haul service to the Leadville District Mill and switched between the Leadville District Mill and Arkansas Valley Smelter for the purpose of thawing.	270

EFFECTIVE JULY 1, 1936

10% increase expired, *Ex Parte* 115.

EFFECTIVE MAY 21, 1937

Amendment 19, D&RGW Tariff 6600-A

Item No.	SWITCHING MOVEMENT
250-A cancels	SWITCHING CARLOAD FREIGHT IN INTRA-PLANT MOVEMENT

250

(Except as otherwise provided)

At points not specifically provided for herein the rate on Intra-Plant Switching (see Item No. 180) will be \$3.15 per car for each switching movement performed at all points named in Item No. 130 of Tariff or as amended, and \$2.70 per car at all other points.

At points not specifically provided for in Tariff or as amended, the rate on Intra-Plant shipments of Coal in Utah will be \$5.85 per car for each switch movement when no further rail haul service is performed.

EFFECTIVE JULY 20, 1937

D&RGW Tariff 6600-B, I. C. C. 577, C. P. U. C. 288 cancelled D&RGW Tariff 6600-A.

Item #250 Same as in previous issue except that the words "in tariff or as amended" were deleted in second paragraph thereof.

Item #1675 Same as in Amendment 16, D&RGW 6600-A, except now applicable on Interstate and Intrastate traffic.

1871

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 15

EFFECTIVE JULY 20, 1937

Amendments 2 and 3, D&RGW Tariff 6600-B.

Item No. Circle reference changed to read:

1700-A

(intra-
state
only)

Applicable only on Cars loaded not in excess of marked capacity of the car. Cars loaded in excess of the marked capacity of the car, will be \$1.00 per car additional.

EFFECTIVE MARCH 28, 1938

Supplement 7, D&RGW Tariff 6600-B

Intrastate charges increased 10%, *Ex Parte* 123.

EFFECTIVE MAY 18, 1938

Supplement L, Agent Kipps Tariff (illegible) (Emergency Charges)

Interstate charges increased 10%, *Ex Parte* 123.

EFFECTIVE JANUARY 27, 1939

Amendment 9, D&RGW Tariff 6600-B

Item No. Same as Item 1670 of D&RGW Tariff 6600-A, 1670-A except for addition of "for line-haul shipments" (intra- after word "movement" in second paragraph. state Also, rate changed from \$2.70 to \$2.97, reflecting only) the *Ex Parte* 123 increase.

Cancels

1670

EFFECTIVE MARCH 15, 1939

Amendment 10, D&RGW Tariff 6600-B

Item No. Same as Item 1670-A, except for changing "for 1670-B. line-haul shipments" to "of line-haul ship- (intra- ments". state only)

Cancels

1670-A

EFFECTIVE JULY 1, 1939

Supplement 10, D&RGW Tariff 6600-B

Item No. Makes provisions applicable on Interstate as 1670-A well as Intrastate traffic. Wording the same.

cancels

1670-&

1670-B

1872

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 16

EFFECTIVE MARCH 1, 1940

D&RGW Tariff 6600-C, I. C. C. 667, Colorado P. U. C. 335, cancels D&RGW Tariff 6600-B. (Not subject to *Ex Parte* 123 increase.)

- Item No.* Same as previously quoted except for the inclusion of the *Ex Parte* 123 increases in the charges
- 250 —\$3.15 increased to \$3.37, \$2.70 increased to \$2.97, \$5.85 increased to \$6.44.
- 1670 Unchanged except *Ex Parte* 123 increase added in charge—\$2.70 increased to \$2.97.
- 1680 Unchanged except *Ex Parte* 123 increase added in charges—22¢ increased to 24¢, 34¢ increased to 37¢, \$3.60 increased to \$3.96, \$4.50 increased to \$4.95.
- 1700 Unchanged except *Ex Parte* 123 increase added in charges—\$1.80 increased to \$1.98, \$5.85 increased to \$6.44, circle reference (1) \$1.00 increased to \$1.10.
- (intra-state only)
- 1720 Unchanged except *Ex Parte* 123 increase added in charges—34¢ increased to 37¢, 45¢ increased to 50¢, \$5.85 increased to \$6.44, \$7.20 increased to \$7.92.
- 1770 Unchanged except *Ex Parte* 123 increase added in charges—\$2.25 increased to \$2.48, \$2.70 increased to \$2.97.
- 1780 Unchanged except *Ex Parte* 123 increase added in charges—\$5.85 increased to \$6.44.
- 1790 Unchanged except *Ex Parte* 123 increase added in charges—\$5.85 increased to \$6.44.
- 1800 Unchanged except *Ex Parte* 123 increase added in charges—25¢ increased to 28¢.

EFFECTIVE APRIL 11, 1941

Supplement 6, D&RGW Tariff 6600-C.

Item No. Same as before with the addition of the following paragraph:

250-A

cancels

250

Exception—At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

EFFECTIVE MARCH 18, 1942

Interstate and Intrastate charges increased 6%, *Ex Parte* 148.

1873

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 17

PRESENT RATES**EFFECTIVE JUNE 10, 1942**

Effective June 10, 1942, D&RGW Tariff 6600-D, I. C. C. 736, C. P. U. C. 378 cancelled D&RGW Tariff 6600-C. (Subject to 6% increase, *Ex Parte* 148, now under suspension until July 1, 1944, Supplements 8 and 13).

*Item No.***APPLICATION OF RATES**

140

**SWITCHING SERVICE INCLUDED IN PUBLISHED
RATES VIA D. & R. G. W.**

Unless otherwise specifically provided herein, or in other tariffs lawfully on file with the Interstate Commerce or State Public Utilities Commissions, all carload rates published or concurred in by the D. & R. G. W. R. R. covering traffic on which it receives a line or road haul, include the switching service to and from the side tracks, warehouse tracks or industry tracks within the switching limits on the D. & R. G. W. R. R.

150

**SWITCHING CHARGES COVER MOVEMENT OF BOTH
EMPTY AND LOADED CAR**

Switching charges named (unless otherwise specifically provided) will cover the handling of cars loaded inbound and empty outbound, or vice versa. If cars are handled loaded in both directions, switching charge will be assessed for each loaded movement.

160

**APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM**

Rates, in connection with which reference is made to this Item, apply only on traffic which has been or will be handled in road or line service, that is, traffic moved between a point within one switching district (or limits), and a point outside of the same switching district (or limits), and on which a charge, other than a switching charge, has been or will be assessed.

Note—Carload shipments entitled to rates made subject to this Item, may also be defined as those

switched to connections for forwarding beyond switching limits without change in contents; or loaded cars received from connections, having their origin beyond the switching limits at the point of delivery, and switched to unloading point within the switching limits without change in contents.

170 APPLICATION OF RATES NAMED HEREIN MADE
SUBJECT TO THIS ITEM

Rates, in connection with which reference is made to this Item, apply only on traffic handled in intra-plant, or intra-terminal or inter-terminal switching service (See Item 180), and will be assessed only when the traffic has not or will not be handled in road or line service, as described in Item 160.

1874

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 18

PRESENT RATES (Con'd.)

Effective June 10, 1942, D&RGW Tariff 6600-D (Con'd)

Item No. APPLICATION OF RATES

180 INTRA-PLANT SWITCHING

A switching movement from one track to another within the same plant or industry.

INTRA-TERMINAL SWITCHING

A switching movement (other than Intra-Plant Switching) from one track to another of the same road within the switching limits of one station or industrial switching district.

INTRA-TERMINAL SWITCHING

A switching movement from a track of one road to a track of another road when both tracks are within the switching limits of the same station or industrial switching district.

Item No.	SWITCHING MOVEMENT	Minimum charge in dollars and cents	
		Switching rates in cents per ton of 2,000 pounds	per car (See Item No. 195)

All Stations on D & R.G.W.

250 SWITCHING CARLOAD FREIGHT IN
INTRA-PLANT MOVEMENT

At points not specifically provided for in Tariff, the rate on Intra-Plant Switching (see Item 180)

will be \$3.47 per car for each switching movement performed at all points named in Item 130, and \$2.97 per car at all other points. (See exception)

At points not specifically provided for, the rate on Intra-Plant shipments of Coal in Utah will be \$6.44 per car for each switch movement when no further rail haul service is performed.

Exception—At stations in Utah, no charge will be made for shifting partly loaded or partly unloaded cars from one location to another at the same shed or loading platform if shifting is performed when the tracks are being switched to remove loaded or empty cars, or to place additional cars.

1875

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 19

PRESENT RATES (Cont'd.)

Effective June 10, 1942, D&RGW Tariff 6600-D (Cont'd.)

Item No.	SWITCHING MOVEMENT	Minimum charge in dollars and cents	
		Switching rates in cents per ton of 2,000 pounds	per car (See Item No. 136)

Leadville, Colo.

1620

APPLICATION OF SWITCHING
CHARGES IN ITEMS NOS.
1630 TO 1660, INCLUSIVE

Switching rates named in Items Nos. 1630 to 1660, incl., will apply on all carload freight (except as otherwise provided herein) between industries named on D.&R.G.W., tracks within the switching limits of Leadville, Colo., and track connections with connecting lines, when shipment is not to or from an industry on connecting line within the switching limits of Leadville, Colo.

(See Items Nos.
1630 to 1660,
inclusive)

Note 1—Rates will not apply on shipments to be loaded or unloaded on team or truck delivery tracks; nor will they apply on shipments to be loaded or unloaded by parties or firms

other than those having trackage locations on D.&R.G.W. within the switching limits of Leadville, Colo.

Industry

1630 Arkansas Valley Smelter (Eilers)

(See Items Nos.
1670 to 1800,
inclusive)

1670 Delivery of a line-haul carload shipment destined to smelter at Leadville, Colo., will include movement within smelter plant over track scales, to and from thaw-house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company.

For each additional movement of line-haul carload shipments, not provided for above, from track to track within smelter plant (including weighing over scales within plant)

\$2.97

1675 Ore and Concentrates, carloads, that have been handled in road haul service to the Leadville District Mill and switched between the Leadville District Mill and Arkansas Valley Smelter for the purpose of thawing

\$2.97

1876

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13
Page No. 20

PRESENT RATES (Cont'd.)

Effective June 10, 1942, D&RGW Tariff 6600-D (Cont'd.)

Item No.	SWITCHING MOVEMENT	Minimum charge in dollars and cents	
		Switching rates in cents per ton of 2,000 pounds	per car (See Item 155)
Leadville, Colo.			

1680 All carload freight switched for account of C.&S., to and from side-tracks within the Leadville yards, including the Chrysolite Mill, Gul-

ler's Sawmill and American Smelting and Refining Co.'s Arkansas Valley Plant.

	Charge when shipment is subject to Item 16	24	\$3.96
	Charge when shipment is subject to Item 170	37	\$4.95
1700 (intra-state only)	All carload freight between Leadville district mill and Arkansas Valley Plant, when cars are not loaded above marked capacity.		
	Charge when shipment is subject to Item 160		(1) \$1.98
	Charge when shipment is subject to Item 170		(1) \$6.44
(1) Applicable only on cars loaded not in excess of marked capacity of the car. Cars loaded in excess of the marked capacity of the car, will be \$1.10 per car additional.			
1720	All carload freight between Graham Park Junction, El Paso Mine, Wolfstone Junction, Jamie Lee Sidetrack, Greenback Mine, Wolfstone Mine, Castle View or Mikado Switch, Tucson Mine and Norton Mill, Eilers Arkansas Valley Plant, and Western Zinc Oxide Plant and Leadville, Colo.		
	Charge when shipment is subject to Item 160	37	\$6.44
	Charge when shipment is subject to Item 170	50	\$7.92
1770	Ore, carloads, from C&S. to Arkansas Valley Plant, when originating at mines located on Belt Lines around and about Leadville, Colo.		
	Note—When cars are weighed at request of shipper or consignee an additional charge of \$2.48 per car will be made. Empty cars will be returned without charge.		
	Charge when shipment is subject to Item 160		\$2.48
	Charge when shipment is subject to Item 170		\$2.97

1877

American Smelting and Refining Company
Leadville, Colorado Smelter

Exhibit No. 13

Page No. 21

PRESENT RATES (Cont'd.)

Effective June 10, 1942, D&RGW Tariff 6000-D (Cont'd.)

Item No.	SWITCHING MOVEMENT	Minimum
		charge in dol- Switching rates lars and cents in cents per ton per car (See of 2,000 pounds Item 195)
<i>Leadville, Colo.</i>		
1780	Dump Ore Concentrates, switched from Norton sampler to Arkansas Valley Plant	\$6.44
1790	Less than carload freight coming from points on or via D.&R.G.W., switched to the Arkansas Valley Plant, Leadville district mill, or Western Zinc Oxide Plant	\$6.44
1800	Slag, carloads, minimum weight marked capacity of car, switched from Union Slag Dump to Arkan- sas Valley Plant	28

NOTE: Due to the complexities of the *Ex Parte*
increases, there are some slight variations on
various commodities from the data shown.

May 10, 1944

1878

Exhibit No. 14

Exhibit No. 14

Witness O. W. TUCKWOOD

AMERICAN SMELTING AND REFINING COMPANY.

"In the United States District Court for the
District of Utah.

"OREGON SHORT LINE :
RAILROAD COMPANY, :
PLAINTIFF :

VS

AMERICAN SMELTING & :
REFINING COMPANY, :
DEFENDANT. :

: : : : : : : : : : :

"This is an action by the plaintiff to recover the sum of
\$60,378.71 on account of certain switching service alleged to

have been performed by the plaintiff and its assignors for the defendant at its smelting plant situated at Murray in this State.

(NOTE:—Complaint filed in District Court of the United States, District of Utah, Central Division, dated November 20, 1916, assigned No. 4552, and served on American Smelting and Refining Company November 22, 1916.)

“The case was heard upon an agreed statement of facts to be considered in connection with the matters admitted by the pleadings.

“The plaintiff and its assignors are railroad companies doing intra and interstate business. The defendant is engaged in smelting ores of the precious metals at its said plant. It has and maintains a large switching yard which it uses in carrying on its said business. Some ten years ago the railroad companies, plaintiff and its assignors, made and filed with the Interstate Commerce Commission tariffs applicable to the said defendant at its plant at Murray, by which certain rates were fixed for shipments made by said smelting company, and which tariffs also had entered under the column headed “Rate” the word “free”, opposite to which it was provided that the said railroad company would move cars containing freight which had paid transportation charges to the plant from track to track of said switching yard.

“Similar tariffs were at the same time filed with the Interstate Commerce Commission by said railroad companies applicable to all other smelting companies with plants situated in Salt Lake Valley—the location of the plant of the defendant—with like provisions for free switching service.

“After the filing of said tariffs with the Interstate Commerce Commission, the plaintiff furnished switch engine and crews in the plant of said defendant and moved all cars containing freight which had paid transportation charges to the plant, delivered by itself or its assignors without charge to the defendant company; for which service, however, its assignors from time to time reimbursed plaintiff according to their respective proportions of the value of such services. This service was continued

1879

I. C. C. Ex Parte 104 Part 2
Investigation.
Exhibit No.
Witness

PAGE 2.

(Continued.)

according to the stipulation of facts, until the 31st day of October, 1916. This suit is brought to recover the value of such service between the 1st day of December, 1912, and the 31st day of October, 1916. The amount claimed by the plaintiff is admitted to be the reasonable value of the services rendered.

"It is the contention of the plaintiff that the word "free" as it appears in the tariff filed with the Interstate Commerce Commission, means free in the sense that the plaintiff and its assignors thereby undertook to donate and give, and did during all the times thereafter, donate and give to the smelting company the value of the services so rendered; that such a donation was and is, in effect a rebate from the rate prescribed in the tariff, and that such a rebate is not only unlawful in itself but amounts to an unreasonable discrimination against other shippers. That such a provision, even though in the tariff publicly filed with the Interstate Commerce Commission, shows upon its face that it is illegal, and that, therefore, the plaintiff in this action is entitled to recover against the defendant the amount claimed.

"The defendant, on the other hand disputes all these propositions and maintains that the word "free" used in the tariff means only that such switching service therein provided should be performed without any additional charge than that provided in the rate fixed, and that the value of such service was considered in making the rate and included therein. That there is no law which requires the separation of the switching charge from ~~the~~ transportation charge, and that the switching charge being included in the transportation rate, is not a rebate as claimed by the plaintiff, or a discrimination against other shippers as asserted by it.

"The defendant further claims that the matters raised by the pleadings and stipulation of facts come within the purview exclusively of the Interstate Commerce Commission.

"There is nothing in the record to show the circumstances under which these tariffs were made and filed. Nothing in the record to show that there are competing shippers, or

shippers similarly situated to the defendant smelting company or other smelting companies in Salt Lake Valley. The United States is not prosecuting this action, nor does any shipper appear complaining.

"To give or take a rebate is a crime: Unfair and unreasonable discrimination is unlawful and illegal. This tariff, and others of similar import, were filed with the Interstate Commerce Commission more than ten years ago. During all this period the provisions of the tariffs were acquiesced in, at least, by the Interstate Commerce Commission. The railroad companies had performed this service for the defendant and made no demand for payment therefor until this action was commenced. Unfair dealing, fraud, or criminality cannot be presumed and ought not to be inferred from words or acts reasonably capable of innocent interpretation.

"It is possible that in making this tariff providing the rate of transportation that the reasonable value of the contemplated switching service was included, and when it is considered that it was publicly filed with the Interstate Commerce Commission, approved, or at least acquiesced

1880

I. C. C. Ex Parte 104 Part 2
Investigation.

Exhibit No.

Witness

PAGE 3

(Continued.)

in by the Commission for many years, and when it is further considered that men in their business dealings generally do not violate the law of the land but act honestly, and, I might add, in their own interest, the possibility above noted becomes a high probability. Such, of course, may not be the fact. Perhaps in a prosecution by the United States, or in a complaint made by a shipper, facts would be developed which would show that this service rendered by the plaintiff and its assignors was in fact a rebate allowed the defendant by the plaintiff and its assignors, and that it was and is an unjust, unfair and unreasonable discrimination against other shippers, but as the record now stands there is, as I view it, not only a failure of proof with respect to these matters, but the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate.

"The judgment will be that the action be dismissed."

1881

Exhibit No. 15

Exhibit No. 15

Page No. 1

Witness: O. W. TUCKWOOD

I.C.C. EX PARTE 104 PART II INVESTIGATION
American Smelting and Refining Company
Garfield, Utah Smelter
Leadville, Colo. Smelter
Murray, Utah Smelter

REPRESENTATIVE TARIFF ITEMS COVERING
DESTINATION WEIGHTS,
METHOD OF WAYBILLING,
DETERMINATION OF VALUATION
AND
SAMPLING IN TRANSIT

Union Pacific Tariff No. 6000-H, I.C.C. 4981

Item No. 235 **WEIGHTS APPLICABLE**

The provisions of T.C.F.B. Tariff No. 58-D, Agent L. E. Kipp's ICC A-3468, will not apply on shipments moving under the rates shown in this tariff. Destination weights will govern.

Shipments of Ore and/or Concentrates originating at points on the Union Pacific R.R. may be weighed at point of origin without extra charge.

(M.T.987)

(This tariff publishes rates on Ore and Concentrates from stations in California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming to various destinations).

Union Pacific Tariff No. 7020, I.C.C. 606

Item No. 349-30

ORE, CONCENTRATES OR MILL OR SMELTER PRODUCTS—
WEIGHTS ON

The weight of Ore, Concentrates, and Mill or Smelter Products, as found at destination, subject to the minimum carload weights provided in this tariff, shall be used in computing freight charges. (See exception).

Exception: Where weights on Ore, Concentrates, Mill or Smelter Products, are obtained at sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carriers

will also accept such weights as a basis for assessing freight charges.

(File 6601-4262)

(This tariff applies between points on the Union Pacific R.R., Ogden and south)

P.F.T.B. Tariff 33-Q, I.C.C. 1386

Item No. 150

ORE, WEIGHT OF

The weight of Ore, Concentrates, and Mill or Smelter products, as found at destination, subject to the minimum carload weights provided in this tariff, shall be used in computing freight charges. (See exception).

Exception: Where weights on Ore, Concentrates, Mill or Smelter products, are obtained at Sampler, at which shipments are stopped for sampling in transit, and such weights are used by smelters in settlement with shippers, carrier will also accept such weights as a basis for assessing freight charges.

(This tariff applies between points in Arizona, California, Colorado, Nevada, New Mexico, Oregon, Texas and Utah)

1882

American Smelting and Refining Company
Garfield, Utah Smelter, Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.
Page No. 2

Union Pacific Tariff No. 6000-H, I.C.C. 4981

Item No. 175 MANNER OF WAYBILLING SHIPMENTS

Ore and concentrates for which rates based on value per ton are published herein, will be waybilled at rates applying on valuation of \$100.00 per ton, or when no rate is provided for that value, at the rate applicable for the highest value shown. (For waybilling purposes only).

RULES FOR DETERMINING RATE UPON WHICH FREIGHT CHARGES SHALL BE ASSESSED

(a) After arrival at smelter or other industry to which shipment is consigned and settlement between shipper and consignee is made on basis of return or assay by said smelter or other industry, the value so determined; and upon which such settlement is made, without deduction for freight charges shall be certified to the carrier, and rate shall be revised in accordance with such certified value.

(b) On shipments exported to foreign countries and upon which settlement between the shipper and consignee is made

on basis of assays by the shipper and the consignees' agent or representative or by a third party; the value so determined, and upon which such settlement is made, without deduction for freight charges, shall be certified to the carrier, and rates shall be revised in accordance with such certified value.

Carriers reserve the right to verify valuation by special assay or otherwise.

(This tariff publishes rates on ore and concentrates from stations in California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming to various destinations.)

D. & R. G. W. Tariff No. 6371-G, I.C.C. 757

Item No. 190 MANNER OF WAYBILLING SHIPMENTS

Ore and concentrates for which rates based on value per ton are published herein, will be waybilled from point of origin at the rate applicable to Ore for \$100.00 per ton value. If no rate is published for Ore of \$100.00 per ton value, then at the highest rate per ton for which a rate is published.

**RULE FOR DETERMINING RATE UPON WHICH FREIGHT
SHALL BE ASSESSED.**

After arrival at mill, smelter or other industry to which shipment is consigned and settlement between shipper and consignee, is made on the basis of return or assay by such mill, smelter or other industry, a revision of rates will be made in accordance with value determined and certified to carrier by such mill, smelter or other industry, without deduction being made for freight charges. Carriers reserve the right to verify valuations by special assays.

(This tariff publishes rates on ore and concentrates between stations in Colorado, Idaho, New Mexico and Utah on the one hand and stations in forty States, the District of Columbia and Canada on the other hand.)

1883

American Smelting and Refining Company
Garfield, Utah Smelter, Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.
Page No. 3

UNION PACIFIC TARIFF No. 7114, I.C.C. 565, P.S.C.U. 144

Item No. 1110-E FLUORSPAR; ORE-SAMPLING IN TRANSIT

Except as provided in individual tariffs lawfully on file with the Interstate Commerce Commission and various State Commissions, shipments of Fluorspar, Ore, Concen-

trates, Copper, Matte, Pyrites, Slag and Sulphurets, carloads will be allowed to stop in transit at Salt Lake City, Midvale, Murray, or International, Utah, (See Note 2), for sampling. Shipments may be billed to, or in care of a Sampler and afterward diverted to destination or consigned to destination in care of Sampler at Salt Lake City, Midvale, Murray or International Utah (See Note 2), for sampling in transit, and after sampling is completed, forwarded to smelter without extra charge. If consignee desires to re-sample at another Sampler, add 13 cents per ton of 2,000 pounds for service between samplers to the through rate to final destination.

(File 5-2).

Note 2.—When sampled at International, Utah, a charge of \$15.40 per car (except on Iron Ores, charge of \$12.65 per car, plus 37 cents per ton of 2,000 lbs.) for haul, Warner to International, Utah, and return to Warner, Utah, and which accrues to Tooele Valley Railway, will be added to through rates, point of origin to destination.

**Item No. 1115-G ZINC ASHES, ZINC DROSS, ZINC SKIMMINGS, SAL-AMMONIAC SKIMMINGS—
SAMPLING IN TRANSIT**

Carload shipments of Zinc Ashes, Zinc Dross, Zinc Skimmings and Sal-ammoniac Skimmings, when moving under rates named in Trans-Continental Freight Bureau East Bound Tariff No. 3-N L. E. Kipp (Agent) I.C.C. No. 1452, supplements thereto or successive issues thereof, may be stopped once at either Midvale, Murray or Salt Lake City, Utah, for the purpose of sampling, without charge for such service.

D. & R. G. W. TARIFF 6000-F, I.C.C. 641

Item No.	Transit Privilege	Transit Station	Transit Rules and Charges.
180	Sampling in Transit	Montrose, Colorado	Vanadium or Carnotite, Ore, also Sandstone Rock, carloads, originating at Ridgway, Ouray, Delta, Paonia, Somerset, Oliver or White-water, Colo., and moving under the rates named in this tariff, may be sampled in transit at Montrose, Colo., without additional charge. Transfer from one car to another must be performed by sampler employees without cost to the D. & R. G. W. R. R.

1884

American Smelting and Refining Company
Garfield, Utah Smelter; Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.

Page No. 4.

D. & R. G. W. TARIFF 6000-F, I.C.C. 641

Item No.	Transit Privilege	Transit Station	Transit Rules and Charges
190	Sampling, Sorting and Separation in Transit	Harold, Utah	Ore, carloads, originating at Dividend, Flora and Iron King, Utah and destined, Garfield, Murray, Midvale, International and West International, Utah, may be stopped in transit at Harold, Utah, for the purpose of sampling, sorting and separation without extra charge. Change in consignee and destination at Harold, Utah, will be permitted without extra charge.
210	Sampling in Transit	Murray, Utah	Manganese Ore, carloads, originating at American Fork, Lehi, Provo, or Elberta, Utah and destined Minnequa (D&RGW-C&W) Colo., may be stopped once in transit to sample at Murray, Utah, without extra charge for the out-of-line involved.
230	Sampling in Transit	Garfield Smelter, Utah	Ore and concentrates, carloads, originating at Belden, Colorado, and destined Midvale or Murray, Utah, may be sampled in transit at Garfield Smelter, Utah, without extra charge for the out-of-line haul from Midvale to Garfield Smelter and return to Midvale or Murray, Utah. Freight charges will be based on the original in pound weight to Garfield Smelter, Utah.

5

1885

American Smelting and Refining Company
Garfield, Utah Smelter, Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.
Page No. 5

D. & R. G. W. TARIFF 6000-F, I.C.C. 641

Item No.	When From	Destination	For Sampling at (Except as noted)	Extra Charge Account Sampling
280 (Applies on Ore and Concentrates, Matte and Slag)	Any Station in Utah	Any Station in Utah	Any Point	When shipped direct from mines to smelters may at discretion of carrier, be sent to sampler to ascertain value, sampler charges to be billed against the shipments. Ore, carloads, may be sampled at smelter samplers at any point of destination named in this tariff. At points where sampling is permitted, such privilege will apply at smelter samplers as well as at public samplers. (12-1226)

SAMPLING IN TRANSIT

UNION PACIFIC TARIFF 6000-H, I.C.C. 4981

Item No. 195 SAMPLING AT BAKER, ORE.

Shipments from Joseph, Ore., and directly intermediate points, may be stopped at Baker, Ore., to be sampled at that point, without charge.

Item No. 200 SAMPLING AT HAILEY, IDAHO

Shipments from Ketchum, Idaho, may be stopped at Hailey, Idaho, for sampling without additional charge.

Item No. 215 SAMPLING AT WALLACE, IDAHO, EAST HELENA AND BUTTE, MONT.

Shipments from Burke, Gem, Hunter, Kellogg-Wardner, Morning, Mullan, Osburn, Bradley, Silver King, Wallace, Idaho, and points between, may be routed via or stopped at Wallace, Idaho, to be sampled at that point, without additional charge.

Shipments from Kellogg-Wardner, Bradley and Osburn, Idaho, via Wallace, Idaho, and Nor. Pac. Ry. may be handled for sampling at East Helena or Butte, Mont., without additional charge.

1886

American Smelting and Refining Company
Garfield, Utah Smelter, Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.
Page No. 6

D. & R. G. W. TARIFF 6371-G, I.C.C. 757

SAMPLING IN TRANSIT

Item No. 200 (3rd paragraph)

Shipments of Manganese Ore originating at stations shown in Groups 1, 2 and 3 (see Page 18) located on the D. & R. G. W., or stations west thereof, may be stopped in transit at Denver or Pueblo, Colo., for sampling, without additional charge except that D. & R. G. W. will not absorb any foreign lines' switching charge.

UNION PACIFIC TARIFF 2047-L, I.C.C. 4956

SAMPLING IN TRANSIT

Item No. 105

ORE AND ORE CONCENTRATES, from Ketchum, Idaho, may be stopped in transit at *Hailey, Idaho* for sampling without extra charge.

CRUSHING IN TRANSIT

Item No. 115

MANGANESE ORE, moving under this tariff destined to Ironton, Utah, may be stopped at *Murray, Utah* to be crushed in transit under the following arrangement:

For stop at Crusher or Sampler. **No Charge**

Shipments must not be held to exceed ten (10) days.

Carrier will not be responsible for mixing of shipments or loss or difference in weights caused by the above privilege being availed.

Shipments may be billed to, or in care of Crusher or Sampler and afterwards diverted to destination without extra charge.

The rate to be applied on the through movement is that on manganese ore in effect on the date of shipment from the primary point of origin.

(This tariff publishes rates on Ore and Concentrates, matte, slag and smelter products from Stations in Idaho, Montana, Nevada, Oregon, Utah and Wyoming.)

1887

American Smelting and Refining Company
Garfield, Utah Smelter, Leadville, Colorado
Smelter and Murray, Utah Smelter

Exhibit No.
Page No. 7

PACIFIC-FREIGHT BUREAU TARIFF No. 33-Q, L.C.C. 1386

SAMPLING IN TRANSIT

From Item on	Points When Destined To Points	Routed	May be Sampled at	Charge in addition to through Rate to final Destination
ATSF	Garfield .. Utah	VIA—	Garfield	Utah
300 SP	International ..	Los Angeles	International	Utah
TRY	Midvale ..	San Bernardino	Midvale	Utah
UP	Murray ..	Colton	Murray	Utah
	Pallas ..	—or—	Salt Lake City	Utah
	Salt Lake City ..	Barstow		

** For first stop at Sampler:

No Charge.

For second stop at Sampler:

13 cents per ton of 2,000 lbs.

Note: When sampled at International, Utah, a charge of \$15.40 per car (except on Iron Ores a charge of \$12.65 per car, plus 37 cents per ton of 2,000 lbs.) for haul from Warner to International, Utah, and return to Warner, Utah, will be added to through rates from point of origin to destination. This charge accrues to Tooele Valley Railway.

(This tariff contains rates on ore, metals or smelter products from Arizona, California, Nevada, New Mexico, Oregon and Utah to Utah.)

May 10, 1944

1888

Exhibit No. 16

Exhibit No. 16

Page No. 1

Witness: O. W. TUCKWOOD

I. C. C. Ex PARTE 104 PART II INVESTIGATION

AMERICAN SMELTING AND REFINING COMPANY

Garfield and Murray, Utah, Smelters
Leadville, Colorado Smelter

DEMURRAGE RULES

Published in Association of American Railroad Tariff 4-X.
I.C.C. 3815 B. T. Jones, Agent

Rule 2. (Item 505-C), Supp. 11, covers free time allowed under various conditions prior to assessment of demurrage charges. Section A, Paragraph 1 thereof provides: "Except as otherwise provided in paragraph 3, of this section, Forty-eight hours' (two days) free time will be allowed to partly or completely load; to partly or completely unload, or to partly unload and partly reload all commodities."

Section A, Paragraph 2 thereof provides:

"When the same car is both unloaded and reloaded, each transaction will be treated as independent of the other; except that, when loading is begun before unloading is completed, the free time for loading shall not begin to run until the first 7 a. m. after unloading is completed. This will also apply to industries performing their own switching service, in which case the industry must notify this railroad date and time car was unloaded promptly after car is unloaded."

Section A, Paragraph 3 (b) provides:

"When a car is placed for unloading, whether or not partly unloaded at point where so placed is moved by railroad or private power to another point within the confines of the same industry or the same public delivery yard to unload, forty-eight (48) hours' free time will be allowed for the entire transaction, except that when this railroad makes a charge for such movement, the time incident thereto shall not be computed against the car."

Section B, Paragraph 1 provides:

"Twenty-four hours' (one day) free time will be allowed:

"When cars are held for reconsignment, diversion or reshipment, or held in transit on orders of consignor, consignee or owner."

NOTE 3—A "reshipment is the making of a new contract by which under a new rate the entire original lading without being unloaded, is forwarded in the same car to another destination.

1889

Exhibit No.

Page No. 2

Witness:

AMERICAN SMELTING AND REFINING COMPANY
Garfield and Murray, Utah, Smelters
Leadville, Colorado, Smelter

Rule 8 (Item 535-A), Supp. 6 to A.A.R. Tariff 4-X, I.C.C. 3815, covers claims and is headed:

"Demurrage charges assessed or collected for detention of cars through proximate causes named below will, subject to conditions set forth, be promptly cancelled or refunded."

Section A, Paragraph 2 of this rule provides:

"When, at the time of actual placement, lading is frozen or congealed so as to require heating, thawing or loosening to unload, the free time shall be extended forty-eight (48) hours, making a total of ninety-six (96) hours' free time, provided the consignee shall, prior to the expiration of forty-eight (48) hours from the first 7:00 A. M. after actual placement on an other-than-public delivery track, or from the first 7:00 A. M. after actual placement and after the day on which notice of arrival has been sent or given by this railroad of a car for delivery on a public delivery track, send or give this railroad's agent a written statement that the lading of the car or cars therein identified by initials and car numbers will require heating, thawing or loosening to unload. If such written statement is mailed, the date of mailing will be settled by the postmark.

**GENERAL EXCEPTIONS TO APPLICATION
OF DEMURRAGE RULES AND CHARGES**

<i>Item No.</i>	<i>Applicable at, or in Connection With</i>	<i>Exception</i>
20	Butte, Anaconda & Pacific Railway Company (On Montana intra-state traffic only.)	Demurrage Rules and Charges published herein, will not apply to Butte, Anaconda & Pacific Railway Company cars used for loading Ores, Concentrates or Lime Rock at mines or mine sidings, nor to such cars loaded with Ores, Concentrates, or Lime Rock at Smelters, Plants or Concentrators located on the Butte, Anaconda & Pacific Railway Company.

1890

Exhibit No.

Page No. 3

Witness:

AMERICAN SMELTING AND REFINING COMPANY
Garfield and Murray, Utah Smelters
Leadville, Colorado, Smelter

GENERAL EXCEPTIONS TO APPLICATION
OF DEMURRAGE RULES AND CHARGES

Item No.	Applicable at, or in Connection With	Exception
70	Duluth, Missabe and Iron Range Railway Company	• • • • • Demurrage rules and charges published herein will not apply during months of November, De- cember, January, February and March of each year on hopper bottom ore cars loaded with frozen ore or frozen silica rock. (Applicable only at Duluth or Steeltion, Minn.)
75	The Duluth, South Shore and Atlantic Railway Company	Demurrage rules and charges, published herein, will not apply during the months of November, December, January, February and March of each year on hop- per bottom ore cars of this rail- road loaded with frozen ore when originating at points on the Du- luth, South Shore and Atlantic Railway and destined to points on the Duluth, South Shore and Atlantic Railway as published in Duluth, South Shore and Atlan- tic Railway Freight Tariff No. 61-B, I.C.C. No. 3809.
100	Great Northern Railway Company	• • • • • Demurrage rules and charges, published herein, will not apply during months of November, De- cember, January, February and March of each year on hopper

*bottom ore cars loaded with frozen ore or frozen silica rock.

Applicable only at Duluth, Minn., and points of origin named in Item No. 85 of Great Northern Ry. G.F.O. No. 30-M, I.C.C. No. A-8031; G.N. Ry. G.F.O. No. 258-I, I.C.C. No. A-7649; Items 3400, 3405 and 3410 of G.N. Ry., G.F.O. No. 605-L, I.C.C. No. A-8051 and C.B.&Q. R.R. Co. No. 12009-Q, I.C.C. 19189.

1891

Exhibit No.

Page No. 4

Witness:

GENERAL EXCEPTIONS TO APPLICATION OF DEMURRAGE RULES AND CHARGES

Item No.	Applicable at, or in Connection With	Exception
130	Minneapolis, St. Paul & Sault Ste. Marie Railway Company	Demurrage rules and charges, published herein, will not apply during months of November, December, January, February and March of each year on hopper bottom ore cars loaded with frozen ore or frozen silica rock. Applicable only at Duluth, Minn., and points of origin subject to Group No. 5 rates in M.St.P.&S.S.M. Ry. Freight Tariff No. 177-G, I.C.C. No. 6972.
145	Northern Pacific Railway Company	Demurrage rules and charges, published herein, will not apply during the months of November, December, January, February and March of each year on hopper bottom ore cars located with frozen ore or frozen silicon rock. Applicable only at Duluth, Minn., and points of origin nam-

ed in Item 1555 series of Northern Pacific Ry. Tariff No. 413-V, I.C.C. No. 9576.

.

1892

*Exhibit No. 19***Assignment No.**

Report of observations of switching done at the Murray, Utah, plant of the American Smelting & Refining Company on March 28, 1944.

Engine U. P. 4420

Engineer	A. L. Haight
Fireman	G. E. Bartschi
Eng. Foreman	Geo. Easton
Brakeman	Herman Gygi
Brakeman	K. T. Borg

Engine left yard office—53 South Street—at 7:10 a. m.
Went light to Roaster track and pulled:

GATX—Tank—38729—Empty

D&RGW—Cov. Hop.—18312—Load, arsenic

AS&R—Hopper—4—Roast ore

AS&R—Hopper—6—Roast ore

AS&R—Hopper—15—Roast ore

AS&R—Hopper—14—Roast ore

AS&R—Hopper—10—Roast ore

AS&R—Hopper—7—Roast ore

AS&R—Hopper—9—Roast ore

AS&R—Hopper—8—Roast ore

AS&R—Hopper—2—Roast ore

AS&R—Hopper—11—Roast ore

Left Roaster track
at 7:15 a. m., arrived
at the scale 7:20 a. m.,
weighing complete
7:30 a. m.

At 7:33 a. m., after
being weighed,

GATX—Tank—
38279—Empty

D&RGW—Cov.
Hop.—18312—Load,
arsenic were placed
on track 6.

Engine then placed
the last five cars of Roast Ore enumerated above on the
North Trestle track for storage, and set the first five cars
of Roast Ore enumerated above on the Rock track for un-
loading at 7:35 a. m., after coupling to:

D&RGW—Gon.—71058—Empty

which had been standing at the east end of the Rock track.
The engine remained with these cars until all had been un-
loaded at 7:58 a. m., and then took them (including D&RG
—71058) out over 53rd South Street, shoved into the West
Lead and on to track 6, coupled to:

GATX—Tank—38279—Empty
D&RGW—Cov. Hop.—18312—Load, arsenic
then placed:

D&RGW—71058—Empty Gon.
GATX —38279—Empty tank
D&RGW—18312—Empty Gon.
on the Slag track.

Engine held on to:

AS&R—Hopper—4—Empty
AS&R—Hopper—6—Empty
AS&R—Hopper—15—Empty
AS&R—Hopper—14—Empty
AS&R—Hopper—10—Empty

Shoved these cars in on
the North Trestle track,
Coupled to:

Shoved all to
Bin 13 on the
Rock track for un-
loading. Engine
remained with
these cars until
the five loads were
unloaded at 8:22
a. m., then took all
to the Roaster
track at 8:30 a. m.

AS&R—Hopper—7—Load, Roast ore
AS&R—Hopper—9—Load, Roast ore
AS&R—Hopper—8—Load, Roast ore
AS&R—Hopper—2—Load, Roast ore
AS&R—Hopper—11—Load, Roast ore

1893 Assignment No.

AS&R, Murray, Utah, plant—March 28, 1944.

Engine then went light to North track at 8:31 a. m. and
picked up:

UCR—Gon.—20228—Load, calcine
pulled out on the lead and doubled to track 4 where:

LA&SL—Gon.—201002—Load ore,
was picked up, then doubled to track 6 at 8:37 a. m., coupled
to:

UCR—Gon.—20497—Load, Garfield pipe dust

ASX—Cov. Hop.—3275—Empty

UCR—Gon.—20319—Load, Triumph concentrates
took these five cars to the scale at 8:41 a. m. and weighed
all; complete at 8:45 a. m.

These cars were then switched as follows:

UCR —Gon.—20319

—Load

to East track in thawhouse

ASX —Cov. Hop.—

3275—Empty

to track 5 (for storage)

UCR —Gon.—20497
 —Load to Old Hand track
 LA&SL—Gon.—201002
 —Load, ore to track 4
 UCR —Gon.—20228
 —Load, calcine to track 5—hold for orders

Engine went light to High Line at 8:55 a. m., and pulled from the High Line at 9:02 a. m. with the following:

LA&SL —Gon.—201034—Part load, arsenic
 pyrites to track 5
 UCR —Gon.—21591—Load to track 5
 D&RGW—Gon.—40857—Empty to track 6
 D&RGW—Gon.—42373—Load, arsenic py-
 rites to track 5
 UCR —Gon.—21145—Empty to track 6

The above were switched as shown; completed 9:04 a. m.

Engine went light to track 4 and picked up:

LA&SL—Gon.—201002—Load, Eureka speiss,
 and placed it on the High Line at 9:05 a. m.

Engine went light to the West track in the thawhouse at 9:08 a. m., and pulled:

UP—Gon.—62003—Load

This car had been ordered to the thawhouse on March 27, but no moisture test had been made, therefore, it was necessary to take the car from the thawhouse to be weighed and left out for moisture test after which it would be returned to the thawhouse.

shoved it in on track 6 against

D&RGW—Gon.—40857—Empty

UCR —Gon.—21145—Empty

pulled all three cars out on the West lead to clear the East lead. Engine then cut off and went light to North Cylinder track at 9:15 a. m. and picked up:

LA&SL—Gon.—201047—Load, coke breeze
 then pulled out and shoved to Middle trestle (or Middle Belt) at 9:17 a. m., and coupled to:

UCR—Gon.—21278—Part load
 which was placed on the North Cylinder track at 9:20 a. m.

Still holding to:

LA&SL—Gon.—201047

the engine came out and doubled against West Lead to:

UP —Gon.—62003—Load, ore (1)

D&RGW—Gon.—40857—Empty (1)

UCR —Gon.—21145—Empty (1)

took all four cars to the scale at 9:23 a. m. and weighed all. Complete at 9:28 a. m., then placed cars marked (1) on the West Lead to clear the East Lead at 9:30 a. m. and shoved:

LA&SL—Gon.—201047—Load, coke breeze
to the Old Hand track at 9:35 a. m.

1894 Assignment No.

AS&R, Murray, Utah, plant—March 28, 1944.

Engine went light to the West Lead at 9:36 a. m., against:

LA&SL —Gon.—62003

—Load, ore

to West track in thawhouse

D&RGW—Gon.—48057

—Empty

to Slag track

UCR —Gon.—21145

—Empty

to Slag track

and switched as shown. Completed at 9:44 a. m.

Engine went light to East track in thawhouse and pulled:

UCR—Gon.—20319—Load, ore

and left it on the thawhouse lead for sampling.

Engine went light to Middle Belt at 9:50 a. m., coupled to:

LA&SL—Gon.—201051—Load, coke breeze,

shoved east on the same track and coupled to:

LA&SL—Gon.—201063—Empty

LA&SL—Gon.—201030—Empty

pulled all three cars out at 9:53 a. m. and kicked:

LA&SL—Gon.—201030—Empty

to track 4 to be loaded by locomotive crane, and set:

LA&SL—Gon.—201063—Empty

on the Bullion track, then pulled:

LA&SL—Gon.—201051—Load, coke breeze,

back on track 4 to clear track 5, and cut off at 10:03 a. m.

At 10:04 a. m. the engine went light to the thawhouse lead, coupled to:

UCR—Gon.—20319—Load ore,

shoved it into the West track of the thawhouse, coupled to:

UP —Gon.—62003—Load, ore

UP —Gon.—62498—Load, ore

UP —Gon.—63673—Load, ore

UCR—Gon.—21069—Load, U. S. Middlings,

switched the last-mentioned car to the Mill 4 track and shoved the balance back into the West track of the thawhouse at 10:11 a. m.

Engine went light to track 5 and at 10:15 a. m. switched out the third car:

D&RGW—Gon.—42373—Load, arsenic pyrites,

shoved it to the Low Line at 10:20 a. m.

Engine went light to Mill 4 track at 10:22 a. m., picked up:

UCR —Gon.— 21069—Load, U. S. middlings

LA&SL—Gon.—201051—Load,

took both cars to the scale, weighed the last-mentioned car, shoved both to the High Line and left:

LA&SL—Gon.—201051—Load

there at 10:30 a. m., then, holding to:

UCR—Gon.—21069—Load, U. S. middlings,
shoved in on the Old Hand track, coupled to:

LA&SL—Gon.—201047—Load, coke breeze

UCR —Gon.— 20497—Load, Garfield pipe dust,
pulled all three cars out of the Old Hand track and at 10:35 a. m. placed

UCR—Gon.—20497—Load, Garfield dust
on the North Cylinder track, and

UCR —Gon.— 21069—Load, U. S. middlings

LA&SL—Gon.—201047—Load, coke breeze

on the Old Belt track at 10:38 a. m.

1895 Assignment No.

AS&R, Murray, Utah plant—March 28, 1944.

Engine went light to Old Hand track and picked up:

D&RGW—Gon.—43298—Load,

Pioche

Engine held to this car

UCR —Gon.—21779—Load,

lime rock

to North Cylinder track

LA&SL —Gon.—201006—Load,

Shoshoni

to Old Hand track

LA&SL —Gon.—201059—Load,

Shoshoni

to Old Hand track

LA&SL—Gon.—201055—Load,

Lakeside

to Old Belt track

and switched as shown. Completed at 10:43 a. m.

Engine then shoved:

D&RGW—Gon.—43298—Load,

Pioche

to Old Hand track

in on the Old Hand track, coupled to:

LA&SL —Gon.—201006—Load,

Shoshoni

to Old Hand track

LA&SL —Gon.—201059—Load,

Shoshoni

to Old Hand track

D&RGW—Gon.— 43029—Load,

sand

to North Cylinder track

D&RGW—Gon.— 43253—Load,

sand

to North Cylinder track

and switched as shown. Complete at 10:46 a. m.

Engine went to North Cylinder track, coupled to:

D&RGW—Gon.—43029—Load, sand

D&RGW—Gon.—43253—Load, sand

UCR —Gon.—21779—Load, lime rock

UCR —Gon.—20497—Load, Garfield pipe dust,
pulled out and shoved all four cars against:

LA&SL—Gon.—201055—Load Lakeside ore,
on the Old Belt track, continued east on the Old Belt track,
coupled to:

UCR —Gon.—21069—Load, U. S. middlings

LA&SL—Gon.—201947—Load, coke breeze,
and left all seven cars on the Old Belt track at 10:50 a. m.

Engine went light to the House track at 10:54 a. m. and
pulled:

LA&SL—Gon.—201001—Empty,

and placed it on the High Line at 10:56 a. m.

Engine returned light to the gate on the West lead but
was delayed there by cars being delivered to plant track 4 by
U. P. engine 581. This engine became derailed and engine
4420, at 11:05 a. m., coupled the rear of the tender to the
following cars:

UCR —Gon.—20507

D&RGW—Gon.—43055

D&RGW—Gon.—43050

D&RGW—Gon.—43147

D&RGW—Gon.—43121

D&RGW—Gon.—71146

and made a drop of them. Total delay, 10 minutes.

Engine went light to North Cylinder track at 11:10 a. m.,
and coupled to:

UCR —Gon.—21228—

AS&R—Gon.—54

AS&R—Gon.—48

Shoved to the extreme east end
of the track to a loading spot
called the "Pug"; and coupled to:

AS&R—Gon.—46—Load,

placed it on the Middle Belt track at 11:13 a. m., and shoved:

AS&R—Gon.—54

AS&R—Gon.—48

to the "Pug" then pulled:

UCR—Gon.—21228

back on the North Cylinder track at 11:16 a. m.

Engine went light to Bag House at 11:18 a. m., and coupled to:

AS&R—Gon.—49

ASX—Cov. Hop.—3287—Part load, arsenic,
1896 Assignment No.

AS&R, Murray, Utah plant—March 28, 1944
shoved two cars to the arsenic house and coupled to:

UP—Cov. Hop.—92027—Load, arsenic,
pulled out and placed:

UP—Cov. Hop.—92027
on the North track lead at 11:20 a. m., then shoved to the
Arsenic house with:

ASX—Cov. Hop.—3287
—Part load, arsenic

AS&R—Gon.—49
spotted:

ASX—3287
in the Arsenic house, and
placed:

AS&R—Gon.—49
on the Arsenic house lead
to clear the Bag House
track.

Note: ASX #3287 was loaded
at the Arsenic house 3/25/44
and taken out that day, but
when weighed it was found to
be insufficiently loaded. It
was, therefore, ret'd. to Ar-
senic house for more load.

Engine went light to Bag House track at 11:25 a. m.,
coupled to:

AS&R—Gon.—42

AS&R—Gon.—53

AS&R—Gon.—50

set:

AS&R—Gon.—50

on the North track lead against

UP—Cov. Hop.—92027,

shoved:

AS&R—Gon.—42

AS&R—Gon.—53

against:

AS&R—Gon.—49

on the Arsenic house track. Pulled all out and shoved into
the Bag House track, spotted:

AS&R—Gon.—49

AS&R—Gon.—53

and pulled:

AS&R—Gon.—42

back and left it on the Bag House track.

Engine went lite to North track lead at 11:33 a. m.,
picked up:

AS&R—Gon.—50—Load, flue dust
UP—Cov. Hop. 92027—Load, arsenic
and shoved them into the Middle Belt, coupled to:

AS&R—Gon.—46—Load, Cottrell dust

UP—Gon.—64169—Empty

Pulled all four cars out and shoved them in on the West Lead against:

D&RGW—Gon.—71146—Load, copper matte

D&RGW—Gon.—43121—Load, lime sand

D&RGW—Gon.—43147—Load, lime sand

D&RGW—Gon.—43050—Load, lime sand

D&RGW—Gon.—43055—Load, Garfield plate dust

UCR—Gon.—20507—Load, U. S. arsenic pyrites

shoved all in on track 4, coupled to:

LA&SL—Gon.—201030—Load, coke

took all to scale at 11:41 a. m., and weighed all (11) cars.
Complete 11:52 a. m.

Engine left the above cars on the scale track, went light to U. P. train yard, took water and picked up:

U. P. Gon.—63591—Load, Shoshoni

brought this car to the scale track, weighed it at 12:05 p. m., shoved it against the 11 cars on the scale track shoved the 12 cars to the gate of the plant and switched as follows:

1897 Assignment No.

AS&R, Murray, Utah, plant—March 28, 1944.

LA&SL—Gon.—201030

to track 1

UCR—Gon.—20507

to track 5

D&RGW—43055—Gon.

to East Lead

D&RGW—Gon.—43055

to East Lead

D&RGW—Gon.—43147

to East Lead

D&RGW—Gon.—43121

to East Lead

D&RGW—Gon.—71146

to track 5

UP—Gon.—64169

to Slag track

AS&R—Gon.—46

to Low Line

UP—92027—Cov. Hop.

to Slag track

AS&R—Gon.—50

to Coke track

UP—Gon. 63591

to track 5

Engine on this end. Complete 12:18 a. m.

Engine went light to Rock track and pulled:

LA&SL—Gon.—201077—Load, Silver King

doubled to track 1 against:

LA&SL—Gon.—201030

and shoved this latter car to the Rock track at 12:21 p. m.

Returned with:

LA&SL—Gon.—201077

and placed it on track 4 at 12:25 p. m.

Crew went to lunch.

During the lunch period a delivery was made by engine

UP 581 at 12:50 p.m. to track 4 as follows:

D&RGW—Gon.—18315—Empty

D&RGW—Gon.—41843—Load, U. S. arsenic pyrites

D&RGW—Gon.—43180—Load, Silver King lead concentrates

D&RGW—Gon.—43302—Load, Silver King lead concentrates

D&RGW—Gon.—43114—Load, Silver King lead concentrates

D&RGW—Gon.—43239—Load, Silver King lead concentrates

At 1:00 p.m. engine went light to East Lead, coupled to:

D&RGW—Gon.—43421—Load, lime sand

D&RGW—Gon.—43147—Load, lime sand

D&RGW—Gon.—43050—Load, lime sand

D&RGW—Gon.—43055—Load, Garfield plate dust

and shoved all to the Old Hand track

Engine went light to Middle Belt at 1:15 p.m. and picked up:

D&RGW—Gon.—43021—Empty

UCR—Gon.—20894—Empty

shoved them in on the old Belt at 1:20 p.m. against

D&RGW—Gon.—43029—Load, sand

D&RGW—Gon.—43253—Load, sand

UCR—Gon.—21779—Load, lime rock

UCR—Gon.—20497—Load, Garfield pipe dust

LA&SL—Gon.—201055—Load, Lakeside ore

UCR—Gon.—21069—Load, U. S. middlings

pulled all out and shoved to Middle Belt at 1:20 p.m. Left all there except:

D&RGW—Gon.—43021—empty

UCR—Gon.—20894—Empty

Took these two cars to East Lead and kicked them in on track 4 at 1:25 p.m.

1898. Assignment No.

AS&R, Murray, Utah, plant—March 28, 1944

Engine went light to Bullion track, 1:35 p.m., coupled to:

LA&SL—Gon.—201063

LA&SL—Gon.—201000, Lead Speiss

NYC—Box—148360—Part load, Bullion

D&RGW—Box—61608, Empty

PRR—Box—44160, Empty

B&O—Box—268302, Empty

PRR —Box—100873, Load, Bullion.
 LV —Box— 61515, Load, Bullion

These two were
 kicked to track 4
 and the remain-
 ing 6 were re-
 placed on Bul-
 lion track and
 spotted.

Engine went light to Brick track at 1:48 p. m., picked up:
 D&RGW—Cov. Hop.—18301—Empty,
 pulled out and shoved into Low Line and coupled to:

AS&R—Gon—46, Load, Dust
 pulled both out at 1:50 p. m. and shoved in on track 4
 against:

PRR —Box—100873—Load	To West Lead
LV —Box— 61515—Load	To West Lead
D&RGW—Gon— 43021—Empty	To West Lead
UCR —Gon— 20894—Empty	To West Lead
D&RGW—Gon— 43239—Load	To East Lead
D&RGW—Gon— 43114—Load	To East Lead
D&RGW—Gon— 43002—Load	To East Lead
D&RGW—Gon— 43180—Load	To East Lead
D&RGW—Gon— 41843—Load	To West Lead
D&RGW—Cov. Hop.—18315—Empty	To West Lead
LA&SL —Gon—201077—Load	To East Lead
UCR —Gon— 20741	To West Lead

Pulled all to scale and weighed all except:

D&RGW—Cov. Hop. 18301, Empty

AS&R —Gon—46, Load, dust

Weighing complete 2:07 p. m., cars were then switched as
 shown.

Engine held on to:

D&RGW—Cov. Hop. 18301, Empty

AS&R —Gon—46, Load, dust

shoved in on East Lead against:

D&RGW—Gon— 43239, Load
 D&RGW—Gon— 43114, Load
 D&RGW—Gon— 43302, Load
 D&RGW—Gon— 43180, Load
 LA&SL —Gon—201077, Load

placed all except the first-named 2 cars in the Old Hand
 track at 2:20 p. m., then kicked:

AS&R—Gon—46—Load, dust
 into the North Cylinder track, and

D&RGW—Cov. Hop.—18301, Empty,
 to the Arsenic House lead.

Engine went light to Middle Belt at 2:25 p. m., and pulled:

D&RGW—Gon—43029—Empty To Slag Track

D&RGW—Gon—43253—Empty To Slag Track

to scale to weigh at 2:30 p. m., then shoved both to West Lead against

1899 Assignment No.

AS&R, Murray, Utah, plant—March 28, 1944.

PRR —Box—100873, Load Bullion To Slag Track

LV —Box—64515, Load Bullion To Slag Track

D&RGW—Gon—43021—Empty To Slag Track

UCR —Gon—20894—Empty To Slag Track

D&RGW—Gon—41843—Load, Arsenic Pyrites To Track 5

D&RGW—Cov. Hop.—18315, Empty Toward the Brick Track

UCR —Gon—20741—Empty To the Slag Track

and switched as shown.

Engine then shoved:

D&RGW—Cov. Hop.—Empty,

to the lumber hoase on the Brick Track to have dumps secured for loading arsenic.

Engine was then coaled by AS&R crane at the Brick track in accordance with an agreement between the industry and the carrier.

At 3:00 p. m. the engine went light to Mill 4 track, shoved:

UP —Gon—63354—Load, scrap iron

AS&R—Gon—44—Empty

to the east end of that track and spotted them. Complete at 3:15 p. m.

Engine went light to track 3 and shoved:

D&RGW—Gon—70618—Empty

to the east end of that track.

Engine went light to Coke track at 3:20 p. m., pulled:

D&RGW—Gon—42373

AS&R —Gon—50—Load, Baghouse dust,

spotted:

AS&R —Gon—50—Load

on the Low Line track, and returned:

D&RGW—42373

to the Coke track at 3:24 p. m.

Engine went light to High Line at 3:25 p. m., pulled

LA&SL—Gon—201001—Part load Engine held to this ear

LA&SL—Gon—201051—Empty To track 4 for loading by crane

LA&SL—Gon—201002—Empty To Coke track for

and switched as shown. Completed 3:30 p. m.

LA&SL—Gon—201001—Part load
in on track 5, coupled to:

D&RGW—Gon—41843—Arsenic pyrites	Toward High Line
UCR —Gon—20507—Arsenic pyrites	Toward High Line
UCR —Gon—21591—Arsenic pyrites	Toward High Line
LA&SL —Gon—201034—Arsenic pyrites	To track 6
D&RGW—Gon—71146—Arsenic pyrites	To Slag Track
UP —Gon—63591—Load, Shoshoni	To Thawhouse Lead

Switched as shown, then shoved to the High Line with:

LA&SL —Gon—201001—Part load
D&RGW—Gon—41842—Arsenic pyrites
UCR —Gon—20507—Arsenic pyrites
and to the Low Line with:

1900 Assignment No.

AS&R, Murray, Utah plant—March 28, 1944.

UCR—Gon—21591—Arsenic pyrites.

Complete at 3:50 p. m.

Engine went light to North Cylinder track, pulled:

AS&R—Gon—46—Load, Dust,
shoved it in on the Old Belt track, coupled to:

UCR—Gon—21779—Empty,
then shoved both to the Pug Hole and spotted at 4:00 p. m.

Engine went light to Old Hand Track, pulled:

D&RGW—Gon—43239—	Concentrates	To Old Hand Track
D&RGW—Gon—43114—	Concentrates	To Old Hand Track
D&RGW—Gon—43302—	Concentrates	To Old Hand Track
D&RGW—Gon—43180—	Concentrates	To Old Hand Track
LA&SL —Gon—201077—Load		To Old Belt Track
D&RGW—Gon—43121—Load,	sand	To Old Hand Track
D&RGW—Gon—43147—Load,	sand	To Old Hand Track
D&RGW—Gon—43050—Load,	sand	To Old Hand Track

D&RGW—Gon—43055—Load, Garfield Plate dust To Old Belt Track
 D&RGW—Gon—43298—Load, To Old Hand Track
 LA&SL—Gon—201006—Load, To Old Belt Track
 LA&SL—Gon—201059—Load, To Old Belt Track
 and switched as shown. Completed 4:15 p. m.

Engine went light to Bag House Lead at 4:18 p. m., coupled to:

D&RGW—Cov. Hop.—18301—Empty
 and shoved it on to the North track lead, then went to Arsenic House at 4:20 p. m. picked up:

ASX—Cov. Hop. 3287—Load, arsenic,
 shoved it in on the North track lead, coupled to:

D&RGW—Cov. Hop.—18301—Empty,
 set the last-mentioned car in the Arsenic house, and left on the Bag House lead:

ASX—Cov. Hop. 3287—Load, arsenic.

NOTE: I was informed that ASX 3287 was taken from the Arsenic House, loaded, on March 25, but when weighed was found to be insufficiently loaded and was returned to the Arsenic house for more loading. My information is to the effect that this occurs frequently.

Engine went light to Slag track at 4:28 p. m., pulled,

D&RGW—Gon—71146—Load, Matte	To Low Line
D&RGW—Gon—43029—Empty	To Low Line
D&RGW—Gon—43253—Empty	To Low Line
PRR—Box—100873—Load, Bullion	To Low Line
LV—Box—61515—Load, Bullion	To Track 4
D&RGW—Gon—43021—Empty	To Low Line
UCR—Gon—20894—Empty	To Track 4
UCR—Gon—20741—Empty	To Track 4
UP—Cov. Hop. 92027—Load, arsenic	To Slag Track
	—Hold

UP—Gon—64169—Empty	To Track 4
D&RGW—Gon—40857—Empty	To Low Line
UCR—Gon—21145—Empty	To Low Line
D&RGW—Gon—71608—Empty	To Low Line
GATX—Tank—38279—Empty	To Low Line

and switched as shown. Completed 4:40 p. m.

1901 Assignment No.

AS&K, Murray, Utah, plant—March 28, 1944

Engine went light to track 4 and at 4:45 p. m. picked up:

LV—Box—61515—Load, Bullion
 UCR—Gon—20894—Empty
 UCR—Gon—20741—Empty

(2)

UP —Gon—64169—Empty
 shoved all to Low Line track, coupled to
 D&RGW—Gon—71146—Load, matte
 D&RGW—Gon—43029—Empty
 D&RGW—Gon—43253—Empty
 PRR —Box—100873—Load, bullion
 D&RGW—Gon—43021—Empty
 D&RGW—Gon—40857—Empty
 UCR —Gon—21145—Empty
 D&RGW—Gon—71608—Empty
 GATX —Tank—38279—Empty

(1)

Pulled out into train yard and placed cars in bracket (2) in the UP train yard, and those in bracket (1) on the D&RGW Interchange track:

1902 Assignment No.

Report of observations made at the plant of the American Smelting & Refining Company, Murray, Utah, March 29, 1944.

Engine UP 4420

Engineer A. L. Haight
 Fireman G. E. Bartachi
 Eng. Foreman Geo. Easton
 Brakeman Herman Gygl
 Brakeman K. T. Borg

Engine left yard office—53rd South Street, 7:10 a. m.

Went light to Roaster track, coupled to

ASX	Cov Hop 3287	(2)	Pulled all from Roaster track to
AS&R	Hop	13-load-Roast ore-	(2) scale track at 7:21 a. m. Arrived
"	"	3- " " " "	at scale track 7:25 a. m. Weigh-
"	"	13- " " " "	ing completed at 7:34 a. m.
"	"	4- " " " "	Placed cars marked (1) in North
"	"	6- " " " "	Coke track, and took cars marked
"	"	15- " " " "	(2) to North Trestle, at 7:40
"	"	14- " " " "	a. m., bin 17 to unload. Engine
"	"	16- " " " "	spotted each car except ASX 3287
"	"	7- " " " "	over bin. Dumping complete 7:58
"	"	9- " " " "	a. m.

Cars marked (2) were then pulled down off trestle and shoved into Coke track against cars marked (1)

ASX Cov Hop 3287—Load, arsenic
 was kicked into Slag track, and all 11 AS&R hoppers listed marked (1) were unloaded into bin 17. Each car was spotted by engine. Dumping complete at 8:15 a. m. Pulled back and cut off cars marked (1) to clear the Rock track.

Cars marked (2) were then shoved into Rock track against LA&SL Gon 201030—

and this latter car was spotted at the furnace coke bin on the Rock track. The 5 cars were necessary as idlers to protect engine footboards and cylinder cocks from material around the unloading spot.

Back with 5 idlers (2) at 8:20 a. m., and coupled to 5 empties (1) on North Trestle and placed all 10 cars on Baghouse lead at 8:22 a. m.

Engine went light to Old Hand Track and Picked up:

D&RGW Gon 43239—Load, Silver King ore

D&RGW Gon 43114—Load, Silver King ore

D&RGW Gon 43302—Load, Silver King ore

D&RGW Gon 43180—Load, Silver King ore

shoved in on Thawhouse lead against

UP Gon 63591—Load, Shoshone ore
then shoved all 5 cars in on East track of thawhouse at 8:32 a. m.

Engine went light to track 6, coupled to

UCR Gon 20228—Load, calcine for Garfield,
and kicked it in on Slag track at 8:35 a. m.

Engine went light to track No. 6, pulled:

LA&SL Gon 201034—Load, calcine—Engine held to this car

1903 Assignment No.

AS&R, Murray, Utah, March 29, 1944—Page 2

UCR Gon 20840—Load, Coal—to Bullion track (x)

AS&R Gon 74—Load, Matte—to Brick track

AS&R Gon 52—Load, Arsenic—to track 5

ASX Cov Hop 3268—Empty to track 5

D&RGW Cov Hop 18304—Empty to Brick track (1)

Switched as shown. Complete 8:46 a. m.

(x) to be unloaded to stock pile by crane. (1) To be prepared for loading.

Engine then went to West track of thawhouse with

LA&SL Gon 201034—Load, _____ calcine,
and switched out the last car in the track, (5th car), to Brick track.

LA&SL Gon 201091—Load, blast furnace calcine

Engine shoved

LA&SL Gon 201034—Load Engine held to this car
in on the Brick track against

LA&SL Gon 201091—Load to North Trestle

AS&R Gon 74—Load to North Trestle
and switched as shown.

Engine then shoved:

LA&SL Gon 201034—Load
against:

D&RGW Cov Hop 18034—Empty
and spotted the latter car on Brick track at Lumber house
at 8:55 a. m.

Engine then shoved:

LA&SL Gon 201034—Load
in on Coke track, coupled at 9:03 a. m. to:

LA&SL Gon 201002—Load, Shoshone ore

D&RGW Gon 42373—Load, Shoshone ore
shoved all in on track 4, coupled to:

LA&SL Gon 201051—Load, calcine
and took all 4 cars to scale at 9:05 a. m. and weighed all.
Complete 9:09 a. m.

Engine then kicked

D&RGW Gon 42373—Load. to Old Hand track

LA&SL Gon 201034—Load. to North Trestle track

LA&SL Gon 201051—Load. to North Trestle track

LA&SL Gon 201022—Load. to Old Belt track

Engine light to Middle Belt at 9:11 a. m. and pulled back
with:

UCR Gon 20497—Empty, (2)

LA&SL Gon 201055—Empty, (2)

UCR Gon 21069—Empty, (2)

shoved all 3 cars into Old Belt track and doubled to:

LA&SL Gon 201002—Load, Shoshone ore (1)

LA&SL Gon 201006—Load, Shoshone ore (1)

LA&SL Gon 201059—Load, Silver King ore (1)

LA&SL Gon 201077—Load, Silver King ore (1)

D&RGW Gon 43055—Load, Garfield plate (1)

shoved cars marked (1) to unloading spots on Middle Belt
then took cars marked (2) to scale and weighed:

UCR Gon 20497—Empty

UCR Gon 21069—Empty

1904 Assignment No.

AS&R. Murray, Utah, March 29, 1944—Page 3

then kicked:

UCR Gon 21069—Empty, to Slag track

UCR Gon 20497—Empty, to Bullion track

LA&SL Gon 201055—Empty, to Bullion track
complete 9:32 a. m.

Engine went light to Baghouse lead at 9:34 a. m., and shoved:

AS&R hopper 13	AS&R hopper 15
AS&R hopper 3	AS&R hopper 14
AS&R hopper 12	AS&R hopper 10
AS&R hopper 4	AS&R hopper 7
AS&R hopper 6	AS&R hopper 9

all empties to the Roaster track. Complete 9:37 a. m.

Engine went light to Arsenic house, pulled:

D&RGW Cov Hop 18301—Load, Arsenic to West lead and shoved it in on North track and coupled to (at 9:45 a. m.):

D&RGW Gon 43217—Load, calcine to west lead took to scale and weighed both cars. Complete 9:50 a. m.

Shoved both in on track 5, coupled to:

AS&R	Gon	52	to West Lead
ASX	Cov Hop	3268	to East Lead

Switched as shown.

Engine went light to East Lead against:

ASX Cov Hop 3268—Empty and spotted in in Arsenic house at 10:12 a. m.

Engine went light to West Lead against:

D&RGW Cov Hop 18301—Load, Arsenic to Slag track

D&RGW Gon 43217—Load, Calcine to track 5

AS&R Gon 52— to track 5

and switched as shown. Delayed 7 minutes a/c broken rail. 10:13 to 10:20 a. m.

Engine went light to High line at 10:21 a. m., pulled:—

LA&SL Gon 201001—Load, Yard sweepings (2)

D&RGW Gon 41843—Empty (2)

UCR Gon 20507—Part load (1)

cut off rear car marked (1) to clear North Trestle track. went in on North Trestle track with 2 head cars marked (2), picked up:—

LA&SL Gon 201034—Load, Calcine

LA&SL Gon 201051—Load U. S.

shoved in on Highline and picked up:

UCR Gon 20507—Part load

doubled on North Trestle to

LA&SL Gon 201091—Load, Calcine

AS&R Gon 74—Load, Calcine

shoved all 7 cars to Highline at 10:35 a. m., brought back:—

LA&SL Gon 201001—Load, Yardsweepings

D&RGW Gon 41843—Empty

and kicked both toward House track at 10:38 a. m.

Engine light to North Coke track and pulled:—

LA&SL Gon 201050—Load, Sub-borings

took it to North Trestle and spotted at 10:45 a. m.

Engine went light to track 3 at 10:53 a. m., pulled:—

1905 Assignment No.

AS&R, Murray, Utah, March 29, 1944—Page 4

D&RGW Gon 70618—Empty

UP Gon 63378—Empty

Shoved the first car in on track 4, and the second car back on track. Complete 10:55 a. m.

Engine went light to Bullion track, pulled:—

LA&SL Gon 201053—Load, sand (1)

shoved it to House track five, coupled to:—

LA&SL Gon 201001—Load

D&RGW Gon 41843—Empty (1)

LA&SL Gon 201090—Load, Mill rejects, (ore) (1)
pulled all 4 cars to scale and weighed those marked (1).

Complete 11:03 a. m.

Kicked:—

D&RGW Gon 41843—Empty to West Lead
and the other 3 to Old Hand track.

Engine light to West Lead against

D&RGW Gon 41843—Empty

and shoved it to North Trestle for crane to Load. Complete 11:13 a. m.

Lunch.

Engine went light to scale test-car house at 12:50 p. m., took test-car to scale and tested scale. Test began, 12:56 p. m. and was completed at 1:00 p. m. Engine returned test car to shed at 1:01 p. m.

Delivery made at 12:55 p. m. by UP engine:—

UP Gon 62425—Load

UCR Gon 20290—Load

UP Gon 62061—Load

Engine went light against the above 3 cars and kicked
to track 5.

Engine went light to Bullion track, coupled to

UCR Gon 20840—Empty

shoved it to North Matte track, coupled to

AS&R Gon 77—Empty

LA&SL Gon 201017—Lead, Matte

shoved all 3 cars to South Matte track and left

LA&SL Gon 201017—Load, Matte

Shoved into Middle Matte track with:—

UCR Gon 20840—Empty

AS&R Gon 77—Empty

coupled to:—

AS&R Gon 78—Part load matte

pulled out and kicked the 2 AS&R cars to North Matte track.

Shoved to Middle Matte track with:—

UCR Gon 20840,—Empty

and pulled

AS&R Gon 47—Part load

AS&R Gon 70—Load, Matte,

shoved all 3 cars into South Matte track and left

AS&R Gon 70—Load, Matte

Shoved to North Matte track with

UCR Gon 20840—Empty

AS&R Gon 47—Part load

went against

1906 Assignment No.

AS&R, Murray, Utah, March 29, 1944—Page 5

AS&R Gon 77—

AS&R Gon 78—Part load, matte

and spotted the last car at the end of the track at 1:22 p. m.

Pulled out with:

UCR Gon 20840—Empty

AS&R Gon 47—Part load

AS&R Gon 77—Empty

shoved to Middle Matte track and spotted the last 2 cars.

Shoved to South Matte track with

UCR Gon 20840—Empty

coupled to

LA&SL Gon 201017—Load, Matte

AS&R Gon 70—Load, Matte

AS&R Gon 45—Empty

AS&R Gon 43—Empty

switched as shown.

Engine held to these

Engine held to these

Engine held to these

to South Matte track

to Middle Matte track

Engine shoved into Middle Matte track with:

UCR Gon 20840—Empty

1927

INTRASTATE MOVEMENT
(By Industry-owned car)
(Roasters)

Car No.
A. S. & R.—Hopp

Switching performed—

Date	Time	Contents	Ass't.	From	To
3/28/44	7:15 a.m.	Roast Ore	1	Roaster Track	Scale & w'g'
3/28/44	7:35 a.m.	"	1	Scale L	Rock Track
					Bin—13
3/28/44	8:00 a.m.	Empty	1	Rock Track	North Trest
3/28/44	8:02 a.m.	"	1	North Trestle	Rock Track
3/28/44	8:30 a.m.	"	1	Rock Track	Roaster Tra

The above car was one of 10 taken from the Roaster Track at 7:15 a. March 28; all ten were unloaded into Bin 13. The Rock Track is a stub track and the location of Bin 13 with respect to the end of the track is that only 5 cars can be placed for unloading at one time. The engine with each cut of 5 cars and moves the cars over the bin as needed. Unloading of a cut of 5 cars requires about 20 minutes. While the first 5 cars being unloaded, the remaining 5 are stored in some other track; after first 5 have been unloaded the last 5 are moved to the bin and unloaded in same manner. Similar movements are made daily except one day each v

Listed on Form 887—No. 3321—3/28/44

890—3/28/44—Roaster to Bin 13—\$2.70

Charged on Freight Bill S. W. 32—4/5/44

1928

INTRAPLANT MOVEMENT
(By Industry-owned Car)

Car No.
L. A. & S. L.—Dump—2

Switching performed—

Date	Time	Contents	Ass't.	From	To
3/28/44	8:55 a.m.	Load	1	High Line	Track 5
(x) 3/28/44	3:45 p.m.	"	1	Track 5	Track 6
3/29/44	9:05 a.m.	"	1	Track 6	Scale & w'g'
(x) 3/29/44	9:10 a.m.	"	1	Scale	No. Trestle
3/29/44	10:35 a.m.	"	1	No. Trestle	High Line
3/30/44	11:45 a.m.	Empty	1	High Line	Coke Track
(1) 3/30/44	2:12 p.m.	"	1	Coke Track	High Line

(x) Incidental switching movements.

(1) This movement was made in conjunction with 3 loads and was the beginning of an interrupted movement. This movement not listed on any Form 887 or 890 up to 3/30/44 but would be shown when car was removed from High Line as a load.

Intraplant movement charged in Freight Bill SW 32—4/5/44—\$2.70

Interrupted " " SW 29—4/5/44 \$1.00

1929

— 15 —

Car No.

D. & R. G. W.—Cov. Hopper—18315

Date Contents Via
Car in 3/28/44 Empty

" out

Origin

Destination

Switching performed:—

Date	Time	Contents	Ass't.	From	To
3/28/44	12:50 pm.	Empty	1	Pallas Yard	Track 4
3/28/44	1:55 pm.	"	1	Track 4	Scale & w'g'd
3/28/44	2:35 pm.	"	1	Scale	Brick Track

No charge is shown on Freight Bill S. W. 25—4/5/44, but usually such charge is reported on Form 890 on the day the car is shipped out as a load.

All D&RGW covered hoppers received for arsenic loading are sent to the brick track, immediately after light weight weighing, to have hoppers blocked.

1930

— 16 —

Car No.

L. U.—Box—61515

Date Contents Via
Car in Prior to 3/28/44
" out 3/28/44 Bullion

Origin

Destination—Omaha, Nebr.

Switching performed:—

Date	Time	Contents	Ass't.	From	To
3/28/44	1:55 pm.	Bullion	1	Bullion Track	Scale & w'g'd
3/28/44	2:07 pm.	"	1	Scale	Slag Track
3/28/44	4:45 pm.	"	1	Slag Track	U.P.

Listed on Form 887—No. 3322—3/28/44

) Light

" " " 890—3/28/44—A. S. & R. to Ship—\$0.50) weighing

1931

— 17 —

Car No.

D. & R. G. W.—Dump—43055

Date Contents Via
Car in 3/28/44 Garfield Plate Dust. D&RGW

" out

Origin—Garfield, Utah

Destination

Switching performed:—

Date	Time	Contents	Ass't.	From	To
3/28/44	11:05 am.	Gar. Plate Dust	1	Pallas Yard	West Lead
3/28/44	11:41 am.	"	1	West Lead	Scale & w'g'd
3/28/44	12:18 pm.	"	1	Scale	Old Hand Track
3/28/44	4:15 pm.	"	1	Old Hand Tr.	Old Belt Track
3/29/44	9:30 am.	"	1	Old Belt Tr.	Middle Belt
3/29/44	4:43 pm.	Empty	1	Middle Belt	Track 6

AS&R Gon 70—Load, Matte
LA&SL Gon 201017—Load, Matte
coupled to

AS&R Gon 43—Load, Matte
and pulled all 4 cars back to clear Bullion track at 1:34 p. m.

Engine went light to Bullion track and pulled

UCR Gon 20497—Load, Garfield Plate dust

LA&SL Gon 201063—Load

LA&SL Gon 201000—Load

NYC Box 148360—Empty

D&RGW Box 61608—Empty

PRR Box 44160—Part load bullion

B&O Box 268302—Load Bullion

Kicked last car to Matte Track lead and shoved balance in on Mill 4 hold track and coupled to

CMS&P&P Box 19063—Empty

NYC Box 99330—Empty

Kicked the 5 box cars to Bullion track, shoved the gons back into Mill 4 hold track against

PRR Box 565711—Empty

D&RGW Box 61742—Empty

Kicked these box cars to the Bullion track at 1:45 p. m., then shoved back into Mill 4 Hold track with the 3 gons which were now necessary as idlers in order to reach:

LA&SL Gon 201008—Load, Arsenic cleanings

Pulled all 4 gons out and shoved them against cars on Matte track lead.

Engine went light to Bullion track and spotted the following at 1:58 p. m.

NYC Box 99330—Empty

to spot 1

CMS&P&P Box 19063—Empty

to spot 2

PRR Box 44160—Part load

to spot 3

D&RGW Box 61608—Empty

to spot 4

NYC Box 148360—Empty

D&RGW Box 61742—Empty

PRR Box 565711—Empty

1907 Assignment No.

AS&R, Murray, Utah, March 29, 1944—Page 6

In switching Bullion track

PRR Box 44160—Part load

was moved from spot 2 to spot 3

Engine went light to Matte track and pulled:

UCR Gon 20497—Load, Garfield Plate dust

LA&SL Gon 201063—Load

LA&SL Gon 201000—Load

LA&SL Gon 201008—Load, arsenic cleanings

B&O Box 268302—Load, Bullion

UCR Gon 20840—Empty

AS&R Gon 70—Load, Blast furnace calcine

AS&R Gon 43—Load, Blast furnace calcine

LA&SL Gon 201017—Load, Blast furnace calcine

shoved all in on track 5 against:

UP Gon 62425—Load, Coke

UCR Gon 20290—Iron middlings

UP Gon 62061—Iron middlings

Engine went light to North Trestle track at 2:05 p. m., and pulled:

D&RGW Gon 41843—Load

LA&SL Gon 201050—Empty

shoved the empty toward the House track and put the load on track 5.

Engine went light to Mill 4 track at 2:10 p. m., and pulled:

UP Gon 63378—Empty to track 5

UP Gon 63354—Empty to track 5

AS&R Gon 44—Empty to Matte track

Switched as shown.

Engine went light for coal at 2:15 p. m.

Engine went light to track 4 at 2:55 p. m. and pulled:

D&RGW Gon 70618—Load, Coke. Engine held to this car and doubled to track 5 and pulled to scale track with:

UP Gon 63378—Empty to Slag track

UP Gon 63354—Empty to Slag track

D&RGW Gon 41843—Load, Arsenic calcine to track 4

UCR Gon 20497—Load, Garfield plate dust to track 4

LA&SL Gon 201063—Load, to track 6

LA&SL Gon 201000—Load to track 6

LA&SL Gon 201008—Load, Arsenic cleanings to track 6

B&O Box 268302—Load, Bullion to Slag track

UCR Gon 20840—Empty to Slag track

AS&R Gon 70—Load, Blast furnace calcine to track 4

LA&SL Gon 201017—Load, Blast furnace calcine to track 4

AS&R Gon 43—Load, Blast furnace calcine to track 4

UP	Gon	62525—Load, Coke	to track 4
UCR	Gon	20290—Load, Iron middlings	to track 5
UP	Gon	62061—Load, Iron middlings	to track 5

arrived at scale at 3:03 p. m.; delayed by UP cars on seal track until 3:37 p. m. Weighing completed 3:50 p. m. Car then switched as shown. Complete 4:00 p. m.

Engine held to

D&RGW Gon 70618—load, coke
shoved it in on Rock track, coupled to

LA&SL Gon 201030—Empty

and placed it on track 2, Engine then shoved

1908 Assignment No.

AS&R, Murray, Utah, March 29, 1944 Page

D&RGW Gon 70618—Load, coke
to unloading bin on Rock track

Engine went light to track 2 at 4:06 p. m., and picked up

LA&SL Gon 201030—Empty

LA&SL Gon 201004—Empty

LA&SL Gon 201071—Empty

placed all on Bullion track

Engine went light to track 4 at 4:15 p. m. against

D&RGW Gon 41843—Load, arsenic calcine

UCR Gon 20497—Load, Garfield plate dust

UP Gon 62425—Load, coke

AS&R Gon 43—Load, blast furnace calcine

LA&SL Gon 201017—Load, blast furnace calcine

AS&R Gon 70—Load, blast furnace calcine

shoved the last 3 cars to mill 4 track, and

UP Gon 62425—Load, coke
to track 3, then brought out

D&RGW Gon 41843—Load, Arsenic dust

UCR Gon 20497—Load, Garfield plate dust
and shoved both to the Old Hand track and coupled to:

LA&SL Gon 201055—Load, sand

pulled all 3 cars out and placed:

LA&SL Gon 201055—Load, sand

UCR Gon 20497—Load, Garfield plate dust
on the North Cylinder track

Engine held on to

D&RGW Gon 41843—Load, arsenic dust and

shoved into the Old Belt track at 4:29 p. m. and coupled to:

UCR Gon 21278—Load, U. S.

LA&SL Gon 201047—Load, Coke breeze

LA&SL Gon 201053—Empty

pulled all 4 out and shoved:

LA&SL Gon 201053—Empty

to Middle Belt, and spotted

LA&SL Gon 201047—Load, coke breeze

at the dump on the Old Belt track

Engine came out of Old Belt track with:

UCR Gon 21278—Load, U. S.

D&RGW Gon 41843—Load, arsenic dust

and set them on North Cylinder track

Engine went light to Old Hand track at 4:35 p. m., and pulled

LA&SL Gon 201001—Load, yard cleanings—Engine held to this car

LA&SL Gon 201090—Load, Mill rejects (ore) to Old Hand track

D&RGW Gon 42373—Load, Shoshone ore to Old Hand track

D&RGW Gon 43121—Load, sand to Old Belt track

D&RGW Gon 43147—Load, 2 to Old Belt track

Switched as shown. Complete 4:40 p. m.

Engine held onto

LA&SL Gon 201001—Load, yard cleanings

shoved it into North Cylinder track and left it there.

Engine went light to Middle Belt track at 4:43 p. m. and pulled

LA&SL Gon 201053—Empty, to house track

LA&SL Gon 201002—Empty, to house track

1909 Assignment No. -

AS&R, Murray, Utah, March 29, 1944—Page 8

LA&SL Gon 201006—Empty, to house track

LA&SL Gon 201059—Empty, to Bullion track

LA&SL Gon 201077—Empty, to Bullion track

D&RGW Gon 43055—Empty, to track 6

switched as shown. Complete at 4:52 p. m.

Engine went light to track 5 and pulled:

UCR Gon—Load—20290

UP Gon—Load—62061

shoved UCR car into Thaw house last track, and UP car to Thaw house west track at 5:00 p. m.

Engine went light to North Cylinder track and pulled:

LA&SL Gon 201001—Load, yard cleanings

D&RGW Gon 41843—Load, arsenic dust

UCR Gon 21278—Load, U. S.

UCR Gon 20497—Load, Garfield plate dust

LA&SL Gon 201055—Load, Sand

shoveled all in on Old Belt track and coupled to

D&RGW Gon 43121—Load, sand

D&RGW Gon 43147—Load, sand

pulled all out and spotted all on Middle Belt. Complete
5:10 p. m.

Engine went light to Slag track and pulled

UP Gon 63373—Empty, to North Trestle
track

UP Gon 63354—Empty, to North Trestle
track

B&O Box 268302—Load, bullion, to North
Trestle (D&RGW)

UCR Gon 20840—Empty, to North Trestle
(D&RGW)

D&RGW Cov Hop 18301—Load, arsenic, to Slag Trestle

UCR Gon 21069—Empty, to track 4

UCR Gon 20228—Load, calcine, to track 4

ASX Cov Hop 3287—Load, arsenic, to track 4

UP Cov Hop 92027—Load, arsenic, to track 4

D&RGW Cov Hop 18312—Load, arsenic, to North
Trestle (D&RGW)

Switched as shown. Complete 5:20 p. m.

3 cars delivered to D&RGW

B&O —Box—268302—

Load bullion

UCR —Gon— 20840—

Empty

D&RGW Cov Hop— 18312—

Load, arsenic

6 cars to Union Pacific

UP — Gon—63378—

Empty

UP — Gon—63354—

Empty

UCR— Gon—21069—

Empty

UCR— Gon—20228—

Load, calcine

ASX—Cov Hop— 3287—

Load, arsenic

UP —Cov Hop—92027—

Load, arsenic

1910 Assignment No.

Report of observations made at the plant of the
American Smelting & Refining Company, Murray, Utah,
March 30, 1944.

Engine U. P. 4420

Engineer A. L. Haight
Fireman G. E. Bartschi
Eng. Foreman Geo. Easton
Brakeman Merman Gygl
Brakeman K. T. Borg

Engine left yard office at 7:25 a. m. Went light to Roaster track and picked up:

AS&R Hopper 8—Load, Roast ore
AS&R Hopper 2—Load, Roast ore
AS&R Hopper 13—Load, Roast ore
AS&R Hopper 3—Load, Roast ore
AS&R Hopper 12—Load, Roast ore
AS&R Hopper 4—Load, Roast ore
AS&R Hopper 6—Load, Roast ore
AS&R Hopper 15—Load, Roast ore
AS&R Hopper 14—Load, Roast ore
AS&R Hopper 10—Load, Roast ore
AS&R Hopper 7—Load, Roast ore

Took all to the scale track at 7:34 a. m. and weighed all between 7:35 a. m. and 7:43 a. m. At 7:47 a. m. took the first 6 cars to bin 17, North Trestle, and spotted each car over the bin. Dumping complete at 8:00 a. m. Took empties back and doubled to the last five cars which had been kicked in on track 4 upon return from scale. Shoved all 11 cars to North Trestle at 8:05 a. m.

and spotted the last-mentioned 5 cars over Bin 17 separately. Dumping complete at 8:15 a. m. The entire cut of 11 cars was then returned to Roaster track and crossing cut at 8:23 a. m.

Engine went light to North track, picked up:

UCR—Gon. 21675—Load, calcine
took it to the scale at 8:28 a. m., weighed it at 8:29 a. m. and placed it on track 5 at 8:32 a. m.

Engine went light to Rock track at 9:25 a. m., pulled:

D&RGW—Gon—70618—Empty

and placed it on track 3 to be loaded by crane. Complete 9:32 a. m.

Engine went light to East track in thawhouse, switched out the second and third cars:

D&RGW—Gon.—43239—Load, Garfield dust

D&RGW—Gon.—43114—Load, Garfield dust

Shoved the above 2 cars through the Bullion track and coupled:

LA&SL—Gon.—201077, Load, Garfield dust

LA&SL—Gon.—201059, Load, Garfield dust

} These cars
had been load-
ed by locomo-
tive crane.

Took all 4 cars to the scale at 9:49 a. m., weighed them at 9:51 a. m., and kicked them in the Old Belt track at 9:55 a. m.

Engine went light to the Old Hand track and switched out the second car:

D&RGW—Gon.—42373—Load, Shoshoni Ore,
to the Old Belt track at 9:54 a. m.

Engine went light to the High Line at 9:59 a. m., and returned light at 10:12 a. m. Thirteen minutes delay a/c broken rail.

Engine went light to House track at 10:13 a. m., pulled:

LA&SL—Gon.—201053—Empty,

and placed it on track 1 for crane to load—10:16 a. m.

1911 Assignment No.

AS&R, Murray, Utah, March 30, 1944—Page 2

Engine went light to Brick Track at 10:18 a. m. and pulled:

D&RGW—Covered Hopper—18304—Empty.

Took it to the scale and weighed it at 10:22 a. m., then set it on the Bullion track to be loaded with arsenic from arsenic storage bins. Complete 10:27 a. m.

Engine went light to track 3 at 10:55 a. m. and pulled:

D&RGW—Gon.—70618—Load, coke

UP —Gon.—62425—Load, coke.

Pulled these out on track 4 & clear track 5 at 10:58 a. m., then went light to track 5 and pulled:

UCR —Gon.—21675 to track 6

D&RGW—Gon.—43217—Load, calcine to Slag track

AS&R —Gon.— 52 to track 6

ASX —Cov. Hopper—3275—Empty to track 4

and switched as shown. Complete 11:04 a. m.

Pulled from track 4 with:

D&RGW—Gon.—70618—Load, coke

UP —Gon.—62425—Load, coke

ASX—Cov. Hop.—3275—Empty

went to scale at 11:06 a. m. and weighed the two gons. Complete 11:09 a. m. Kicked the two gons in on the West Lead and took:

ASX—Cov. Hop.—3275—Empty,
to the North track lead at 11:11 a. m.

Engine went light to Arsenic House at 11:15 a. m. and pulled:

ASX—Cov. Hop.—3268—Load, arsenic,
doubled it against:

ASX—Cov. Hop. 3275—Empty,
on the North lead, and placed the latter car in the Arsenic House to load at 11:18 a. m., then took

ASX—Cov. Hop.—3268—Load, arsenic,

to the North Cylinder track at 11:22 a. m., coupled to

LA&SL—Gon.—201001, Load, coke breeze, pulled both cars out, doubled to the Middle Belt (11:23 a. m.) against:

D&RGW—Gon.—41843—Empty

UCR —Gon.—21278—Empty

UCR —Gon.—20497—Empty

LA&SL —Gon.—201055—Empty

took all to scale (6 cars) weighed: (11:25 to 11:29 a. m.)

ASX—Cov. Hop.—3268—Load, arsenic

LA&SL —Gon.—201001—Load, coke breeze

D&RGW—Gon.—41843—Empty

UCR —Gon.—21278—Empty

then switched as follows:

ASX—Cov. Hop.—3268—Load,
arsenic

Engine held to this
car to Old Hand

LA&SL —Gon.—201001—Load, coke
breeze track

D&RGW—Gon.—41843—Empty to West Lead

UCR —Gon.—21278—Empty to West Lead

UCR —Gon.—20497—Empty to West Lead

LA&SL —Gon.—201055—Empty to West Lead

Engine then went to West Lead with:

ASX—Cov. Hop.—3268—Load, arsenic, to track 6

coupled to:

D&RGW—Gon.—41843—Empty to Slag track

UCR—Gon.—21278—Empty to Slag track

1912 Assignment No.

AS&R, Murray, Utah, March 30, 1944—Page 3

UCR —Gon.—20497—Empty to track 4
 LA&SL —Gon.—201055—Empty to track 4
 D&RGW—Gon.—Load, coke, 70618 to track 4
 UP —Gon.—62425—Load, coke to track 4
 and switched as shown. Complete at 11:38 a. m.

Engine went light to High Line at 11:39 a. m. and pulled:
 LA&SL—Gon.—201034—Empty to Coke track
 LA&SL—Gon.—201051—Empty to Coke track
 UCR —Gon.—20507—Empty to track 4
 LA&SL—Gon.—201091—Empty to Coke track
 AS&R —Gon.—74—Empty to track 4
 and switched as shown. Complete at 11:45 a. m.

Went to lunch.

At 1:30 p. m., U. P. engine 6051 delivered the following cars to the Scale track for the plant:

D&RGW—Cov. Hop.—18306—Empty	Engine held to this car
UCR —Gon.—21010—Load, ore	To High Line
D&RGW—Gon.—43174—Load, Gar-	
field Plate	To East Lead
WP —Gon.—5930—Load, arseno	
pyrites	To House
D&RGW—Gon.—40618—Load, arseno	
pyrites	To House
WP—Gon.—2371—Load, Lake-	
side Monarch	To House
D&RGW—Gon.—41821—Load, Arseno	
pyrites	To track 6
SLU —Gon.—1104—Load, arseno	
pyrites	To track 6
D&RGW—Gon.—41098—Load, arseno	
pyrites	To track 6

Note:

Delivery to scale track is not usual. In this case the lead track to the plant was being repaired and delivery to plant tracks could be made only via the scale track.

Engine 4420 went light to the scale track and started to weigh the above cars at 1:41 p. m. Weighing was completed at 1:53 p. m., and the cars were then switched as shown. Complete at 2:03 p. m.

Engine shoved:

D&RGW—Cov. Hop.—18306—Empty
into North Coke track, coupled to:

LA&SL—Gon.—201034—Empty,
shoved the 2 cars in on the House track, coupled to:

WP —Gon.— 5930—Load, arseno pyrites

D&RGW—Gon.—40618—Load, arseno pyrites,
pulled out and shoved all 3 cars against:

UCR—Gon.—21010—Load, U. S. crude ore,
on the High Line track, then shoved four cars to the bins
located on the High Line track. Complete 2:12 p. m.

Engine then shoved:

D&RGW—Cov. Hop.—18306—Empty
in on the Brick track to be prepared for arsenic loading.

Engine went light to track 1, picked up:

LA&SL—Gon.—201053—Load, Missouri Monarch,
took it to the scale and weighed it at 2:17 p. m., then shoved
it to the North Trestle at 2:24 p. m.

1913 Assignment No.

AS&R, Murray, Utah, March 30, 1944—Page 4

Engine went to Brick track for coal at 2:27 p. m.

Check of switching discontinued at 2:40 p. m.

1914

Exhibit No. 20

SWITCHING OPERATIONS OBSERVED BY
REPRESENTATIVES OF THE INTERSTATE COMMERCE COMMISSION
ON MARCH 28, 29 AND 30, 1944
AT THE PLANT OF
AMERICAN SMELTING & REFINING CO.,
MURRAY, UTAH

1915

INTRAPLANT MOVEMENT

(By Industry-owned Car)

(Scale Test Car)

Car No.

A S & R—Scale Test-car

Switching performed:—

Date	Time	Contents	Axis't.	From	To
3/29/44	12:50 p.m.		1	Test-car house	Scale
3/29/44	1:01 p.m.		1	Scale	Test-car house

The plant track-scale is tested on six spots each month; in making this test the test car is used. The test shown above required 5 minutes.

Not listed on any Form 887 or Form 890.

No charge shown on any bill.

1916

- 2 -

INTRAPLANT MOVEMENT
(By leased Car)

Car No.

L. A. & S. L.—Dump. Gen. 201030

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	9:53 p.m.	Empty	1	Middle Belt	Track 4
3/28/44	11:41 a.m.	Coke	1	Tract 4	Scale w'g'd
3/28/44	12:21 p.m.	"	1	Scale	Rock Track
3/29/44	4:15 p.m.	Empty	1	Rock Track	Bullion Track

Listed on Form 887—No. 3322—3/28/44

" " " 890—3/28/44—Stock in Bin 11—\$2.70

1917

- 3 -

INTRAPLANT MOVEMENT
(By Leased Car)

Car No.

L. A. & S. L.—Dump Gen. 201001

Switching Performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	10:54 am.	Empty	1	House Track	High Line
3/29/44	10:49 am.	Yard	1	High Line	House Track
		Cleanings			
3/29/44	10:55 am.	"	1	House Tract	Scale & w'g'd
3/29/44	11:03 am.	"	1	Scale	Old Hand Track
3/29/44	5:10 pm.	"	1	Old Hand Track	Middle Belt
(1)	(1)	Empty	1	Middle Belt	No. Cylinder Track

(1) This car moved from Middle Belt to North
Cylinder track by locomotive crane.

Listed on Form 887—No. 3325—3/29/44

" " " 890 Mar. 29—Mill 1 to Bin 5—\$2.70

1918

- 4 -

Car No.

D. & R. G. W.—Cov. Hopper—18301

Date	Contents	Via
Car in Before 3/28/44		
" out	Empty	

Origin

Destination

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	2:20 pm.	Empty	1	Brick Track	Arsenic House
3/29/44	9:37 am.	Arsenic	1	Arsenic House	Scale & w'g'd
3/29/44	10:20 am.	"	1	Scale	Slag Track

Light weighing charged for in Freight Bill No. SW 25—4/5/44

1919

- 5 -

INTRAPLANT MOVEMENT
(By Lease Car)

Car No.

L. A. & S. L.—Dump Gon. 201051

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	3:25 pm	Empty	1	High Line	Track 4
3/29/44	9:05 am	U S Mids	1	Track 4	Scale & w'g'd
(x) 3/29/44	9:10 am	"	1	Scale	North Trestle
3/29/44	10:35 am	"	1	North Trestle	High Line
3/30/44	11:45 am	Empty	1	High Line	Coke Track

(x) This was an incidental switching move.

Listed on Form 887—No. 3324—3/29/44

" " " 890—3/29/44—Stock to Bin 2—\$2.70

1920

- 6 -

INTRAPLANT MOVEMENT
(By leased Car)

Car No.

L. A. & S. L.—Dump Gon. 201002

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	3:25 pm	Empts.	1	High Line	Coke Track
3/29/44	9:05 am	Ore	1	Coke Track	Scale w'g'd
3/29/44	9:10 am	Ore	1	Scale	Middle Belt
3/29/44	4:52 pm	Empty	1	Middle Belt	House Track

Listed on Form 887—No. 3325—3/29/44

" " " 890—3/29/44—Stock to Bin 1—\$2.70

1921

- 7 -

Car No.

B. & O. Box—268302

Car in	Date	Contents
Prior to 3/28/44		
" out	3/29/44	Bullion

Origin

Destination—Omaha, Nebr.

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/29/44	3:03 pm	Bullion	1	Bullion track	Scale & w'g'd
3/29/44	4:00 pm	Bullion	1	Scale	Slag Track
3/29/44	5:20 pm	Bullion	1	Slag Track	D & RGW

Listed on Form 887—No. 3325—3/29/44

" " " 890—3/29/44—A. S. & R. to ship—\$0.50 | Light weighing

1922

— 8 —

D. & R. G. W.—Cov. Hop—18312
Via

	Date	Contents
Car in	Before 3/28/44	Empty
" out	3/29/44	Arsenic

Commodity

Origin

Destination

Peoria, Ill.—D. & R. G. W.

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	7:15 a.m.	Arsenic	1	Roaster Lead	Scale & w'g'd
3/28/44	8:00 a.m.	Arsenic	1	Scale	Slag Track
3/29/44	5:20 p.m.	Arsenic	1	Slag Track	D & R. G. W.

Light weighing charged for in Freight Bill No. SW 25—4/5/44

No charge made for movement from Roaster Lead to Slag Track where car was held for shipping orders from 8:00 a. m. till 5:20 p. m., 3/29/44.

1923

— 9 —

INTRAPLANT MOVEMENT
(By industry owned car)Car No.
A. S. & R.—43

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/29/44	3:37 pm	Bl. Fur. Speiss	1	No. Matte Track	Scale & w'g'd
3/29/44	4:20 pm	"	1	Scale	Mill 4 Track

Listed on Form 887—No. 3324—3/29/44

890—3/29/44—Matte Track to Mill 4—\$2.70

1924

— 10 —

INTRAPLANT MOVEMENT
(With Carrier's Car)Car No.
D. & R. G. W.—Dump—41843

	Date	Contents	Via
Car in	3/28/44	Ore	D. & R. G. W.
" out			

Origin—Wendover, Utah

Destination—

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	12:50 pm	Arsenic pyrites	1	Pallas Yard	Track 4
3/28/44	1:55 "	"	1	Track 4	Scale & w'g'd
(x) 3/28/44	2:07 "	"	1	Scale	Track 5
3/28/44	3:50 "	"	1	Track 5	High-Line

3/29/44	10:38 am	Empty	1	High Line	House Track
3/29/44	11:13 "	"	1	House Track	No. Trestle
3/29/44	3:37 pm	Calcine	1	No. Trestle	Scale & w'g'd
3/29/44	4:35 pm	"	1	Scale	No. Cylinder
				Pug Mill	Tr.
(x) 3/29/44	5:10 pm	"	1	No. Cyl Track	Middle Belt
3/30/44	11:25 am	Empty	1	Middle Belt	Scale w'g'd
3/30/44	11:38 am	"	1	Scale	Slag Track

(x)—Intermediate switching moves

Listed on Form 887—No. 3325—3/29/44

" " " 890—3/29/44—Stock to Bin 4—\$2.70

" " " 887—No. 3326—3/29/44

" " " 890—3/29/44—Yard to Scale—\$0.50

Intraplant

move

Light

weighing

Intraplant movement charged on Freight Bill SW 32—4/5/44

Light weighing charged on Freight Bill SW 25—4/5/44

1925

— 11 —

INTRAPLANT MOVEMENT

(By Leased Car)

Car No.

L. A. & S. L.—Con. 201053

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/30/44	10:16 am	Empty	1	House Track	Track 1
3/30/44	2:17 pm	Ore	1	Track 1	Scale w'g'd
3/30/44	2:24 pm	Ore	1	Scale	North Trestle

Listed on Form 887—No. 3328—3/30/44

" " " 890—3/30/44—Stock to Bin 18—\$2.70

1926

— 12 —

Car No.

P. R. R.—Box 100873

	Date	Contents	Via
--	------	----------	-----

Car in Prior to 3/28/44 Bullion

" out 3/28/44

Origin

Destination—Omaha, Neb.

D&RGW

Switching performed:—

Date	Time	Contents	Ass'g't.	From	To
3/28/44	1:55 p. m.	Bullion	1	Bullion Track	Scale & w'g'd
3/28/44	2:07 p. m.	Bullion	1	Scale	Slag Track
3/28/44	4:45 p. m.	Bullion	1	Slag Track	D & R G W

Listed on Form 887—No. 3322—3/28/44

) Light

" " " 890—3/28/44—A. S. & R. to Ship—\$0.50 weighing

1932

— 18 —

Car No.

D. & R. G. W. Dump—71146

Date Contents Via
Car in 3/28/44 Matte D&RGW

" out

Origin Garfield, Utah

Destination

Switching performed:—

Date	Time	Contents	Ass'g't	From	To
3/28/44	11:05 am.	Matte	1	Pallas Yard	West Lead
3/28/44	11:41 am.	"	1	West Lead	Scale & w'g'd
3/28/44	12:18 pm.	"	1	Scale	Track 5

1933

— 19 —

INTRAPLANT MOVEMENT
(By Industry-owned car)
(Roaster)

Car No.

A. S. & R.—Hopper—7

Switching performed:—

Date	Time	Contents	Ass'g't	From	To
3/28/44	7:15 pm.	Roast ore	1	Roast Track	Scale & w'g'd
3/28/44	7:35 am.	"	1	Scale	North Trestle
3/28/44	8:02 am.	"	1	North Trestle	Rock Track
3/28/44	8:30 am.	Empty	1	Rock Track	Roaster Track

This car was one of 10 taken from the Roaster Track at 7:15 a. m. Mar. 28; All 10 were unloaded into Bin. 13. Only 5 cars can be handled over this bin at one time so it was necessary to store 5 cars in some available track space while 5 are being unloaded. This car was one of those stored. After the first 5 had been unloaded, the second 5 were moved to Bin 13 and unloaded. Similar moves are made daily except one day each week.

Listed on Form 887—No. 3321—3/28/44

" " " 890—3/28/44—Roaster to Bin 13—\$2.70

1934

— 20 —

Car No.

U. P. Cov. Hopper—92027

Date Contents Via
Car in Before 3/28/44 Empty
" out 3/29/44 Arsenic

Origin

Destination—No. Kansas City, Mo. U. P.

Switching performed:—

Date	Time	Contents	Ass'g't	From	To
3/28/44	11:18 a.m.	Arsenic	1	Arsenic House	Scale & w'g'd
3/28/44	12:05 p.m.	"	1	Scale	Slag Track
3/29/44	5:20 p.m.	"	1	Slag Track	U. P.

Light weighing charged for in Freight Bill No. SW 26—4/5/44. No charge made for movement from Arsenic House to Slag Track where car was held for shipping orders from 12:05 p.m., 3/28/44 till 5:20 p.m. 3/29/44

Car No.

D&RGW—Dump—43147

ar in 3/28/44 Lime Sand Via D&RGW
 ar out

origin Magna, Utah
 destination

switching performed:

Date	Time	Contents	Assgt.	From	To
3/28/44	11:05 am	Lime Sand	1	Pallas Yard	West Lead
3/28/44	11:41 am	" "	1	West Lead	Scale & Weighed
3/28/44	12:18 pm	" "	1	Scale	Old Hand Track
3/29/44	4:40 pm	" "	1	Old Hand Tr.	Old Belt Track
3/29/44	5:10 pm	" "	1	Old Belt Tr.	Middle Belt

936

INTRAPLANT MOVEMENT
 (By Leased Car)

Car No.

LA&SL—Dump Gon—201077

switching performed:

Date	Time	Contents	Assgt	From	To
3/28/44	12:25 pm	Ore	1	Rock Track	Track 4
3/28/44	1:55 pm	" "	1	Track 4	Scale & Weighed
3/28/44	2:20 pm	" "	1	Scale	Old Hand Track
3/28/44	4:15 pm	" "	1	Old Hand Track	Old Belt Track
3/29/44	9:15 am	" "	1	Old Belt Track	Middle Belt Track
3/29/44	4:52 pm	Empty	1	Middle Belt Track	Bullion Track
3/30/44	9:40 am	Garfield Plate	1	Bullion Track	Scale & Weighed
3/30/44	9:55 am	" "	1	Scale	Old Belt Track

listed on Form 887—No. 3322—3/28/44

" " " 887—No. 3328—3/30/44

" " " 890—3/28/44—Stock to Bin 1—\$2.70

" " " 890—3/30/44—" " " 1—2.70

1937

—23—

Car No.
ASX—Cov Hop—3287

		Date	Contents	Via
Car in	Before	3/28/44	Arsenic	U. P.
Car out		3/29/44		
Origin				
Destination	No. Kansas City, Mo.			

Switching performed:

Date	Time	Contents	Assgt	From	To
3/28/44	11:18 am	Part load- Arsenic	1	Bag House Track	Arsenic Track
3/28/44	4:20 pm	Arsenic	1	Arsenic Track	Roaster Lead
3/29/44	7:10 am	Arsenic	1	Roaster Lead	Scale & Weighed
3/29/44	8:00 am	Arsenic	1	Scale	Slag track
3/29/44	5:20 pm	Arsenic	1	Slag track	U. P.

Light weighing charged for in Freight Bill SW 26—4/5/44. No charge made for movements from Arsenic Track to Roaster Lead or for movement from Roaster Lead to Slag Track. Car was loaded 3/28/44 but was not billed out until 3/29/44. Prior to 3/28/44 this car was loaded at the Arsenic House but when weighed it was found to be underloaded. It was reset for further loading at 11:15 am, 3/28/44. No charge made for weighing and resetting.

1938

—24—

INTRAPLANT MOVEMENT
(By Industry-owned car)

AS&R
78

Switching performed:

Date	Time	Contents	Assgt	From	To
3/29/44	1:34 pm	Part load matte or Speiss	1	Middle Matte Track	North Matte Track

Not listed on any Form 887—3/28 to 3/30, inclusive.

" " " " " 890—3/27 to 3/30; "

1939

- 25 -

Car No.
D&RGW—Dump—432.79

Date Contents Via
Car in 3/28/44 Concentrates D&RGW

Car out

Origin Park City, Utah

Destination

Switching performed:

Date	Time	Contents	Assgt	From	To
3/28/44	12:50 pm	Concentrates	1	Pallas Yard	Track 4
3/28/44	1:55 pm	"	1	Track 4	Scale & Weighed
3/28/44	2:07 pm	"	1	Scale	Old Hand Track
3/29/44	8:32 am	"	1	Old Hand Tr.	Thawhouse-East
3/30/44	9:40 am	"	1	Thawhouse-East	Scale & Weighed
3/30/44	9:55 am	"	1	Scale	Old Belt Track

Listed on Form 887—No. 3328—3/30/44

" " " 890—Thaw to Bin 1—3/30/44—\$0.50

1940

- 26 -

Car No.
U. C. R.—Dump—21069

Date Contents Via
Car in Prior to 3/28/44 U. S. Mids.

Car out

Origin

Destination

Switching performed:

Date	Time	Contents	Assgt.	From	To
3/28/44	1:20 pm	U. S. Mids	1	Thawhouse	Middle Belt
3/29/44	9:30 am	Empty	1	Middle Belt	Scale & Weighed
3/29/44	9:32 am	Empty	1	Scale	Slag Track
3/29/44	5:20 pm	Empty	1	Slag Track	U. P.

Listed on Form 887—No. 3321—3/28/44

) Thawhouse to

" " " 890—3/28/44—Thaw to Bin 4—\$0.50) unloading

" " " 887—No. 3326—3/29/44) spot

" " " 890—3/29/44—Yard to Scales—\$0.50) Light Weighing

1941

Exhibit No. 21

 Exhibit No. 21
 Page No. One (I)
 Witness

 AMERICAN SMELTING AND REFINING COMPANY
 Garfield, Utah Smelter

STATEMENT SHOWING INCOMING SHIPMENTS FOR 12 MONTH PERIOD ENDING WITH MARCH 31, 1944

(Arrival dates at smelter determine whether shipment included in year reported)

Miscl. Materials and Supplies Received

Carloads Received

Plant Location Where Unloaded

Name of Commodity	Utah Origin	Interstate Origin	Total No. Carloads	Name	Plant Map Coordinate
Brick, Diamond S Brand		2	2	Roaster Brick Shed	S175 -W1250
" , Mts. Red Common	3		3	" " "	S175 -W1250
" , Silica	52		52	" " "	S175 -W1250
" , Utah Fire Clay	3		3	" " "	S175 -W1250
" , Magnesite		4	4	N. E. Corner Converter Bldg.	N240 -E150
" "		7	7	Fire Brick Shed	N210 -W1430
Cement	2		2	Cement Shed	W1100-N35
Coal Ground Storage	37		37	Ground Storage	O-00 -N770
Coal, Locomotive	3		3	Boiler House Bins	W1200-N190
Clay Converter	17		17	Clay Bins	W600 -N100
Clay, Utah Fire Clay	9		9	Clay Shed	W1170-N50
Coke, Foundry		3	3	Foundry Coke Shed	W600 -N1200
Coke, Petroleum	2		2	Pest House Bin 9-A	W750 -S635
Gravel	6		6	Gravel Bins	N190 -W630
Lime	6		6	Lime Shed	W1170-N50
Lumber		12	12	Carpenter Shop Lumber Yard	W470 -N400
"		2	2	Ground Storage	W1825-S550
"		3	3	Storage W. End Unloading Docks	W200 -S450
"		8	8	Lumber Yard Salvage	W100 -N925
"		1	1	Sand Beach	None
Merchandise, General (Note 1)		96	96	Warehouse	W800 -N380
" "		1	1	Old Foundry	W1300-N175
" "		1	1	Sampling Mills	W700 -S335
" "		1	1	Acid Plant	W1800-S100
Oil, Diesel Fuel		1	1	Coal Trestle	W1650-N190
Pig Iron	4		4	Foundry Ground Storage	W600 -N1250
Salt	4		4	Bins	W800 -N190
Sand (Concrete)	6		6	Bins	W550 -N190
" (Mortar)	2		2	Bins	W1420-N190
Silica Dust		47	47	Unloading to Trucks	E350 -N300

Note 1:—Cars average about 5 tons of less carload freight consisting in general of small lots, repair parts and miscellaneous supplies for plant use.

1370

1942

 Exhibit No.
 Page No. Two (2)
 Witness

Misc. Materials and Supplies Received (Cont'd)

Name of Commodity	Carloads Received			Name	Plant Location Where Unloaded	Plant Map Coordinate
	Utah Origin	Interstate Origin	Total No. Carloads			
Silica Dust		2	2	Clay Sheds	W1170-N50	
Steel Plate, Structural	4	11	15	Ground Storage	W1300-N220	
Steel, Smelter Bar		3	3	" "	W610-N200	
Ties		10	10	" "	W1800-S550	
Track Material		5	5	" "	W1850-S550	
Beach Clay	2		2	Unloading Docks	W650-S425	
Draper Silica	48		48	Unloading Docks	W1500-S435	
Excavator	1		1	Sand Beach	W400-N450	
TOTAL MISCL. MATERIALS & SUPPLIES	211	220	431			

Raw Material Received

Name of Commodity	Carloads Received			Name	Plant Location Where Unloaded	Plant Map Coordinate	Via Hot House Intrastate-Interstate
	Utah Origin	Interstate Origin	Total No. Carloads				
Beach Sand	41		41	Bin 10-C Pest House	W1035-S635		
" "	50		50	Bin 226	W100-S425	22	
" "	15		15	Converter Bins	W250-S400	10	
" "	1408		1408	"C" Line Chute	W650-S425	120	
Utah Copper Slag & Shavings	1		1	Unloading Docks	W1500-S425		
" " Mill Cleanings	1		1	#3 Pug Mill	E100-N625	1	
" " Concentrates	13025		13025	Martin Machine	W1035-S635	485	
" " Precipitates—Bingham	360		360	Unloading Docks	W300-S450	59	
" " "—Magna	14		14	" "	W300-S450	1	
Miscl. Midds and Concentrates	69		69	New Yard Center Track	E1350-S1000		
" " " "	8		8	" " " "	E1700-S1125		
" " " "	39		39	" " " "	E1550-S1050		
" " " "	33		33	" " " "	E1550-S1085		
" " " "	18		18	" " Scalehouse Track	E2425-S1450		
" " " "	5		5	" " " "	E2225-S1400		
" " " "	3		3	" " Old Main	E2250-S1350		
" " " "	16		16	" " Center Track	E1425-S925		
		3	3	#3 Pug Mill	E100-N625	2	

1371

1943

Exhibit No. 21
Page No. Three (3)
Witness

Raw Material Received (Cont'd.) Name of Commodity	Carloads Received			Plant Location Where Unloaded		Plant Map Coordinate	Via Hot House	
	Utah Origin	Interstate Origin	No. Carloads Total	Name	Docks		Intrastate	Interstate
Misc. Midds and Concentrate		29	29	Unloading	Docks	W650 -S425		10
" " " "	943		943	"	"	W650 -S425	196	
Matte & Speiss	332	144	476	"	"	W1500-S425	20	4
Remington Arms Copper Bullets	18		18	"	"	W1500-S425		
Crude Ore via B&G	742	71	813	"	"	W1500-S435	118	14
Misc. Tailings	1219	94	1313	"	"	W1500-S425	139	11
" " " "	8		8	Coal Hole	Slag Lead	W1950-N450		
" " " "	17		17	"	"	W1700-N575		
" " " "	92		92	"	"	W1950-N400	40	
" " " "	63	1	64	"	"	W1800-N575	2	
Crude Ores	28		28	#2 Salvage Track		E100 -N825		
" " " "	14		14	New Yard Center Track		E1150 -S850		
" " " "	6		6	" " " "		E1300 -S900		
" " " "	31		31	" " " "		E1000 -S735		
" " " "		1	1	" " " "		E1700 -S1125		1
" " " "		14	14	Lower Docks #3		W110 -S400		3
" " " "		1	1	" " " "		E135 -S435		
" " " "		560	560	Unloading Docks #2		W1500-S435		112
" " " "		150	150	" " " "	"D" Line	W1500-S425		34
" " " "		150	150	" " " "	"C" Line	W1500-S375		19
" " " "	2100		2100	" " " "	"B" Line	W1500-S435	137	
" " " "	350		350	" " " "	"D" Line	W1500-S425	31	
" " " "	264		264	" " " "	"C" Line	W1500-S375	12	
TOTAL RAW MATERIAL RECEIVED	21333	1218	22551				1393	210
GRAND TOTAL RECEIVED	21544	1438	22982					

Total No. Loaded Cars Received From D&RG 3312
 Total No. Loaded Cars Received From Union Pacific 3934
 Total No. Loaded Cars Received From B&G 15736

GRAND TOTAL RECEIVED 22982

1372

1944

Exhibit No. 22

I. C. C. *Ex Parte* 104 PART II INVESTIGATION
AMERICAN SMELTING & REFINING COMPANY
Garfield, Utah Smelter

Exhibit No. 22

Witness

STATEMENT SHOWING OUTGOING SHIPMENTS 12 MONTH PERIOD ENDING WITH MARCH 31, 1944

(Bill of lading dates determine whether or not shipment included in year reported)

Name of Commodity	Carloads Shipped		Total Carloads	Plant Location Where Loaded	
	Utah	Interstate		Name	Plant Map Coordinate
Acid, Sulphuric	192	563	755	Acid Plant	W168 - S105
Blister Copper		5855	5855	Copper Casting Building	W250 - N340
Dust, Converter Plate & Pipe (Pugged)	225		225	No. 2 Pug Mill	E400 - S230
Merchandise, General (Note 1)		44	44	Warehouse	W800 - N380
Scrap	16		16	Salvage Area	E370 - N830
Sulphur	8	24	32	Sulphur Plant	W1325 - N30
Excavator	1		1	Ping Pong	W400 - N450
Ties and Rails	1		1	Ping Pong	W400 - N450
Ore "Divisions"	31		31	Yard	W400 - S800
TOTAL	474	6486	6960		

Note 1:—Cars average about 5 tons of less carload freight consisting in general of miscellaneous merchandise.

SUMMARY

TOTAL NUMBER OF LOADED CARS DELIVERED TO RAILROADS

	B&G		D&RG		Union Pacific		Total	Total Number of Loaded Cars Delivered to Railroad	
	Interstate	Intrastate	Interstate	Intrastate	Interstate	Intrastate		B&G	D&RG
Blister Copper	5855						5855		5969
Acid, Sulphuric	74	17	144	130	345	45	755		450
Dust, Converter Plate & Pipe				156		69	225		541
Merchandise, General (Note 1)					44		44		
Scrap Iron		11		3		2	16		
Sulphur	7		1		16	8	32		
Ore (Divisions)		3		16		12	31		
Excavator		1					1		
Ties and Rails		1					1		
TOTAL	5936	33	145	305	405	136	6960		

1373

Exhibit No. 23

AMERICAN SMELTING & REFINING COMPANY
Garfield, Utah Smelter

Exhibit No. 23

Witness

Analysis of Switching & Weighing Charges Incurred for Work Performed by
Railroad During 12 Month Period Ending March 31, 1944

— Federal Transportation Tax NOT Included

Applies only on Shipments originating outside of or shipped to points outside of the State of Utah

Switching movements in connection with Line-Haul traffic

Name of Commodity	Rate \$3.96 per car		Rate \$1.00 per car		Rate \$0.50 per car	
	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount
Blister Copper	5855	\$23185.80				
Concentrates, Misl. Sources					12	\$ 6.00
Ores, Misl. Sources	71	281.16	112	\$112.00	183	91.50
Sulphur, Misl. Sources	7	27.72				
Sulphuric Acid	74	293.04				
Matte & Speiss			5	5.00	4	2.00
Tailings					11	5.50
TOTAL	6007	\$23787.72	117	\$117.00	210	\$105.00

SUMMARY

Note 1: "Switching rates higher than those listed were in effect during the 45 day period ending with May 15, 1943, due to application of *Ex parte* No. 148, increases which amounted to 6%."

Line Haul Traffic		No. C/L's	Amount
Switching @ \$3.96 per car		6007	\$23787.72
" @ \$1.00 " "		117	117.00
" @ \$0.50 " "		210	105.00
TOTAL LINE HAUL TRAFFIC		6334	\$24009.72
Intraplant @ \$2.70		—	—
Weighing Empty Cars @ \$0.50		1621	810.50
GRAND TOTAL INTERSTATE			\$24820.22

Amount paid by B&G Ry. Co.
" " " AS&R Co.

	23,787.72
	1,032.50
	<u>24,820.22</u>
\$24,820.22	\$24,820.22

Note 2: "Switching and weighing rates shown here in are contained in D&RGW freight tariff No. 6600-D, I. C. C. 736, P.S.C.U. 289."

1946

Exhibit No. 24

I. C. C. *Ex Parte* 104 PART II INVESTIGATION
 AMERICAN SMELTING & REFINING COMPANY
 Garfield, Utah Smelter.

Exhibit No. 24
 Witness

Analysis of Switching & Weighing Charges Incurred for Work Performed by Railroad
 during 12 Month Period Ending March 31, 1944

Federal Transportation Tax NOT Included

Applies only on shipments originating within or shipped to points within the State of Utah

Switching movements in connection with line-haul traffic

Name of Commodity	Rate \$3.60 per car		Rate \$2.25 per car		Rate \$1.00 per car		Rate \$0.05 per car	
	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount
Utah Copper Co.—Copper Concentrates			13025	\$29306.25				
Utah Copper Co.—Copper Precipitates from Bingham	360	\$1296.00 (a)					59	\$ 29.50
Beach Sands (Sands Utah)			1514	3406.50			152	76.00
Concentrates—Misc. Sources							196	98.00
Ores	742	2671.20 (a)			358	\$358.00	298	149.00
Sulphur								
Sulphuric Acid	17	61.20 (b)						
Scrap Iron	9	32.40 (a)						
Precipitates—Magna	14	50.40 (b)					1	.50
Matte & Speiss					6	6.00	20	10.00
Tailings							181	90.50
Utah Copper Mill Cleanings	2	7.20 (b)					1	.50
Salt	4	14.40 (a)						
Misc. from Sand Beach			5	11.25				
TOTAL	1148	\$4132.80	14544	\$32724.00	364	\$364.00	908	\$454.00

SUMMARY

Note 1:—"Switching rates higher than those listed were in effect during the 45 day period ending with May 15, 1943 due to application of *Ex Parte* No. 148 increases which amounted to 6%."

(a) Paid by A. S. & R. Co.

(b) Paid by B. & G. Ry.

Line Haul Traffic		No. C/L's	Amount
Switching @ \$3.60 per car		1148	\$ 4132.80
" @ \$2.25 " "		14544	32724.00
" @ \$1.00 " "		364	364.00
" @ \$0.50 " "		908	454.00
TOTAL LINE HAUL		16964	\$37674.80
Intra-plant @ \$2.70 per car		564	1522.80
Weighing Empty Cars @ \$0.50 per car		5676	2838.00
		6240	4360.80
GRAND TOTAL INTRASTATE		23204	\$42035.60

Note 2:—"Switching and weighing rates shown here in are contained in D&RGW freight tariff No. 6000-D, I. C. C. 736, P.S.C.U. 289."

Total paid by AS&R Co. 41,916.80

" " " B&G Ry. Co. 118.80

42,035.60

1375

1947

Exhibit No. 25

Exhibit No. 25

Witness:

AMERICAN SMELTING & REFINING COMPANY

Statement showing total number of
Original Carloads Received at GARFIELD
SMELTER for years shown below.

<i>Year.</i>	<i>Total.</i>	<i>Year.</i>	<i>Total.</i>
1909 (Last ten months only.)	18,680	1927	17,411
1910	21,639	1928	16,019
1911	23,062	1929	18,820
1912	26,029	1930	13,495
1913	27,898	1931	9,142
1914	21,633	1932	6,624
1915	20,096	1933	7,802
1916	29,204	1934	13,130
1917	32,269	1935	17,693
1918	26,327	1936	20,891
1919	12,621	1937	23,712
1920	12,719	1938	20,318
1921	9,307	1939	23,041
1922	15,646	1940	25,108
1923	19,611	1941	23,809
1924	19,277	1942	22,366
1925	22,995	1943	23,578
1926	24,059	1944 (First four months only)	7,107

1949

 Exhibit No.
 Page No. Two (2)
 Witness:

 AMERICAN SMELTING AND REFINING COMPANY
 Murray, Utah Smelter

STATEMENT SHOWING INCOMING SHIPMENTS FOR 12 MONTHS PERIOD ENDING WITH MAR. 31, 1944

(Arrival dates at smelter determine whether shipment included in year reported.)

Raw Material Received

Name of Commodity	No. of Cars Recd.		No. of Cars Recd.		Point of Origin	Unloading Point	D&L Low Line			Map Coordinate	
	D&RGW	UP	Intrastate	Interstate			Mill 1	Mill 2	Mill 4	Plant Bin A&B	Stock Piles
Ores:											
Cts. Clayton Silver		43		43	Mackay, Idaho	Stock Pile 15			28		W1500-S2500 W1500-S3000
" Comb. Metals	2	134	136		Bauer, Utah	" 54			43	39	W1500-S2500 W1500-S3000
Cr. Lakeside Monarch	9		9		Delle, Utah	House Truck to Transfer					W1500-S3000
" Shoshone Mines		287		287	Dunn, Calif.		9	49			W1500-S3000
Cts. Silver King	154		154		Park City, Ut.	Stock Pile 54			100		W1500-S2500
Cr. " Crude	2		2		" "		2				W1000-S2500
Cts. Talache Mines		15		15	Boise, Idaho	" 15					W1500-S2000
" U. S. S. Fe Mids	182	182	364		Midvale, Utah	" 105			158	101	W1500-S2500
" Speiss	16	16	32		" "						W1500-S2000
Cr. " As. pyrite	71		71		Wendover, Nev.		71		32		W1500-S2000
Getchell As. Dust	103			103	Redhouse, "	" 47				56	W1000-S2500
Rich-Eureka Speiss	61	1		62	Pallasade, "			62			W1500-S2500
Cr. Chief Cons.	22		22	22	Eureka, Utah		22				W1000-S2500
" S. L. Pioche Mng.		50		50	Pioche, Nev.		47	3			W1000-S2500
" AS&R Co. Boston Con	68	52	120		Bingham, Utah		117	3			W1000-S2500
Garfield Dust	159	70	229		Garnfield, "	" 113			116		W2000-S2500 W1500-S3000
Cts. Triumph Mng. Co.		42		42	Hailey, Idaho	" 34			1	7	W1500-S2500
Cr. Misc. Cr. Shippers	22	69	33	58	Various Inter-Mtn. Points		63	27	1		W1000-S2500
E. H. & Selby Dust	1	21		22	E. Helena, Mont.	"					
A. V. & Fed. Matte	16	10		26	& Selby, Calif.	" 22					W2000-S2500
					Leadville, Colo. & Alton, Ill.	"			26		W1500-S2000
Cts. Callahan Pb & Zn	10			10	Cascade, Idaho	" 10					W1500-S2000
" Rip Van Winkle	8			8	Winnemucca, Nev.	" 2			6		W1500-S2000 W1500-S3000
" Tintic Std.	44		44	44	Dividend, Utah		25	19			W1500-S2500
Pig Lead		1	1	1	Ironton, "	Power House 1					W1000-S2500
TOTALS	950	993	1079	864							
			1217	726							

1950

Exhibit No. 28

Exhibit No. 28

Witness:

I. C. C. EX PARTE 104 PART II INVESTIGATION

AMERICAN SMELTING & REFINING COMPANY
Murray, Utah Smelter

STATEMENT SHOWING OUTGOING SHIPMENTS 12 MONTHS PERIOD ENDING WITH MARCH 31, 1944

(Bill of Lading dates determine whether or not shipment included in year reported.)

Name of Commodity	Carloads Shipped			Delivered to—			Plant Location Where Loaded	
	Utah	Interstate	Total Carloads	D&RGW	—	UP	Name	Plant Map Coordinate
Crude Arsenic*		77	77	44		33	Arsenic Storage	W1000-S3000
Lead Bullion		437	437	317		120	Remelting Plant	W1000-S1500
Cd. Baghouse Dust		13	13	6		7	Baghouse	W500-S3000
Rev. Matte	7	—	7	7		—	Matte Track	W1000-S1500
Speiss Calcines	282	—	282	140		142	Roast Track	W1500-S3000
Dump Slag		27	27	—		27	Mill #4	W1500-S2000
Miscl. Ores	2	—	2	—		2	Yard Storage	W1500-S2500
TOTALS	291	554	845	514		331		

NOTE—*Only 8 of these cars were ASX—balance were RR owned cars.

1379

1951

Exhibit No. 29

Exhibit No. 29

Witness:

AMERICAN SMELTING & REFINING COMPANY
Murray, Utah Smelter

**Analysis of Switching & Weighing Charges Incurred for Work Performed by Railroad During
 12 Months Period Ending March 31, 1944**

Federal Transportation Tax NOT Included

Applies only on Shipments originating outside of or shipped to points outside the State of Utah

Switching movements in connection with Line-Haul Traffic

Name of Commodity	Rate Empties \$0.50 per car		Rate Line-Hauls \$1.00 per car		Rate Thawhouse \$0.50 per car	
	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount
Concentrates	99	\$ 49.50	1	\$ 1.00	44	\$ 22.00
Crude	490	245.00	448	448.00	117	58.50
Bullion	426	213.00				
Baghouse Dusts	5	2.50				
Cd. Dust Shipped	5	3.00				
As. " "	50	25.00				
Soda Ash	1	.50				
Slag Shipped	3	1.50				
Coal			1	1.00		
TOTAL	1,080	\$540.00	450	\$450.00	161	\$ 80.50

SUMMARY

NOTE 1: "Switching rates higher than those listed were in effect during the 45 day period ending with May 15, 1943, due to application of Ex Parte No. 148, increases which amounted to 6%."

Line-Haul Traffic	No. C/L's	Amount
Empties @ \$0.50 per car	1,080	\$ 540.00
Line-Haul 1.00 " "	450	450.00
Thawhouse .50 " "	161	80.50
TOTAL LINE-HAUL TRAFFIC	1,691	\$1,070.50

NOTE 2: "Switching and weighing rates shown herein are contained in Union Pacific Railroad Co. freight tariff No. 7114, I. C. C. 565, P. S. C. U. 144."

1380

1952

Exhibit No. 30

Exhibit No. 30

Witness:

I. C. C. EX PARTE 104 PART II INVESTIGATION
 AMERICAN SMELTING & REFINING COMPANY
 Murray, Utah Smelter

Analysis of Switching & Weighing Charges Incurred for Work Performed by Railroad During
 12 Months Period Ending March 31, 1944
 Federal Transportation Tax NOT Included

Applies only on shipments originating within or shipped to points within the State of Utah

Switching movements in connection with Line-Haul Traffic

Name of Commodity	Rate Intraplant \$2.70 per car		Rate Empties \$0.50 per car		Rate Line-Hauls \$1.00 per car		Rate Thawhouse \$0.50 per car	
	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount	No. C/L's	Amount
Ore Concentrates	216	\$ 583.20	577	\$288.50	12	\$ 12.00	200	\$100.00
" Crude	534	1,711.80	283	141.50	276	276.00	52	26.00
Barrings	129	348.30						
Limesand & Rock	120	324.00	215	107.50	16	16.00	2	1.00
Calclnes	542	1,463.40						
Sinter	2,527	6,822.90						
Matte & Speiss	163	440.10	2	1.00				
Coke	193	521.10			63	63.00		
Garfield Dusts	130	351.00	203	101.50			3	1.50
Baghouse "	75	202.50						
Flue / "	176	47.20						
Slag	37	99.90	3	1.50	3	3.00		
Coal	58	156.60	15	7.50	11	11.00		
Scrap Iron			23	11.50	1	1.00		
Bullion Brick	2	5.40						
Speiss Calcines—Ship.			44	22.00				
Clay			1	.50	1	1.00		
TOTALS	5,002	\$13,505.40	1,366	\$683.00	383	\$383.00	257	\$128.50

SUMMARY

NOTE 1:—"Switching rates higher than those listed were in effect during the 45 day period ending May 15 1943, due to application of Ex Parte No. 148, increases which amounted to 6%."

Line-Haul Traffic
 Intra-plant @ \$2.70 per car
 Empties @ 0.50 " "
 Line-Hauls @ 1.00 " "
 Thawhouse @ 0.50 " "

No. C/L's	Amount
5,002	\$13,505.40
1,366	683.00
383	383.00
257	128.50
7,008	\$14,699.90

NOTE 2:—"Switching and weighing rates shown herein are contained in Union Pacific Railroad Co. freight tariff No. 7114, I. C. C. 565, P. S. C. U. 144."

TOTAL LINE-HAUL

1382

1953

Exhibit No. 34

SWITCHING OPERATIONS OBSERVED BY
REPRESENTATIVES OF THE INTERSTATE COMMERCE COMMISSION,
ON FEB. 29, MARCH 1 AND 2, 1944,
AT THE PLANT OF
AMERICAN SMELTING & REFINING CO.,
LEADVILLE, COLO.

1954

Car Initial & Number
AS&R 106 Dump

INTRA-PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/17/44	12:35 PM	Globe Concts	1	Trk 5	Trk 2
	3:45 PM		2	Trk 2	Trk 9
3/18/44	11:19 AM	Load	1	Trk 9	Trk 5

Switching Charges:

Intraplant—\$2.97 on Bill No. 31406 of 3/21/44—From Yd. to 9 on 3/17/44
\$2.97 on Bill No. 31408 of 3/25/44—From Yd. to 9 North on 3/20/44

1955

Car Initial & Number
AS&R 111 Dump

INTRA PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/17/44	12:35 PM	Globe Concts	1	Trk 5	Trk 2
	3:45 PM	Concts	2	Trk 2	Trk 9
3/18/44	11:19 AM	Load	1	Trk 9	Trk 5
	2:45 PM		2	Trk 5	Trk 9
		E	?	Trk 9	New Trk
3/20/44	10:45 AM	E	1	New Trk	Rapp Trk
	2:45 PM	Load	2	Rapp Trk	Scales & Weighed
	3:35 PM		2	Scales	Trk 5
	3:50 PM		2	Trk 5	Conveyor House

Switching Charges:

Intraplant—\$2.97 on Bill No. 31406 of 3/21/44—From Yd to 9—on 3/17/44
\$2.97 on Bill No. 31408 of 3/25/44—From Yd to 9—on 3/20/44

1383

1956

Car Initial & Number
AS&R 132 Gon.

INTRA PLANT MOVEMENT ONLY

From American Loading Dock—Loaded from Trucks

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	11:50 AM	Ore	2	Loading Dock	Thawhouse
3/20/44	8:30 AM	Ore	1	Thawhouse 13	Scale & Weighed
3/20/44	9:19 AM	Ore	1	Scale	Trk 9

Switching Charges:

Intraplant—\$2.97 on Bill No. 31405 of 3/20—from Amer. to T H on 3/18/44.
 2.97 on Bill No. 31415 of 4/4—from T H to Scales on 3/20.
 2.97 on Bill No. 31406 of 3/21—from Scales to Trk 9.

1957

Car Initial & Number
D&RGW-Box—66572

Date	Contents	Via
Car in: 3/15/44	Concentrates	D&RGW (Carriers' records)

Car out:

Origin: Creede

Destination: Leadville, Colo.

Commodity: Concentrates

3/17/44—This car, loaded with concentrates, was in the thawhouse on track 12 at 7:00 AM

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/20/44	8:32 AM	Concentrates	1	Thawhouse 12	Scales & Weighed
"	9:23 AM	"	1	Scales	Track 9 North
"	12:55 PM	Sample Ore	1	Track 9 North	Track 4 Up
"	2:45 PM	Empty	2	Track 4 Up	Scales & Weighed
"	3:00 PM	Empty	2	Scales	Flat 5

Switching Charges:

Intraplant—None

Light Weigh—None

1958

5

Car Initial & Number
D&RGW-62782 Box

	Date	Contents	Via
Car In	3/17/44	Empty	D&RGW
Car Out	3/20/44	Lead Bullion	D&RGW (Phone Billed 3/20/44 11:10AM)
Origin	Leadville, Colo.		
Destination	Perth Amboy, N. J.		
Commodity	Bars Lead Bullion		

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/17/44	3:10 PM	Empty	1	Flat 2	Scale & Weighed
	3:20 PM		1	Scale	Bullion Trk
3/18/44	3:13 PM	Load	1	Bullion Trk	Scale & Weighed
3/20/44	10:14 AM	Load	1	Scale	Flat 4 Track

Switching Charges:

Intra Plant: None
Empty, Weigh: None

1959.

6

Car Initial & Number
AS&R—Dump—253

INTRA PLANT MOVEMENT ONLY

3/17/44—This car, loaded with ore, was in the thawhouse on track 13 at 7:00 am.

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	7:23 AM	Ore	1	Thawhouse 13	Scales & Weighed
"	8:17 AM	Ore	1	Scale	Main track
"	8:23 AM	Ore	1	Main track	Track 9 North
3/20/44	9:19 AM	Empty	1	Track 9 North	Track 9

Switching Charges:

Intraplant: \$2.97—Bill No. 31406, 3/21/44—T H to 9 on 3/18/44
Light Weigh: None

1960

7

Car Initial & Number

AT&SF--Box--23853

Date Contents Via
 3/14/44 Concentrates D&RGW (Carrier's records)

Car out

Origin: Silverton, Colo.

Destination: Leadville, Colo.

Commodity: Concentrates

3/17/44--This car, loaded with concentrates, was in the thawhouse on track
 17 at 7:00 AM

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	7:35 AM	Concentrates	1	Thawhouse 17	Scales & Weighed
	8:17 AM	"	1	Scale	Main track
	8:23 AM	"	1	Main track	Track 9 North

Switching Charges:

Intraplant--None

Light Weigh--None

1961

Car Initial & Number

AS&R 163 Con

INTRA PLANT MOVEMENT ONLY

From American Loading Dock--Loaded from Trucks

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
	About				
3/20/44	10:30 AM	Ore	2	Loading Dock	Thawhouse 12

Switching Charges:

Intraplant--\$2.97 on Bill No. 31415 of 4/4/44--From Amer. to T-41 on 3/20/44

1962

Car Initial & Number

AS&R 173 Dump

INTRA PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	12:25 PM	Ore	2	8 hole Trk	Ore house
	About				
3/20/44	8:15 AM	Empty	2	Ore house	Trk 10
3/20/44	10:44 AM		1	Trk 10	Scales & Weighed
3/20/44	12:35 PM		1	Scales	Trk 1
3/20/44	3:45 PM	Coal	1	Trk 1	Scales & Weighed
	4:25 PM		1	Scales	Trk 4

Switching Charges:

Intraplant--\$2.97 on Bill No. 31406 of 3/21/44--From 7 to 4 on 3/18/44

2.97 on Bill No. 31408 of 3/25/44--From 1 to 4 on 3/20/44

1386

1963

10

Car Initial & Number
B&O 269883 Box

Date Contents Via
Car In: 3/18/44 Concts D&RGW
Car Out:
Origin: Resurrection Mine, Colo.
Destination: Leadville, Colo.
Commodity:
Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/20/44	9:38 AM	Concts	1	Flat 1	Scale & Weighed
3/20/44	10:25 AM	Concts	1	Scale	Thawhouse 12

Switching Charges:
Intraplant: None

1964

11

Car Initial & Number
PM 17914 Gon °

Date Contents Via
Car In: 3/20/44 Residue D&RGW
Car Out:
Origin: Blackwell, Okla.
Destination: Leadville, Colo.
Commodity: Residue
Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/20/44	11:59 AM	Residue	1	Flat 1	Scale & Weighed
	12:09 PM	Load	1	Scale	Flat 1

Switching Charges:
Intraplant: None

1387

1965

12

Car Initial & Number
D&RGW Dump 41094

	Date	Contents	Via
Car in:	3/15/44	Ore	D&RGW (Carrier's record)
Car out:	3/20/44	Empty	D&RGW
Origin:	Belden, Colo.		
Destination:	Leadville, Colo.		
Commodity:	Ore		

3/17/44—This car, loaded with ore, was in the ~~thaw~~house on track 15 at 7:00 AM

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/18/44	7:30 AM	Ore	1	Thawhouse 15	Scale & Weighed
3/18/44	8:40 AM	"	1	Scale	Track 10
3/20/44	10:44 AM	Empty	1	Track 10	Scale & Weighed
3/20/44	4:40 PM	"	1	Scale	Leadville

Switching Charges:

Intraplant: None
Light Weigh: "

1966

13

Car Initial & Number
WLE 53105 Gon

	Date	Contents	Via
Car In:	3/18/44	Residue	D&RGW
Car Out:			
Origin:	Blackwell, Okla.		
Destination:	Leadville, Colo.		
Commodity:	Residue		

Switching Performed:

Date	Time	Contents	Assign- ment No.	From	To
3/18/44	2:05 PM	Load	2	Flat 1	Scales & Weighed
	About				
3/18/44	2:15 PM	Load	2	Scale	Trk 5

Switching Charges:

Intraplant: None

1967

14

Car Initial & Number
D&RGW Dump 42085

	Date	Contents	Via
Car in:	3/15/44	Ore	D&RGW (Carrier's records)
Car out:	3/20/44	Empty	"
Origin:	Belden, Colo.		
Destination:	Leadville, Colo.		
Commodity:	Ore		

3/17/44—This car, loaded with ore, was in the thawhouse on track 17 at 7:00 AM

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	7:35 AM	Ore	1	Thawhouse 17	Scales & Weighed
"	8:15 AM	"	1	Scale	
"	8:40 AM	"	1	Main Track	
3/20/44	10:38 AM	Empty	1	Track 10 Up	
"	4:40 PM	"	1	Scale Track	

Switching Charges:

Intraplant: None

Light Weigh: "

1968

15

Car Initial & Number
D&RGW 70485 Dump

	Date	Contents	Via
Car in:	3/17/44	Coke	D&RGW
Car out:			
Origin:	Cokedale, Colo.		
Destination:	Leadville, Colo.		
Commodity:	Coke		

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	9:00 AM	Coke	2	Flat 1	Scales & Weighed
	9:40 AM		2	Scale	Trk 4

Switching Charges:

Intraplant: None

Empty Weigh:

1389

1969

16

Car Initial & Number
NYC 29017 Box

Date Contents Via
Car in: 3/18/44 Concentrates D&RGW (Carrier's records)

Car out:

Origin: Belden, Colo.

Destination: Leadville, Colo.

Commodity: Concentrates

3/17/44—This car, loaded with concentrates, was in the thawhouse on track 14 at 7 00 AM

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	7:23 AM	Concentrates	1	Thawhouse 14	Scales & Weighed
"	8:15 AM	"	1	Scales	Main Track
"	8:23 AM	"	1	Main Track	Track 9
"	3:10 PM	Empty	2	Track 9 North	Scales & Weighed
"	3:10 PM	"	2	Scale	Flat 5

Switching Charges:

Intraplant: None

Light Weigh: "

1970

17

Car Initial & Number
PRR 56867 Box

Date Contents Via
Car in: 3/17/44 Concentrates D&RGW

Car out:

Origin: Telluride, Colo.

Destination: Leadville, Colo.

Commodity: Concentrates

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	9:00 AM	Concentrates	2	Flat 1	Scale & Weighed
	9:30 AM	Load	2	Scale	Thawhouse 12
3/20/44	9:10 AM		1	Thawhouse 12	Scale & Weighed
	9:23 AM		1	Scale	9 North
	12:55 PM	(Sample Ore)	1	9 North	4 UP
	2:11 PM	Empty	1	4 UP	Trk 7
	"		2	Trk 7	Trk 4
	2:45 PM		2	Trk 4	Scale & Weighed
	3:50 PM		1	Scale	Bullion Trk

Switching Charges:

Intraplant: None

Empty Weigh:

1971

18

Car Initial & Number
AS&R 177 Dump

INTRA PLANT MOVEMENT ONLY

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/17/44	1:15 PM	Load	1	Trk 9	Scales & Weighed
		?	?	Scale	Ore House 3
3/18/44	2:50 PM	Empty	2	Ore House 3	Trk 9
3/20/44	2:00 PM	Part Load	2	Trk 9	Oversize Chute 9

Switching Charges:

Intraplant—\$2.97 on Bill No. 31405 of 3/20/44—From T. H. to Scales on 3/17/44

2.97 on Bill No. 31406 of 3/21/44—From Scales to 9 on 3/17/44

1972

19

Car Initial & Number
AT&SF 168729 Gon

Date	Contents	Via
3/18/44	Cans	D&RGW

Car out:

Origin: Denver, Colo.

Destination: Leadville, Colo.

Commodity: Cans

Switching Performed:

Date	Time	Contents	Assignment No.	From	To
3/18/44	2:05 PM	Load	2	Flat 1	Scales & Weighed
	About				
	2:15 PM		2	Scale	Trk 3
	About				
3/20/44	2:30 PM	Empty	2	Trk 3	Scales & Weighed
3/20/44	3:00 PM		2	Scale	Flat 5

Switching Charges:

Intraplant: /None

1973

Exhibit No. 35

I. C. C. EX PARTE 104 PART II INVESTIGATION
 AMERICAN SMELTING AND REFINING COMPANY
 Leadville, Colorado Smelter

Exhibit No. 35

Page No.

Witness

STATEMENT SHOWING INCOMING SHIPMENTS FOR 12 MONTHS PERIOD ENDING WITH MAR. 31, 1944

(Arrival dates at smelter determine whether shipment included in year reported)

Carloads Received

Plant Location Where Unloaded

Name of Commodity	Colorado	Interstate	Total No.	Name	Plant
MATERIALS & SUPPLIES, viz.:	Origin	Origin	Carloads		Map Coordinate
Acid, Sulphuric	3	12	15	Acid Furnace	F-9
Brick, Red Common	2		2	#1 Thaw House	E-8
" Special Stack		3	3	South Cottrell Track	E-8
Coal, Slack	10		10	Bullion Room	H-9
" "	35		35	Boilers (Bin 6)	H-10
" "	11		11	#2 Thaw House	F-7
" "	3		3	Acid Furnace	E-9
" "	6		6	Stock Track 8	G-9
" "	15		15	Stock Old Bullion	G-6, H-7
" "	1		1	Stock Track 10	F-7
" "	1		1	Stock Track 1	G-6
" Lump	5		5	Shed	G-11
" Anth. Dust	6		6	Bin 1	H-9
" "	3		3	Stock Old Bullion	G-6, H-7
Coke	310		310	Bin 2	H-9
" "	1		1	Bin 3	H-9
" "	13		13	Stock Flat	C-5, D-5
Coke Breeze	83		83	Track 9 Hopper	G-8
" "	11		11	Stock Track 5-6	H-7, H-8
" "	17		17	Stock Track 1	G-7
" "	35		35	Stock Track 9-11	G-6
" "	1		1	Stock New Track	G-6
" "	1		1	Stock Blast Furnace Hopper	H-9
" "	1		1	Stock Old Bullion	H-7
Coke, Salamander	2		2	Mixer	G-7
Iron, Scrap	13		13	Bin 7	H-10
" "	12		12	Bin 5A	H-10
" "	81		81	Bin 1	H-9
" "	4		4	Track 8-10	G-11
" "	1		1	Hopper	H-9
" "	3		3	Bin 13	H-9

1391

1974

I. C. C. EX PARTE 104 PART II INVESTIGATION
AMERICAN SMELTING AND REFINING COMPANY
 Leadville, Colorado Smelter

Exhibit No.
 Page No.
 Witness

STATEMENT SHOWING INCOMING SHIPMENTS FOR 12 MONTHS PERIOD ENDING WITH MAR. 31, 1944

(Arrival dates at smelter determine whether shipments included in year reported)

Carloads Received

Plant Location Where Unloaded

Name of Commodity	Colorado Interstate Total No.			Name	Plant	
	Origin	Origin	Carloads		Map	Coordinate
MATERIALS & SUPPLIES, cont.						
Merchandise, general (Note 1)	9		9	Boiler Track in front of warehouse	H-10	
Oil, Diesel Fuel	3		3	Track 8 Tank	G-10	
Sand	2		2	Matte crane shed	H-10	
Sulphur, commercial	1		1	Shed	G-11	
RAW MATERIALS, viz.:						
Limerock	279		279	Track 10	F-8	
"	4		4	Furnace Hopper	H-9	
"	1		1	Platform	F-9	
"	19		19	Stock Track 1	G-7	
"	17		17	Stock Track 3	H-11	
"	2		2	Stock Track 11	F-8	
"	2		2	Flat	G-7	
"	8		8	1 No. & 2 South	G-7	
"	1		1	Stock Track 2	G-7	
Alta Mines, Inc. Concentrates	31		31	Track 9 Belt	G-7, G-8	
Amarillo, Plant, Residue		21	21	" " "	G-9, G-10	
Aspen Leases, Crude	52		52	Crushing Mill	F-9, G-9	
Belle Eldridge, Concentrates		3	3	Track 9 Belt	G-7, G-8	
Blackwell Zinc Co., Residue		20	20	Track 9 Belt	G-9, G-10	
Denver Equipm't Co., Concentrates	64		64	" " "	G-7, G-8	
Emperius Mining Co., "	121		121	" " "	" "	
Globe Plant, Residue	80		80	" " "	G-9, G-10	
Golden Cycle Con'n, Concentrates	96		96	" " "	G-7, G-8	
Hawkeye Mine, Crude	15		15	Crushing Mill	F-9, G-9	
Highland Mary Mines, Inc., Con.	10		10	Track 9 Belt	G-7, G-8	
Lark Mine, Crude	6		6	Crushing Mill	F-9, G-9	
Midnight Mining Co., Concentrates	11		11	Track 9 Belt	G-7, G-8	
New Jersey Zinc Co., "	93		93	" " "	" "	
A. M. Poston, Crude	2		2	Crushing Mill	F-9, G-9	
Red Mountain Mine, Crude	7		7	" "	" "	
Resurrection Mng. Co., Concen.	140		140	Track 9 Belt	G-7, G-8	
Rico Argentine Mng. Co., "	85		85	" " "	" "	

1392

1975

I. C. C. EX PARTE 104 PART II INVESTIGATION
AMERICAN SMELTING AND REFINING COMPANY
Leadville, Colorado Smelter.

Exhibit No.
Page No.
Witness

STATEMENT SHOWING INCOMING SHIPMENTS FOR 12 MONTHS PERIOD ENDING WITH MAR. 31, 1944

(Arrival dates at smelter determine whether shipment included in year reported)

Name of Commodity	Carloads Received			Plant Location Where Unloaded	
	Colorado	Interstate	Total No.	Name	Plant Map Coordinate
	Origin	Origin	Carloads		
RAW MATERIALS, cont.					
Shenandoah Dives Mng. Co., Concentrates		97	97	Track 9 Belt	G-7, G-8
Telluride Mines, Inc.		229	229	" " "	" "
Base Metals Corpn.		1	1	" " "	" "
Callahan Zinc-Lead Co., Crude		2	2	Crushing Mill	F-9, G-9
Commodore Mine, Crude		1	1	" "	" "
Ted Cooper,		1	1	" "	" "
Cresson Consol. Gold Mines, Crude		1	1	" "	" "
Gold Links Mine, Crude		4	4	" "	" "
Herron Bros., Concentrates		2	2	Track 9 Belt	G-7, G-8
Everett Hess & H. C. Pryor, Crude		1	1	Crushing Mill	F-9, G-9
Intermountain Iron & Metal Co., Scrap		1	1	" "	" "
Ore & Chemical Corpn., Concentrates		1	1	Track 9 Belt	G-7, G-8
Sand Springs Plant, Residue		1	1	" " "	G-9, G-10
U. S. Mint, Residue		1	1	" " "	" "
Ward United Mines Co., Con'trates		4	4	" " "	G-7, G-8
H. M. Williamson & Son,		3	3	" " "	" "
TOTALS	2,102	158	2,260		

NOTE 1: Cars average about 1 ton of less carload freight consisting in general of Machine Castings.

1976

Exhibit No. 36

Exhibit No. 36

Page No. 7

Witness:

I. C. C. Ex PARTE 104 PART II INVESTIGATION

AMERICAN SMELTING AND REFINING COMPANY

LEADVILLE, COLORADO SMELTER

STATEMENT SHOWING OUTGOING SHIPMENTS 12 MONTHS PERIOD ENDING WITH MARCH 31, 1944

(Bill of lading dates determine whether or not shipment included in year reported)

Name of Commodity	Carloads Shipped		Plant Location Where Loaded	Plant Map Coordinates
	Destinations Colorado Interstate	Total Carloads	Name	
Baghouse Dust	5	5	Baghouse	H-7 H-8
Matte and Speiss	62	62	Crushing Mill	F-9 G-9
Lead-Bullion	409	409	Bullion Room	H-9
		476		

1394

1977

Exhibit No. 37

Exhibit No. 37

Page No.

I. C. C. EX PARTE 104 PART II INVESTIGATION

AMERICAN SMELTING AND REFINING COMPANY
LEADVILLE, COLORADO SMELTER

ANALYSIS OF SWITCHING AND WEIGHING CHARGES INCURRED FOR WORK PERFORMED BY RAILROAD
DURING 12 MONTH PERIOD ENDING MARCH 31, 1944

Federal Transportation Tax NOT Included

Applies only on shipments originating outside of or shipped to points located outside the State
of Colorado

Name of Commodity

Switching movement or connection with line haul traffic

NONE

SUMMARY

NONE

1395

1978

Exhibit No. 38

Page No.

I. C. C. Ex PARTE 104 PART II INVESTIGATION
AMERICAN SMELTING AND REFINING COMPANY
LEADVILLE, COLORADO SMELTER

ANALYSIS OF SWITCHING AND WEIGHING CHARGES INCURRED
FOR WORK PERFORMED BY RAILROAD DURING 12 MONTH
PERIOD ENDING MARCH 31, 1944

Federal Transportation Tax NOT Included

Applies only on shipments originating within or shipped to
points within the State of Colorado

Name of Commodity *Switching movement in connection with line haul traffic*
Rate \$2.97 per car

	<i>No. C/L's</i>	<i>Amount</i>
Cars containing 2 or more lots	81	\$ 240.57

S U M M A R Y

<i>Line Haul Traffic</i>	<i>No. C/L's</i>	<i>Amount</i>
Switching @ \$2.97	81	\$ 240.57
TOTAL LINE HAUL	81	\$ 240.57
Intra-plant @ \$2.97 per car	3,706	11,006.82
GRAND TOTAL INTRASTATE	3,787	\$11,247.39

NOTE 1: "Switching rates higher than these listed above were in effect during the 45 day period ending with May 15, 1943 due to application of Ex Parte No. 148 increases which amounted to 6%."

NOTE 2: "Switching and weighing rates shown herein are contained in D&RGW freight tariff No. 6600-D, I. C. C. 736, C. P. U. C. 378"

1980 Exhibit H-5 (Civil No. 1324)

UNION PACIFIC RAILROAD COMPANY

John A. Bennewitz,

Elmer B. Collins,

W. H. House,

Dana T. Smith,

Asst. Western Gen. Counsel

C. B. Matthal

Asst. General Solicitor

T. W. Bockes,

Western General Counsel

T. F. Hamer,

General Solicitor

W. H. Fitzpatrick,

J. C. Holdrege,

F. J. Mella,

General Attorneys

Charles F. Bongardt,

R. B. Hamer,

Asst. General Attorneys

Omaha, Nebraska

93

CC 2660

June 3, 1944

Hon. W. P. Bartel, Secretary
Interstate Commerce Commission
Washington 25, D. C.

Dear Sir:

Re: *Ex Parte* 104

PRACTICES OF CARRIERS AFFECTING
OPERATING REVENUES AND EXPENSES
PART II, TERMINAL SERVICES

Pursuant to directions of Examiner Leonard Way at hearings at Denver in the above-entitled proceeding I enclose three copies of agreement between D&RGWRCo and LA&SLRRCo, and agreement between OSLRCo and D&RGWRCo covering joint switching service at smelter plants of American Smelting and Refining Company, and United States Smelting, Refining and Mining Company, at Garfield, Midvale and Murray, Utah.

Examiner Way directed that copies of these documents be furnished within ten days from May 26. Copies are being sent to other parties of record as shown below.

Yours very truly,

Original Signed

ELMER B. COLLINS

cc—Mr. John F. Finnerty, Counsel

American Smelting & Refining Co.

120 Broadway, New York, N. Y.

Mr. Omar O. Victor, GTM

U. S. Smelting, Refining & Mining Co.

Salt Lake City, Utah

Mr. Chas. A. Root, Public Service Commission

Salt Lake City, Utah

Public Service Commission, Denver, Colo.

Mr. Walter M. Campbell, D&RGWRR,

Denver, Colorado

1981 In the Supreme Court of the United States

No. 173

*Appellants' Statement of Points to be Relied Upon and
Designation of the Record to be Printed—*

Filed Aug. 5, 1949

Come now the appellants and say that they will rely in brief and oral argument before this court on the points made in their assignments of errors on their appeal in the above-entitled causes.

Appellants further state that the entire record in these causes, as filed in this court pursuant to praecipe of transcript of record, is necessary for consideration of the points specified above, and is designated for inclusion in 1982 the printed record, with the exception of the following portions which are requested to be excluded from the printed record.

Please omit from the printed record in *United States Smelting, Refining and Mining Company, et al. v. United States and Interstate Commerce Commission*, Civil Action No. 1524, the following portions of the record:

Briefs of U. S. Smelting Company and Union Pacific and Denver & Rio Grande Railroads, two briefs, before the Interstate Commerce Commission in proceedings here involved; filed October 15, 1944, as offered by plaintiff in C. A. No. 1325 as a part of Plaintiffs' Exhibit H-1, said briefs not being designated as Appendices or Exhibits.

Stenographer's minutes before the I. C. C., transcript of oral argument by Alderson Reporting Company at Washington, D. C., on May 3, 1945, a part of Plaintiffs' Exhibit H-1 in C. A. No. 1325, not designated as an Appendix or Exhibit.

I. C. C. order for oral argument dated June 11, 1946, and stenographer's minutes before the I. C. C., transcript of argument by Electroreporter, Inc., at Washington, D. C., June 27, 1946, a part of Plaintiffs' Exhibit H-1 in C. A. No. 1325, not designated as Appendices or Exhibits.

I. C. C. report of October 14, 1946 [266 I. C. C. 476] and order of same date, a part of the I. C. C. records offered by plaintiffs in C. A. 1325 as Exhibit H-1, not designated therein as Appendices or Exhibits.

Appendix "B" to plaintiffs' complaints in C. A. No. 1325 [R. p-1], I. C. C. report in original proceedings

of *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services* [209 I. C. C. 11]. This report is more than

50 printed pages in the Official I. C. C. Reports, and has been considered by the court in a number of previous cases, for which reason it is believed inclusion in the printed record would be an unnecessary burden, particularly since the report may be referred to as appearing in the Official Commission Reports.

Appendix "C" to complaint of plaintiffs in C. A. No. 1325 [R. p-1], large map of Midvalle plant which cannot be reproduced in the printed record, and may be referred to and considered as part of the unprinted record in the clerk's office.

Exhibit 1 to the I. C. C. record offered by plaintiffs in C. A. No. 1325, as part of plaintiffs' court Exhibit H-1, large map and legend of Midvalle plant, the same as Appendix "C" to plaintiffs' complaint. It is impracticable to include this map in a printed record.

Please omit from the record in *American Smelting & Refining Company v. United States and Interstate Commerce Commission*, Civil Action No. 1525 the following portions of the record:

Plaintiffs' Ex. H-3 and H-4 to C. A. No. 1324.

Stenographer's minutes of oral argument before the I. C. C., at Washington, D. C., on June 27, 1946, a part of Plaintiffs' Exhibit H-2 in C. A. No. 1324, not designated as Appendices or Exhibits.

Plaintiffs' Exhibit B-3, filed in C. A. No. 1324, brief of American Smelting Company before the I. C. C., filed November 1, 1944, [R. p-71].

Plaintiffs' Exhibit B-5, filed in C. A. No. 1324, supplemental memorandum before the I. C. C., filed May 31, 1945, [R. p-73].

Plaintiffs' Exhibits N-3, [R. p-147], N-4, [R. p-148], N-6, [R. p-150], and N-7, [R. p-151], filed in C. A. 1525, which are duplicates of I. C. C. reports of October 1, 1945, and October 14, 1946, order of October 14, 1946, and findings of fact, conclusions of law, and order of the Court, which otherwise appear in the record.

The following exhibits to the I. C. C. record, offered by plaintiffs in C. A. 1324 as Ex. H-2; Ex. 1, a large map of the Garfield plant; Ex. 2, map of the D. & R. G. R. railroad system; Ex. 3, map of Garfield Smelting Yard; Ex. 17, large map of Murray plant; Ex. 18, small map of Murray plant; Ex. 26, large picture of

Garfield plant; Ex. 31, large picture of Murray plant; and Ex. 32, large map of Leadville plant. It is practically impossible to reproduce these exhibits in the printed court record, and this evidence can be made available to the court and to counsel only as a part of the unprinted record in the clerk's office.

Reporter's transcript [corrected transcript] of proceedings before the U. S. District Court for the District of Utah, Central Division, Civil Actions Nos. 1524 and 1525 of October 18, 1948. Please include in the printed record only the following pages; pages 2-11, inclusive; pages 14, 15, and 16; pages 38-43, inclusive; pages 56 and 57; pages 91-94, inclusive; and pages 127 to 133, inclusive.

Respectfully submitted,

PHILIP B. PERLMAN,
Philip B. Perlman,
Solicitor General.

HERBERT A. BERGSON,
Herbert A. Bergson,
Assistant Attorney General.

W. D. MCFARLANE,
W. D. McFarlane,
*Special Assistant to the
Attorney General.*

For the United States of America.

DANIEL W. KNOWLTON,
Daniel W. Knowlton,
Chief Counsel.

ALLEN CRENSHAW,
Allen Crenshaw,
Assistant Chief Counsel.

For Interstate Commerce Commission.

I certify that service of a copy of the statements of points to be relied upon and designation of the record to be printed, has been served upon the counsel for all parties to the actions herein, as appears below by mailing a copy thereof to each such counsel on the 4th day of August, 1949.

John F. Finerty, Esq., 120 Broadway, New York 5, N. Y.
Attorney for American Smelting & Refining Company;
Paul B. Cannon, Esq., Cheney, Jensen, Marr & Wilkins,
120 Continental National Bank Bldg., Salt Lake City,
Utah,

Attorney for United States Smelting, Refining and
Mining Company;

- Otis J. Gibson, Esq., Denver & Rio Grande R. R. Bldg.,
Denver, Colorado,
Attorney for Denver & Rio Grande Western Railroad
Company;
- W. Q. Van Cott, Esq., Walker Bank Building, Salt Lake
City, Utah,
Attorney for Denver & Rio Grande Western Railroad
Company;
- H. B. Thompson, Esq., Union Pacific Building, Salt Lake
City, Utah,
Attorney for Union Pacific Railroad Company;
- Grover A. Giles, Esq., Attorney General of the State of
Utah, State Capitol, Salt Lake City, Utah,
Attorney for the State of Utah;
- H. Lawrence Hinkly, Esq., Attorney General of the State
of Colorado, State Capitol, Denver, Colorado,
Attorney for the State of Colorado;
- Quinton L. R. Alstrom, Esq., Salt Lake City, Utah,
Attorney for the Public Service Commission of the
State of Utah;
- Joseph W. Hawley, Esq., 318 State Office Bldg., Denver 2,
Colorado,
Attorney for the Public Utilities Commission of the
State of Colorado;
- Mitchel Malich, Esq., Kearns Building, Salt Lake City,
Utah,
Attorney for the Utah Mining Association;
- Henry S. Sherman, Esq., 514 Equitable Building,
Denver, Colorado,
Attorney for the Colorado Mining Association;
- Covington, Burling, Rublee, O'Brien and Shorb,
Attorneys,
Union Trust Building, 15th & H. Streets, N. W.,
Washington, D. C.

ALLEN CRENSHAW,

Allen Crenshaw,
Assistant Chief Counsel.
Interstate Commerce Commission.

1987 In the Supreme Court of the United States
No. 173

*Designation by Appellees of Additional Parts of the Record
to be Printed—Filed October 12, 1949.*

To Charles Elmore Cropley, Esq., Clerk, Supreme Court
of the United States.

The several appellees, by their respective attorneys, herewith designate additional part of the record for printing, considering them material in the above proceedings.

1. That portion of the transcript of the consolidated hearing before the Statutory Court in the District Court of the United States for the District of Utah, Central Division, held June 18, 1947, in Civil Actions 1988 Nos. 1324 and 1325, beginning with the fifth line on page 5 of said transcript and continuing to and including the first line on page 46 thereof. (This transcript is that specified in the stipulation amending praecipe filed in the District Court for the District Court of Utah on September 9, 1949).

2. Pages 12 and 13, and page 17 of the reporter's corrected transcript of hearing of October 18, 1948 before the Statutory Court in said United States District Court for the District of Utah, Central Division in Civil Actions Nos. 1524 and 1525. (The pages here designated are in addition to those designated in the last paragraph of appellants' designation of the record to be printed.)

OTIS J. GIBSON

Otis J. Gibson, *Attorney for*
Denver and Rio Grande Western
Railroad Company

ELMER B. COLLINS

Elmer B. Collins, *Attorney for*
Union Pacific Railroad Company

JOHN F. FINERTY

John F. Finerty, *Attorney for*
American Smelting and Refining
Company.

C. A. HORNBY

C. A. Hornby, *Attorney for*
United States Smelting, Refining
and Mining Company.

Copies to

Allen Crenshaw, Esq.,

Attorney for Interstate Commerce Commission

Herbert A. Bergson, Esq.,

Assistant Attorney General, Department of Justice

1990

Supreme Court of the United States

No. 173, October Term, 1949

*Order Noting Probable Jurisdiction—Filed October 10,
1949*

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 1525

AMERICAN SMELTING & REFINING COMPANY, THE
DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS

Civil No. 1524

UNITED STATES SMELTING REFINING AND MINING
COMPANY, THE DENVER AND RIO GRANDE WEST-
ERN RAILROAD COMPANY, AND UNION PACIFIC
RAILROAD COMPANY, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COM-
MERCE COMMISSION, DEFENDANTS

• CONSOLIDATED CAUSES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules
of the Supreme Court of the United States, defend-
ants-appellants, United States and Interstate Com-

merce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree of the district court entered in these causes, dated January, 7, 1949, and filed January 10, 1949. A petition for appeal was filed on March 7, 1949, and is presented to the district court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the final decree of the district court in these causes is conferred by the Judicial Code, as revised by the act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Sections 1253 and 2101(b), consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside orders of the Interstate Commerce Commission. The following decisions, appeals in which were taken pursuant to such prior provisions thus codified, sustain the jurisdiction of the Supreme Court to review the judgment of the specially constituted district court on direct appeal in these cases. *United States v. American Sheet & Tin Plate Company*, 301 U.S. 402; *United States v. Wabash R.R. Co.*, 321 U.S. 403; *United States v. Capital Transit Company*, 325 U.S. 357; *United States v. Pennsylvania Railroad Co.*, 326 U.S. 612; *Corn Products Refining Company v. United States*, 331 U.S. 790.

STATUTES INVOLVED

Section 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)), provides as follows:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.* (Italics supplied.)

THE ISSUES AND THE RULINGS BELOW

A statutory three judge district court for the District of Utah, by its final decree dated January 7, 1949, and filed January 10, 1949, set aside orders of the Interstate Commerce Commission, dated May 14, 1948,¹ requiring the railroads serving cer-

¹ The order assailed in No. 1525 was made in proceedings entitled *American Smelting & Refining Company, Ex Parte No. 104 (75th Supplemental Report)*, 270 I.C.C. 359, and related to plants of that company at Garfield and Murray, Utah, and Leadville, Colorado. The order assailed in No. 1524 was made in *United States Smelting, Refining & Mining Company, Ex Parte No. 104 (76th Supplemental Report)*, 270 I.C.C. 385, and related to the plant of that company at Midvale, Utah. Both proceedings constituted a continuation of a proceeding known as *Ex Parte No. 104, Practices of*

tain industrial plants of plaintiff smelting companies to cease and desist from furnishing, without appropriate charges therefor in addition to the rates for line-haul transportation, certain switching and car-spotting service within said plants in excess of the carriers' line-haul transportation obligation as determined by the Commission. The Commission found that the furnishing of such service by the carriers was a violation of Section 6(7) of the Interstate Commerce Act and ordered the carriers to cease and desist therefrom.

The district court held that the evidence did not support the determination made by the Commission with respect to the points where industrial interruption or interference was experienced and the line-haul transportation ended. The district court held that the interchange tracks at each plant, which the Commission found to be the respective points where line-haul transportation ended, and intra-plant service began, were in fact used by the

Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, in which a report, dated May 14, 1935, 209 I.C.C. 11, set forth certain standards for determining the amount of terminal switching service which may properly be performed by carriers under their line-haul rates. In numerous supplementary reports the general principles there laid down have been applied to the fact situations and operating conditions found to exist at various industrial plants.

The orders of May 18, 1948, are substantially identical with prior orders of October 14, 1946, which were assailed in prior suits (Civil Nos. 1324 and 1325), wherein the court in a decision rendered November 14, 1947, temporarily enjoined the orders of October 14, 1946, and remanded the cases to the Commission for further proceedings "upon a new theory" (in accordance with *Securities & Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 196) and "for such action as it may find justifiable in the premises." The Commission on December 5, 1947, reopened the proceedings for reconsideration on the existing record. Pursuant to such reconsideration it rendered its reports of May 18, 1948, upon which the new orders of that date were based.

carriers as part of their railroad yard facilities, utilized for the performance of carrier functions, and that the shippers were entitled to an additional placement of cars beyond such points. In so holding the district court substituted for the Commission's determination of an administrative question the court's own appraisal of the same facts.

The principal question decided by the district court, however, was whether as a matter of law the Commission's findings supported its order to cease and desist from violation of Section 6(7) of the Act.² The district court held that they did not; that it was not enough for the Commission to determine the points at each plant where line-haul transportation begins and ends, in order to forbid as a violation of Section 6(7) the rendition of service beyond such points without compensation in addition to the rate for line-haul transportation; but that it is also necessary for the Commission to make a finding that the level of the line-haul rate was not sufficiently high to include compensation for the additional service rendered in excess of line-haul transportation. In so deciding, the district court held that the Commission was required to make a finding upon a subject with respect to which the Commission was not required to admit evidence.³

² In the conclusions of law prepared by plaintiffs and adopted by the district court, it is also held that the Commission's orders violate Sections 1(5)(a) and 3(1) of the Act, and that findings under Section 6(1) are necessary in order to require carriers to state line-haul and terminal switching charges separately. Appellants regard reference to these sections as extraneous to the issues involved in the case at bar, although the making of these conclusions of law constitutes error and is assigned as such.

³ The Commission's ruling that evidence on that subject should be excluded as irrelevant was judicially sustained in

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district court's decision is not only clearly erroneous, but could be productive of injurious consequences to the public. That decision would necessitate turning every *Ex Parte No. 104* case into a rate case. This would add further and tremendously burdensome obstacles to those already encountered by the Commission⁴ in the performance of its duty "to proceed as rapidly as may be to suppress violations of § 6(7) in the performance of switching services." *United States v. Wabash Railroad Co.*, 321 U.S. 403, 413. The district court's decision would not only transform every terminal service case into a rate case, but into a rate case depending upon obscure and subjective criteria, involving the psychological processes and undisclosed intent of railroad traffic officials. The Commission and the courts have always hitherto held that the determination of where a carrier's line-haul transportation ends at a particular industrial plant is a question to be determined by scrutiny of the physical facts and operating conditions at the plant, without the intrusion of competitive and bargaining considerations which might influence the judgment of a traffic official with respect to the level of rates deemed desirable or obtainable.⁵ The task which

Corn Products Refining Co. v. United States, 331 U. S. 790, the latest Supreme Court decision dealing with an order of the type involved in the case at bar.

⁴The Commission has often commented on the lack of cooperation by carriers and industries in establishing uniform practice and equality of treatment for all shippers with respect to terminal switching service. See 57th Annual Report of the Interstate Commerce Commission, pp. 58-59.

⁵As the Commission stated in its basic report of May 14, 1935 "what constitutes a carrier's duty . . . can readily be

the Commission ordinarily performs in a terminal service case is precisely that of correcting conditions which have arisen as a result of the natural pressure upon carriers' traffic officials to grant concessions to favored shippers controlling a large volume of business.

Performance by carriers for favored shippers of service in excess of that accorded to the public generally has long been recognized as an evil requiring the attention of regulatory and legislative authorities.* The adverse effect of such concessions in dissipating the carriers' revenues through the performance of services in excess of the carriers' legal transportation obligation seemed so widespread during the depression that the Commission of its own motion on July 6, 1931, instituted a proceeding known as *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, wherein it made a basic report on May 14, 1935, 209 I.C.C. 11. The Commission made no order on the basis of that report, but set forth therein certain standards for determining the amount of switching service which may properly be performed by carriers as part of their line-haul transportation obligation under their line-haul rates. In supplementary proceedings the general principles laid down in that basic report have been applied to

ascertained at any individual industry by experienced railroad operating men or committees if honestly performed without consideration of traffic reasons," 209 I.C.C. 11, at 38.

*The late Mr. Justice Brandeis, when counsel for the Interstate Commerce Commission in 1913-14, argued that a rate increase which the carriers were then seeking would be unnecessary if such preferential services accorded to certain favored shippers controlling a large volume of traffic were eliminated. Mason, *Brandeis: A Free Man's Life*, (1946) 341-342.

the physical facts and operating conditions found to exist at numerous industrial plants.⁷

The standards set forth in the Commission's basic report of May 14, 1935, in Ex Parte No. 104, 209 I.C.C. 11, were sustained in *United States v. American Sheet & Tin Plate Company*, 301 U.S. 42, decided in 1937. Since that time, in a long and unbroken line of judicial decisions following that case, the Commission's application of those standards to particular industrial plants has been uniformly upheld by the courts.⁸

As the result of these decisions; the general principle adhered to by the Commission and the courts is that line-haul transportation may or may not include car-spotting and switching service within an industrial plant to the point of loading and unloading cars; it includes such service if, and only if, the service can be performed at the carrier's ordinary operating convenience in a single uninterrupted movement. Where these conditions are not met, the carrier's transportation obligation under line-haul rates ends at the point where industrial interruption or interference due to plant operations is experienced. The precise determination of the point in time and space where line-haul transportation begins and ends is a function entrusted by law to the Commission.⁹

⁷ The orders involved in the case at bar were based upon the 75th and 76th of such Supplemental Reports.

⁸ The most recent decisions sustaining the Commission's determinations with respect to the point where line-haul transportation begins and ends at particular industrial plants are *United States v. Wabash Railroad Company*, 321 U. S. 403; *Corn Products Refining Company v. United States*, 331 U. S. 790, and *Anaconda Copper Company v. United States*, 77 F. Supp. 611 (D. Mont., 1947).

⁹ A clear statement of the applicable law is given by the late Mr. Chief Justice Stone in *United States v. Wabash Railroad Co.*, 321 U. S. 403, 407-412.

With respect to each of appellee's smelting plants involved in the instant proceedings, the Commission has made such a determination of the respective points within each plant where line-haul transportation begins and ends.¹⁰ Consequently the performance by the carriers serving such plants of service in excess of the line-haul transportation obligation as so determined by the Commission constitutes the performance of industrial or intraplant service, not a part of the line-haul transportation covered by the line-haul rate. Accordingly the performance of such excess service, in the absence of an appropriate charge therefor in addition to the rate for line-haul transportation, is *ipso facto* an unlawful rebate and constitutes a violation of Section 6(7) of the Interstate Commerce Act. Therefore, the Commission has power to order the discontinuance of such service, and its cease and desist orders in the case at bar are valid and should be upheld on judicial review.

Appellees in their attack on the Commission's orders with respect to their plants originally advanced only two grounds of distinction upon which they relied to escape the effect of the line of authorities uniformly sustaining the Commission's determinations made in terminal service cases. These points were (1) that here the tariffs themselves recite that the rate shall cover the service furnished, and (2) that here the rates vary in accordance with the value of the commodity transported, which can be determined only after sampling, and that therefore such switching in excess

¹⁰ Appellants submit that such determinations are abundantly supported by substantial evidence of record, and that the district court erred in holding to the contrary.

of line-haul transportation as is furnished before completion of the sampling process is necessary in order to enable the carriers to compute the transportation charges. Both these circumstances were present in a companion case, *Anaconda Copper Company v. United States*, 77 F. Supp. 611 (D. Mont., 1947), which was decided in favor of the Commission by another three-judge court during the pendency of the instant litigation.¹¹ With respect to the second of the above points, it should be noted that in both the *Anaconda* case and the case at bar the tariffs provide that it is the duty of the shipper to certify the value of the ore after sampling, and that the carriers shall accept the value so certified. Obviously, therefore, the carriers are under no legal obligation to furnish without additional charge the excess transportation here condemned by the Commission.

Furthermore, with respect to the first alleged ground of distinction, the fact is that in the *Tin Plate* case in 1937 the same argument was advanced which appellees here rely upon. The allowances made to the shippers in that case were published in tariff form. The mere publication in tariff form does not excuse disregard of the Commission's determination with respect to the permissible amount of switching service which may be performed as a part of line-haul transportation. A violation of law by a carrier furnishing to favored shippers switching service in excess of its legal obligation is not cured or legalized by the fact that the carrier makes a public announcement plainly stating its intention to commit such a violation of law. Publication in tariff form of the

¹¹ No appeal was taken by the industry from the decision upholding the Commission's order.

carrier's purpose to accord such favored treatment cannot clothe the unlawful practice with immunity. *Merchants Warehouse Company v. United States*, 283 U. S. 501, 511; *B. & O. Railroad Co. v. United States*, 305 U. S. 507, 525-26.

If the appellee smelting companies were to be permitted to enjoy the preferential position with respect to the public generally which is accorded them under the district court's decision, great injustice and unfairness would result to other shippers, and especially to the unsuccessful litigants in all previous cases involving *Ex Parte No. 104* orders. This would be particularly true with respect to the *Anaconda Copper* case above referred to, which involved an industry competitive with the appellees here. Moreover, the same questions were presented as are presented here, except that the *Anaconda Company* had a stronger case on the facts with regard to its plant than the smelting companies do here. The *Anaconda* case thus applies *a fortiori* in every respect to the case at bar.

After the Commission's orders on reconsideration were issued in the instant proceedings, in which the Commission clarified its prior reports by making clear that it based its decision upon *Ex Parte No. 104* principles and not upon a determination with respect to the level of the line-haul rates, appellees argued that the absence of a finding as to the rate level was a fatal defect, and sought to distinguish the case at bar from prior terminal service cases upon that ground. But the fact is that in the *Corn Products* case¹² there was no finding with respect to the rate level, and indeed the Commission was sustained in ruling that evidence with respect to the question whether or not

¹² 331 U. S. 790.

the level of the line-haul rate had been made sufficiently high to include compensation for terminal service in the Chicago Switching District should be excluded as irrelevant. The appellant in that case raised, to no avail, every argument upon which appellees here rely.

It is thus evident that important issues, involving the administration of the Interstate Commerce Act so as to provide uniform practice with respect to switching service and equality of treatment for all shippers, have been erroneously decided by the district court and are raised on this appeal. It is accordingly submitted that substantial questions are involved which call for the appropriate exercise of appellate jurisdiction.

Dated March 3, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,

HERBERT A. BERGSON,
Assistant Attorney General;

EDWARD DUMBAULD,
Special Assistant to the Attorney General,

DANIEL W. KNOWLTON,
Chief Counsel,

ALLEN CRENSHAW,
Attorney,
Interstate Commerce Commission.

FILED: U. S. District Court.
March 7, 1949.

**IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF UTAH**

No. 1524 Civil

D. & R. G. W. R. R. ET AL., PLAINTIFFS,

vs.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS**

No. 1525 Civil

BINGHAM & GARFIELD RAILWAY, PLAINTIFF,

vs.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS**

Before Judges Phillips, Kennedy and Johnson.

**At Federal Building, Salt Lake City, Utah,
Monday, October 18, 1948.**

Opinion of the Court, stated by Judge PHILLIPS:

THE COURT: The Court reaffirms and remakes the findings of fact numbered 1, 2, 3, 4 and 5 in its order in the other cases; that is, its order in 1324 and 1325, civil.

The Court further finds that upon this record it must find and presume that the charges in the tariffs cover the services rendered beyond the points designated by the Commission as the end of the line haul in the three yards. Those points are designated in the order of the Commission as the "plant yard" at Garfield, the "hold tracks" at Murray, and the "flat yard" at Leadville.

The Court further finds, that there is no basis in the record for a finding by the Commission that the furnishing of the services referred to beyond the points above designated constitute either free services or constitute a rebate or violation of Section 6, Paragraph 7.

The Court further finds, that the plant yard at Garfield, the hold tracks at Murray, and the flat yards at Leadville are used by the railroads as terminal facilities; that is to say, are used as any terminal is used by a railroad where it brings the cars into the terminal for the purpose of further disposition to the consignee and that the evidence does not support the finding of the Commission that the line haul terminates at the plant yards, the hold tracks and the flat yards, for the reason that the shipper is entitled to an uninterrupted service beyond that point to a convenient point of delivery.

The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul, and a separate specific charge for switching services beyond the end of the line haul, and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.

We conclude, as a matter of law, that the evidence in this case does not support a finding of a violation of Sec. 6, Paragraph 7, of the Act, or a basis for an order to cease and desist from a violation of the provisions of that section.

I don't know whether the case is ripe for a permanent injunction, Gentlemen.

Mr. FINERTY: May I say a word on that?

THE COURT: I will hear from both of you.

Mr. FINERTY: I filed a motion when the court entered a temporary injunction in the old case, pointing out that under Section 47, Title 28, the court could only enter a temporary injunction pending determination of the issues before the court, and that after those issues had been determined a final injunction might be issued; though there might be a remand under the former injunction.

THE COURT: I assume there is no objection to a permanent injunction, because the whole case is before the court, isn't it?

Mr. CRENSHAW: I couldn't bind the Commission without reporting and a recommend to the Commission with reference to an appeal, and have the Commission decide what it wants to do.

THE COURT: It occurs to me, Gentlemen, that the case is fully submitted. All of the facts are clear.

Mr. FINERTY: That is my opinion.

THE COURT: All of the legal arguments have been made that could be made on a final hearing, and I see no reason why we shouldn't grant a permanent injunction against the enforcement of the order. Perhaps my associates will want to suggest some additional findings.

JUDGE JOHNSON: Couldn't the gentlemen here stipulate that it is on the merits.

THE COURT: Will you stipulate that this hearing is on the merits?

Mr. FINERTY: I think actually, Judge Johnson, that was the intention at the start.

THE COURT: The record may show that both sides agree that the case may be disposed of as upon final hearing.

Mr. CRENSHAW: May I suggest that a permanent injunction would leave it open to the Commission to reopen in any case if they wanted to reconsider, if they thought they could conform to the court's requirements.

THE COURT: You mean a temporary injunction?

Mr. CRENSHAW: No; this one.

THE COURT: All right,—the court will grant a permanent injunction.

Mr. CRENSHAW: We tried to do what we understood the court wanted us to do as a commission.

THE COURT: We are not criticising you.

Mr. CRENSHAW: Mr. Finerty is correct, I suppose in saying we are just stupid.

THE COURT: You had your own good reason for taking this course, and we have no criticism.

Mr. DUMBAULD: It occurs to me that the Commission might wish to make findings under 6-1, if that would be of benefit, and I wondered whether your injunction would permit that?

THE COURT: They can still do that.

Mr. CANNON: In referring to the various yards I believe you omitted the "assembly yard."

THE COURT: What we have said in this case applies equally to your case, except that the yard in question, designated by the Commission as the end of the line haul is called the "assembly yard," and the same findings will be made in both cases, with that differentiation.

Now you gentlemen can prepare a permanent injunctive order.

Mr. DUMBAULD: Will that include findings, conclusions and decree and everything, in a formal way?

THE COURT: I think we have indicated what they ought to be, and you can prepare them in both cases.

Mr. CRENSHAW: I suggest that they be submitted in chambers.

JUDGE KENNEDY: You gentlemen will stipulate that we may sign these findings, conclusions and order at our respective places?

Mr. CRENSHAW: Yes.

Mr. FINERTY: If we could get about ten days—

Mr. CANNON: The order will be a consolidated order, as it was last time?

THE COURT: Yes. You will have to differentiate between those assembly yards and those places.

Mr. CANNON: Yes.

THE COURT: Court is in recess.

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

Civil No. 1525

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY,
and AMERICAN SMELTING & REFINING COMPANY,
PLAINTIFFS,**

vs.

**THE UNITED STATES OF AMERICA and the INTER-
STATE COMMERCE COMMISSION, DEFENDANTS**

Civil No. 1524

**UNITED STATES SMELTING REFINING AND MINING
COMPANY, a corporation, THE DENVER AND RIO
GRANDE WESTERN RAILROAD COMPANY, a corpora-
tion, and UNION PACIFIC RAILROAD COMPANY, a
corporation, PETITIONERS,**

vs.

**THE UNITED STATES OF AMERICA and the INTER-
STATE COMMERCE COMMISSION, DEFENDANTS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled causes, on stipulation of the parties, came on for final hearing on October 18, 1948, before a duly-convened statutory three-judge Court upon the application of the plaintiffs for orders to restrain and enjoin the carrying into effect of the respective orders of the Interstate Commerce Commission dated May 18, 1948, with respect to charges for terminal switching services involved in the transportation of carload freight to and from the smelters of the American Smelting & Refining Company and of the United States Smelting Refining and Mining Company, and all of the parties being represented by counsel and evidence having been introduced, briefs received, and

arguments made, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) On November 14, 1947, a prior statutory court duly convened in this District and consisting of the same judges constituting the present statutory court, issued in certain proceedings before it, designated as Civil Actions Nos. 1324 and 1325, a single consolidated order, temporarily enjoining certain respective orders of the Interstate Commerce Commission of October 14, 1946, made in the same proceedings before the Commission, in which were entered its respective orders of May 18, 1948, here sought to be enjoined. Such proceedings before the Commission were supplemental proceedings, respectively designated as "American Smelting & Refining Company" and as "United States Smelting Refining and Mining Company", under a general proceeding before the Commission entitled "Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services". In such general proceedings the Commission had previously issued a report, known herein as its basic report, 209 I.C.C. 11. Said prior statutory court, in addition to thus temporarily enjoining the Commission's respective orders of October 14, 1946, remanded to the Commission the respective supplemental proceedings in which such orders had been made, "for such action as it may find justifiable in the premises."

(2) The Commission's respective orders of October 14, 1946, thus temporarily enjoined, required the plaintiff carriers to cease and desist from certain alleged violations of Section 6 (7) of the Interstate Commerce Act in connection with the performance of terminal switching services in the transportation of carload freight to and from the smelters of the American Smelting & Refining Company at Garfield and Murray, Utah, and Lead-

ville, Colorado, and the United States Smelting Refining and Mining Company at Midvale, Utah.

(3) Such alleged violations of Section 6 (7), were based on findings set forth in the Commission's respective reports of the same dates as its respective orders, 266 I.C.C. 349 and 266 I.C.C. 476, and are herein incorporated by reference. Such findings were primarily confined to the terminal switching services at the respective smelters on inbound carload shipments of non-ferrous ores and concentrates handled under line-haul rates, based on the actual value of each carload and on destination weights. The Commission's respective orders extended, however, to carload shipments of all commodities, whether handled inbound or outbound at such smelters.

(4) Such findings were in substance, (a) that under the carriers' duly published tariffs, it is the duty and obligation of the respective smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values; (b) that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters, of carload freight by the plaintiff carriers; (c) that the transportation services, which it is the duty of the plaintiff carriers to perform under their line-haul rates, begin and end at such designated points; (d) that the line-haul rates of the plaintiff carriers do not include compensation for any terminal switching services beyond such designated points; (e) that the performance by the plaintiff carriers of terminal switching services beyond such designated points, without charge in addition to the line-haul

rates, constitute violations of Section 6 (7) of the Act.

(5) Such prior statutory court, in thus temporarily enjoining the Commission's respective orders of October 14, 1946, made the following findings of fact with respect to each such order:

"(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants.

(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary.

(4) That in view of the decision of the Commission in Ex Parte No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under Ex Parte 104 in that the order made is not specifically based upon that authority."

In addition, such court made the following conclusions of law:

"(1) We conclude as a matter of law that in the state of the present record there is no

legal basis for the order issued by the Commission, and that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent powers to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in *Securities & Exchange Commission v. Chenery Corporation*, — U. S. —, June 23, 1947, and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this court."

Judge Phillips, in concurring in the findings and conclusions, stated:

"I join in the foregoing findings and in the disposition to be made of the cases, and desire to further indicate my views.

"The Commission found and determined that the 'plant yard' at Garfield, the 'hold tracks' at Murray, the 'assembly yard' at Midvale, and the 'flat yard' at Leadville constituted reasonable points for the delivery of cars of ore and receipt of empty cars at the smelters; and that line-haul outbound transportation begins and line-haul inbound transportation terminates at those points.

"I would find:

"(1) That such 'plant yard,' 'hold tracks,' 'assembly yard' and 'flat yard' have the physical characteristics of terminal facilities and are actually used by the railroad as terminal facilities.

"(2) That the line-haul transportation properly includes one uninterrupted switch placement, or customary and reasonable terminal services not 'in excess of that performed in simple switching or team-track delivery.'

"The challenged order is predicated on the finding that railroad companies 'line-haul rates do not include compensation' for switching services beyond the points where the Commission found line-haul transportation begins and terminates, and that such switching services were performed without compensation in addition to the line-haul rates, and were therefore unlawful.

"The order requires the railroads to establish reasonable and compensatory charges for all switching services rendered beyond the points where it held the line-haul transportation begins and terminates.

"I would further find:

"(1) That the only evidence in the record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the points where the Commission found the line-haul transportation begins and terminates, especially uninterrupted movements beyond such points.

"(2) That there is no evidence in the record to support a contrary factual conclusion.

"(3) That there is no evidence in the record to overcome the presumption that the railroads are not performing services gratuitously and that the tariffs do include compensation for movements beyond the points where the Commission found line-haul transportation begins and terminates.

"(See Interstate Commerce Commission vs. Chicago, Burlington & Quincy Ry. Co., 186 U. S. 320.)

"The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

"The question whether the Commission might require the railroad companies to file and publish new tariffs that provide separate and distinct charges for transportation services to and from the points where it found line-haul transportation begins and terminates, and additional and separate charges for switching services beyond those points, is not presented, and it is my view that we should not express any opinion with respect thereto.

"While for the reasons indicated I would hold the order illegal and permanently enjoin its enforcement, I will join in the order of remand."

(6) Neither the Commission nor the United States took any appeal from such order of the prior statutory court temporarily enjoining the Commission's respective orders of October 14, 1946, but the Commission, by its respective orders of December 5, 1947, vacated and set aside its respective orders of October 14, 1946, and reopened the respective proceedings before it for reconsideration of its respective reports and orders therein of October 14, 1946, "upon the present and existing record".

(7) Upon such reopening, the Commission held no further hearing, received no further evidence, and permitted no further briefs or argument, but on May 18, 1948 issued its respective orders, here sought to be enjoined, together with its respective reports, 270 I.C.C. 359 and 270 I.C.C. 385, containing new findings upon which such respective orders are expressly based, which findings are incorporated herein by reference. Such findings likewise relate primarily to the terminal switching services at the respective smelters on inbound carload shipments of non-ferrous ores and concentrates, handled under line-haul rates based on the actual value of each carload and on destination weights. The Commission's respective orders, however, extend to the terminal switching services on carload shipments of all commodities, whether handled inbound or outbound at such smelters.

(8) Such findings are substantially similar to the findings upon which the Commission had based its respective orders of October 14, 1946, except that such findings expressly eliminate any findings as to whether the line-haul rates are reasonable and do or do not include compensation for terminal switching services beyond the designated points. In this connection, the Commission's respective reports containing such findings, expressly state as to each of its said orders of May 18, 1948:

"It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in Ex Parte No. 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not

include compensation for switching within the plant areas."

In addition, the Commission's report involving the smelters of the American Smelting & Refining Company, expressly states:

"We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

(9) The Commission, in its respective reports of May 18, 1948, expressly disavowed any findings as to whether the switching charges in addition to the line-haul rates, now published in the tariffs of the plaintiff carriers for so-called interrupted switching movements beyond the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, are or are not reasonable and compensatory.

(10) On hearing of these proceedings the parties hereto, with the approval of this Court, stipulated that the entire records in the respective proceedings before the prior statutory Court in Civil Actions Nos. 1324 and 1325, should be considered incorporated by reference in the record of these proceedings as fully as if physically incorporated herein. The records in the prior proceedings, so incorporated herein, comprise among other things the entire evidence, including the exhibits, before the Commission in the respective proceedings before it, which is the same evidence as that upon which the Commission made its respective prior findings and orders of October 14, 1946, and which evidence was held by the prior statutory Court to be insufficient to sustain such findings and orders.

(11) This Court reaffirms and remakes the findings of fact (1) to (5), inclusive, made by the prior statutory Court in temporarily enjoining the Commission's respective orders of October 14, 1946, in so far as such findings of fact relate to the evidence

before the Commission in the making of its respective orders of October 14, 1946, and in the making of its respective orders of May 18, 1948, here sought to be enjoined, and further in so far as such findings of fact of the prior statutory Court refer to the basis upon which the Commission made its respective orders of October 14, 1946.

This Court makes the following additional findings of fact with relation to the Commission's respective orders of May 18, 1948, here sought to be enjoined.

(12) There was no evidence before the Commission to support any of the findings upon which the Commission has based its respective orders of May 18, 1948, and the only evidence of record before the Commission was contrary to such findings and each of them.

(13) There was no evidence to support the Commission's findings that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the plaintiff carriers. On the contrary, the only evidence before the Commission was that such carriers, under the express provisions of their duly published tariffs, have for approximately fifty years delivered and received carload freight at actual points of unloading and loading at the respective smelters beyond such designated points, and have never delivered or received such freight at such designated points.

(14) That there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective plaintiff industries. On the contrary, the only evidence before the Commission was that the tracks at such designated points constitute the only available railroad terminal facilities of the plaintiff carriers for their ordinary railroad termi-

nal handling of carload freight to and from the respective smelters of the plaintiff industries, and, as such, are used in the same manner as any railroad terminal facilities are used by carriers generally, in bringing cars into their terminals for further disposition to consignees of inbound shipments, and for the assembling of outbound shipments into the carriers' road-haul trains.

(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. On the contrary, the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called "interrupted movements" incident to determining the value of inbound shipments of non-ferrous ores and concentrates.

(16) The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates, and that the presently effective tariffs at Leadville continue so to provide. Such evidence was further that while since July, 1938, such tariffs at Garfield, Murray and Midvale still provide that the line-haul rates include terminal switching of carload shipments to track scales and delivery to or receipt from any designated track within the plant which can be accomplished by one uninterrupted movement, such tariffs have, since July, 1938, provided certain charges in addition to the line-haul for terminal switching involving so-called "interrupted movements" resulting from orders from or requirements of the smelters.

(17) The Commission's respective orders of May 18, 1948, herein sought to be enjoined, nevertheless require the carriers to charge for all terminal switching services beyond such designated points, including switching movements incidental to the delivery and receipt of carload shipments at actual and customary points of loading and unloading at such smelters, even though no so-called "interrupted movements" be thereby involved and although neither under the Commission's basic report in Ex Parte 104, Part II nor in any other supplemental proceeding thereunder have charges in addition to the line-haul rates for terminal switching services been required except where so-called "interrupted movements" were thereby involved.

(18) The Commission, in its basic report in Ex Parte 104, Part II, 209 I.C.C. 11, p. 29, made the following general conclusions of law as to the extent of a carrier's legal obligation under its line-haul rates in operating over private industrial tracks in the delivery and receipt of carload freight:

△ "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not be any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co. v. Pennsylvania R. Co., supra.* Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6

of the Act. *American Exp. Co. v. United States, supra*; *Louisville & N. R. Co. v. United States, supra*."

In such basic report, the Commission then stated, p. 44 as follows, with reference to the character of the line-haul rates involved in its general investigation covered by such basic report, and the measure of compensation contained in such rates:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such case the carriers simply assumed a burden not previously borne."

The Commission then stated, pp. 44-45 of such report, the following general administrative principles for determining the extent of the obligation of a carrier, in reaching points of loading or unloading within a plant under line-haul rates, of the character involved in the general investigation upon which such report was based. The Commission there stated:

"When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix,

the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the Act.

"Generally the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

The Supreme Court of the United States, in *United States v. Wabash Railroad Co.* (*Staley Case*), 321 U. S. 403, in upholding such general administrative principles announced by the Commission, expressly recognized that the line-haul rates involved in the Commission's general investigation did not include compensation to the carriers for the performance of "spotting service", i.e., delivery to or receipt from actual points of loading or unloading within a plant. The Court there said, p. 406:

"After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charges by the carriers, the Commission found that the freight rates had

not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs." (Italics supplied)

(19) The Commission's respective orders of May 18, 1948, here sought to be enjoined are not based on the Commission's powers under Section 6 (1) of the Act to require the plaintiff carriers to state separately in their published tariffs their line-haul charges and their terminal charges, and the Commission in making its respective orders has made no order or findings under Section 6 (1) of the Act, although the ~~prior~~ statutory court by its order of remand expressly afforded the Commission an opportunity so to do.

CONCLUSIONS OF LAW

(1) It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services here involved at the respective smelters of the plaintiff industries.

(2) Under the conclusions of law made by the Commission in its basic report in Ex Parte 104, Part II, set out in Finding of Fact (18), which conclusions of law this Court adopts, it is therefore the obligation of the plaintiff carriers to perform the terminal switching services here involved without charges in addition to their line-haul rates, and in so performing such terminal switching services the plaintiff carriers do not violate Section 6 (7) of the Act.

(3) Since the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here involved, the Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect and the plaintiff in-

dustry to pay charges in addition to the line-haul rates for such terminal switching services, would require the carriers to collect and the industries to pay twice for the same services, and thereby would violate Section 1 (5) (a) of the Act, which requires that all charges for any service in the transportation of property, or in connection therewith, shall be just and reasonable, and which prohibits and declares unlawful any unjust and unreasonable charge for such service.

(4) The Commission by expressly disclaiming in its respective reports of May 18, 1948, any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating in its report in the American Smelting & Refining Company case its previous finding that the line-haul rates do not include such compensation, thereby deprived its respective findings of violations of Section 6 (7) of the Act and its respective orders to cease and desist from such alleged violations, of basic findings of fact essential to support such findings of violations of Section 6 (7) and its orders to cease and desist from such alleged violations.

(5) The Commission by thus expressly disclaiming any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating its former finding in the case of the American Smelting & Refining Company that such line-haul rates do not include such compensation, thereby rendered irrelevant under Section 6 (7) all other findings upon which the Commission based its respective orders of May 18, 1948.

(6) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to their line-haul rates for all terminal switching services beyond the points designated in the Commission's respective find-

ings, even though such terminal switching services beyond such designated points involve no so-called "interrupted movements", violate the general administrative principles determined by the Commission's own basic report in Ex Parte 104, Part II, quoted in Finding of Fact (18) of this Court, which administrative determination by the Commission was approved by the Supreme Court of the United States as within the Commission's administrative powers under Section 6 (7) of the Act, in, among other cases, *United States v. American Sheet & Tin Plate Company*, 301 U. S. 402; and *United States v. Wabash R. Co.*, (*Staley case*), *supra*.

Moreover such orders in requiring payment of charges in addition to the line-haul rates for all terminal switching services beyond the points designated in the Commission's findings even though no so-called "interrupted movements" be thereby involved, would thereby require the plaintiff industries to pay terminal switching charges from which all other industries have been expressly exempted by the Commission's orders in all other supplemental proceedings under Ex Parte 104, Part II, and would deprive the plaintiff industries of the right thereby available to all other such industries to avoid such additional terminal switching charges by eliminating such interrupted movements. Such orders therefore would result in undue prejudice against the plaintiff industries in violation of Section 3 (1) of the Act.

(7) Assuming that under the tariffs of the plaintiff carriers it is the duty of the plaintiff industries to certify to such carriers the values of inbound carloads of non-ferrous ores and concentrates, and that ordinarily carriers would be under no obligation to perform the terminal switching services necessary to enable industries to determine such values, it is nevertheless the obligation of the plaintiff carrier to perform such terminal switching services without charge in addition to their line-haul rates, since, on this record, it must be conclusively

presumed that compensation for such switching services included in such line-haul rates, and since under the Commission's own conclusions of law in Ex Parte 104, Part II, the measure of such compensation determines the extent of a carrier's lawful obligation under its line-haul rates.

(8) Since it must be conclusively presumed on this record that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here involved, the performance by such carriers of such terminal switching services without charges in addition to the line-haul rates cannot, as the Commission has found, result in the plaintiff industries' receiving a "preferential service not accorded shippers generally" or in any "refunding or remitting of a portion of the rates and charges collected" merely because the rates and charges for the line-haul services and for the terminal switching services are collected under blanket rates and charges which include compensation for both services, instead of by separate rates and charges for each service which contain compensation only for that service.

(9) The Commission's respective orders of May 18, 1948, cannot be construed as requiring the plaintiff carriers merely to state separately their line-haul charges and their terminal switching charges, since such orders are expressly based solely on Section 6 (7) of the Act, which section confers no such power upon the Commission, and since the Commission has made no findings under Section 6 (1) of the Act, under which section alone the Commission has power to require such separation of line-haul and terminal switching charges.

(10) While the Commission under Section 6 (1) of the Act would have power to require the plaintiff carriers to state separately in their tariffs their line-haul charges and their terminal switching charges, the Commission could only so require upon findings made under Section 6 (1) of the Act, and

on evidence to support such findings. This Court expresses no opinion as to whether the evidence of record before the Commission in these proceedings would support such findings and orders under Section 6 (1) of the Act, no such issue being presented in these proceedings.

(11) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to the line-haul rates for all switching movements beyond the points designated in its findings, even though no so-called "interrupted movements" be thereby involved, would require the plaintiff carriers to disregard and depart from the express provisions of their duly published and effective tariffs, and are therefore unauthorized and beyond the powers of the Commission under Section 6 (7) of the Act, at least in the absence, as here, of any findings by the Commission that such tariff provisions themselves violate any section of the Act or are otherwise unlawful.

(12) The Commission's respective orders of May 18, 1948, here sought to be enjoined, are without foundation in law, are based on errors of law, are without findings or evidence essential to support them, are arbitrary and in violation of the Interstate Commerce Act and beyond the statutory powers of the Commission, and should be permanently and forever enjoined, set aside and annulled.

(s.) ORIEL L. PHILLIPS,
United States Circuit Court Judge,
 (s.) TILLMAN D. JOHNSON,
United States District Judge,
 (s.) T. BLAKE KENNEDY,
United States District Judge.

Dated this 7th day of January, 1949.

Filed in United States District Court, District of Utah, Jan. 10, 1949. V. P. Ahlstrom, Clerk.

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

Civil No. 1525

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY,
and AMERICAN SMELTING & REFINING COMPANY,
PLAINTIFFS,**

vs.

**THE UNITED STATES OF AMERICA and the INTER-
STATE COMMERCE COMMISSION, DEFENDANTS**

Civil No. 1524

**UNITED STATES SMELTING REFINING AND MINING
COMPANY, a corporation, THE DENVER AND RIO
GRANDE WESTERN RAILROAD COMPANY, a corpora-
tion, and UNION PACIFIC RAILROAD COMPANY, a
corporation, PLAINTIFFS,**

vs.

**THE UNITED STATES OF AMERICA and the INTER-
STATE COMMERCE COMMISSION, DEFENDANTS**

FINAL ORDER AND DECREE

The above-entitled causes having come on to be heard on October 18, 1948, before a District Court of three judges duly constituted in accordance with statute, and by agreement of all parties having been submitted for final hearing, and evidence having been taken, briefs received, and arguments heard on behalf of all parties, and the Court being fully advised in the premises, and having entered its findings of fact and conclusions of law made herein in writing,

IT IS HEREBY ORDERED, ADJUDGED and finally determined and decreed, that the respective orders of the Interstate Commerce Commission dated May 18, 1948, be, and the same are hereby permanently enjoined, set aside and annulled, and that the en-

enforcement of said orders, and the execution, enforcement and operation thereof, be permanently and forever stayed and enjoined.

Dated this 7th day of January, 1949.

(s.) ORIE L. PHILLIPS,
United States Circuit Judge,
 (s.) TILLMAN D. JOHNSON,
United States District Judge,
 (s.) T. BLAKE KENNEDY,
United States District Judge.

Filed in United States District Court, District of Utah, Jan. 10, 1949. V. P. Ahlstrom, Clerk.

~~Clerk's Note: Notation of entry of Judgment made on docket sheet on January 10, 1949, in accordance with Rule 79 of Rules of Civil Procedure.~~

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3, 129
QUESTIONS PRESENTED	3, 4, 5
STATEMENT	5
COMMISSION PROCEEDINGS	6
PROCEEDINGS IN THE DISTRICT COURT	28
SPECIFICATION OF ERRORS TO BE URGED	31
SUMMARY OF ARGUMENT	34
(a) The statutory authority.....	34
(b) Evidence of record supports the Commission orders.....	35
(c) The lower court erred in substituting its judgment for that of the Commission, in respect to administrative questions.....	37
(d) Tariff provisions and rate compensation thereunder.....	39
(e) The orders here involved are not unreason- able or arbitrary.....	40
ARGUMENT	41
I. THE COMMISSION ORDERS WERE AUTHOR- IZED BY THE INTERSTATE COMMERCE ACT.....	41
II. RECORD EVIDENCE SUPPORTS THE COM- MISSION ORDERS.....	50
III. THE DISTRICT COURT ERRED IN SUBSTITUT- ING ITS JUDGMENT FOR THAT OF THE COMMISSION UPON ADMINISTRATIVE QUESTIONS.....	69
IV. TARIFF PROVISIONS AND COMPENSATION INCLUDED IN RATES THEREUNDER DO NOT PRECLUDE COMMISSION DECISION AS TO WHAT IS OR IS NOT A PART OF THE RAILROAD TRANSPORTATION.....	75
V. THE COMMISSION ORDER IS NOT ARBI- TRARY.....	125

CONCLUSION.....

APPENDIX I.....

APPENDIX II.....

CITATIONS

<i>Anaconda Copper Mining Co. et al. v. U. S.</i> , 77 F. Supp. 611.....	83
<i>Baltimore & Ohio R. Co. v. U. S.</i> , 305 U. S. 506.....	103
<i>Board of Trade of Kansas City v. U. S.</i> , 314 U. S. 534.....	76
<i>Carnegie Steel Co. v. Director General</i> , 96 I. C. C. 527, 132 I. C. C. 689.....	106
<i>Crane and Company</i> , 210 I. C. C., 23 F. Supp. 295.....	43, 76, 83
<i>Corn Products Refining Co. v. U. S.</i> , 331 U. S. 790, 96 F. Supp. 269.....	12, 43, 52, 75, 79, 111
<i>East Chicago Dock Terminal Co. v. U. S.</i> , 18 F. Supp. 19.....	76
<i>Elgin, Joliet & Eastern R. Co. v. U. S.</i> , 18 F. Supp. 19.....	76
	82, 107, 108
<i>General Electric v. N. Y. C. & H. R. R.</i> , 14 I. C. C. 237.....	103
<i>Goodman Lumber Co. v. U. S.</i> , 301 U. S. 669.....	75
<i>Hanna Furnace Corp. v. U. S.</i> , 323 U. S. 667.....	75
<i>Inland Steel Co. v. U. S.</i> , 306 U. S. 153, 23 F. Supp. 291.....	12
	43, 75
<i>Int. Com. Comm. v. Hoboken Manufacturers' R. R. Co.</i> , 320 U. S. 368.....	76
<i>Int. Com. Comm. v. Union Pacific R. R.</i> , 222 U. S. 541.....	76
<i>Lehigh Valley R. Co. v. U. S.</i> , 243 U. S. 444.....	103
<i>Los Angeles Switching Case</i> , 234 U. S. 294.....	34, 46
<i>Louisville & Nashville R. Co. v. U. S.</i> , 282 U. S. 740.....	104
<i>Merchants Warehouse Co. v. U. S.</i> , 283 U. S. 501.....	50, 102
<i>New York Central & H. R. R. Co. v. General Electric Co.</i> , 219 N. Y. 227, 114 N. E. 115, 243 U. S. 636.....	46
<i>Non-Ferrous Metals</i> , 204 I. C. C. 319.....	81
<i>Pressed Steel Car Co. v. Director General</i> , 93 I. C. C. 224, 109 I. C. C. 75.....	103
<i>Rochester Telephone Corp. v. U. S.</i> , 307 U. S. 125.....	69
<i>Smith (A. O.) Corp. v. U. S.</i> , 301 U. S. 669.....	75
<i>Staley Company</i> , 245 I. C. C. 383; 321 U. S. 403.....	43
<i>Union Pacific R. Co. v. Updike Grain Co.</i> , 222 U. S. 215.....	104
<i>U. S. v. American Sheet & Tin Plate Co. et al.</i> , 301 U. S. 402.....	12
	35, 43, 44, 48, 51, 73, 75, 114, 115
<i>U. S. v. Chicago Heights Trucking Co.</i> , 310 U. S. 344.....	76
<i>U. S. v. Pan American Petroleum Corp. et al.</i> , 304 U. S. 156.....	12, 75
<i>U. S. v. Pierce Auto Lines</i> , 327 U. S. 515.....	72
<i>U. S. v. Union Stock Yard Co.</i> , 226 U. S. 286.....	103
<i>U. S. v. Wabash R. Co. et al.</i> , 321 U. S. 403.....	12
	18, 35, 45, 44, 48, 70, 75, 117
<i>Virginian Ry. v. U. S.</i> , 272 U. S. 658.....	71
<i>Western Paper Makers Chemical Co. v. U. S.</i> , 271 U. S. 268.....	71
<i>Wierton Steel</i> , 209 I. C. C. 445; 301 U. S. 405.....	43

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS**

v.

**THE DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, UNION PACIFIC RAILROAD COMPANY,
AND AMERICAN SMELTING & REFINING COMPANY,
APPELLEES**

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS¹**

v.

**UNITED STATES SMELTING, REFINING AND MINING
COMPANY, A CORPORATION, THE DENVER AND RIO
GRANDE WESTERN RAILROAD COMPANY, A COR-
PORATION, AND UNION PACIFIC RAILROAD COM-
PANY, A CORPORATION, APPELLEES**

CONSOLIDATED CAUSES

¹ The following parties were permitted to intervene in the court below: State of Utah (R. 377); State of Colorado (R. 383); Public Service Commission of the State of Utah (R. 386); Public Utilities Commission of the State of Colorado (R. 391); Utah Mining Association (R. 408); Colorado Mining Association (R. 401).

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

**BRIEF FOR THE INTERSTATE COMMERCE
COMMISSION**

OPINIONS BELOW

The informal opinion of the District Court (R. 499) is not reported.¹

The general report of the Commission is reported in 209 I. C. C. 11. The two final supplemental reports are reported at 270 I. C. C. 359 (R. 364)² and 270 I. C. C. 385 (R. 315).³

JURISDICTION

The final decree of the District Court was entered January 10, 1949 (R. 463). Petition for appeal was filed March 7, 1949 (R. 464) and the appeal was allowed the same day (R. 465). Probable jurisdiction was noted October 10, 1949 (R. 403). The jurisdiction of this Court is founded upon provisions of the Judicial Code as revised by the Act approved June 25, 1948, ef-

¹ The court opinion was informally stated from the bench at the close of the hearing. Later Findings of Fact, Conclusions of Law, and Final Decree were entered (R. 449).

² American Smelting and Refining Company, Ex Parte No. 105, 75th Supplemental Report.

³ United States Smelting, Refining & Mining Company, Ex Parte No. 104, 76th Supplemental Report.

fective September 1, 1948, Title 28 U. S. Code Sections 1253 and 2101 (b), consolidating and continuing the substance of prior acts relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix I, *infra*, pp. 129, 138.

QUESTIONS PRESENTED

The ultimate questions relate to validity of the two orders of the Commission, entered May 18, 1948, one in American Smelting & Refining Company, *Ex Parte No. 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, Seventy-fifth Supplemental Report of the Commission (R. 363),^{*} the other in United States Smelting, Refining and Mining Company, *Ex Parte No. 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, Seventy-sixth Supplemental Report of the Commission

^{*} The order involved in *The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, and American Smelting & Refining Company, Plaintiffs v. United States of America and Interstate Commerce Commission, Defendants*, Civil Action No. 1525, in the District Court below.

(R. 321).⁶ Each of said Commission orders require the two appellee-carriers, Denver and Rio Grande Western Railroad Company (hereinafter referred to as D. & R. G.) and Union Pacific Railroad Company (hereinafter referred to as U. P.), to cease and desist performance of terminal switching service at the industrial plants of said American Smelting and United States Smelting Companies, as performed by either or both said carriers, beyond the points in each particular plant as determined by the Commission in its reports of the same date, as a part of the common carrier line-haul obligations. In effect the Commission has determined, in the two Supplemental Reports entered May 18, 1948, that the transportation under appellee-carriers' line-haul obligations begin and end with the receipt and delivery of cars on the designated interchange tracks at each separate plant, and that spotting service beyond such interchange tracks as part of delivery would violate Section 5 (7) of the Interstate Commerce Act.

Subordinate questions are:

1. Whether the Commission orders were authorized by the Interstate Commerce Act.

⁶ The order involved in *United States Smelting, Refining and Mining Company, a corporation, The Denver and Rio Grande Western Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, Plaintiffs v. United States of America and Interstate Commerce Commission, Defendants*, Civil Action No. 1524 in the District Court below.

2. Whether the Commission orders are supported by substantial evidence.

3. Whether the district court could legally decide questions of fact, or legally substitute its judgment for that of the Commission upon administrative questions and base its decision and judgment on a partial record.

4. Whether carrier determination, by practice or tariff provision, of what is or is not a part of the line-haul transportation to and from each plant here involved, legally prohibits the determination of that question by the Commission, upon the basis of switching conditions at each particular plant.

5. Whether the Commission orders are unreasonable or arbitrary.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Utah, as a specially constituted three-judge court, permanently enjoining and setting aside orders of the Commission entered May 18, 1948, in *American Smelting & Refining Company, Ex Parte No. 104*, Seventy-fifth Supplemental Report, 270 I. C. C. 359, and in *United States Smelting, Refining and Mining Company, Ex Parte No. 104*, Seventy-sixth Supplemental Report, 270 I. C. C. 385. The District Court consolidated and heard the two actions, filed under sep-

arate complaints (R. 303 and R. 342), and decided the same under a single final decree (R. 463).

COMMISSION PROCEEDINGS

The American and United States Smelting Companies are engaged in the business of smelting and refining copper, lead, zinc, and other metals. The American operates industrial plants at Garfield and Murray, Utah, and Leadville, Colorado, the United States operates a plant at Midvale, Utah.* Maps of these plants are exhibits to the Commission record, were offered in the District Court, and are in the appeal record. They could not be included in the printed record, for which reason appellants have prepared photostats of the record maps of the Garfield, Leadville, and Midvale plants and will submit separately.*

* Since the docketing of this appeal appellants have been advised that the Murray, Utah, plant of American Smelting has been or is being abandoned and is or will be dismantled. Such abandonment and dismantling would make further consideration of questions relating to that plant, as involved in this appeal, unnecessary. For this reason no further reference to the Murray plant will be made herein. Amendment of Commission or Court orders respecting that plant is believed unnecessary.

* The photostat maps are approximately one-half the size of record maps. For purpose of comparison and verification reference is made to record maps of which photostats are submitted. Map of Garfield plant is Exhibit 3, and map of Leadville plant is Exhibit 32 to the Commission record in the American Smelting case, a part of the appeal record. The map of the Midvale plant is Exhibit 1 to the Commission record in the United States Smelting case, a part of the appeal record.

The Commission, upon its own motion, instituted the proceeding leading to the orders here involved, as a part of and supplemental to its main report in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, 209 I. C. C. 11, American Smelting designated the Seventy-fifth, and United States Smelting the Seventy-sixth Supplemental Reports of the Commission. The main report, entered May 14, 1935, is based a general investigation, also instituted by the Commission, to determine the practices and customs of rail carriers, in the performance of terminal or switching services at industrial plants, and the payment of allowances to industries performing their own switching or spotting service in lieu of carrier performance of such services. The main report, as stated therein, p. 15, dealt "only with the legal questions and general situations presented."

The main report is based upon a general investigation of approximately 200 industrial plants where spotting allowances were paid, and numerous plants where carriers assigned locomotives to perform spotting service beyond the points of interchange, some of which required the full-time assignment of locomotives for their exclusive use, and the service performed under direction and control of the industry (p. 43). Hearings were held at convenient points throughout the country and covered the practices at

many individual industries. No separate reports were issued, at that time, covering individual industries, the main report stating, page 15, that such separate reports would be issued later, as they were, in the form of "Supplemental Reports," of which the Seventy-fifth and Seventy-sixth are here involved. Such supplemental reports, with reference to date of orders and citation in Commission reports, are set forth in Appendix II, *infra*, pp. 139, 144.

Numerous supplemental reports issued in *Ex Parte 104* have been, in each case, sustained by this Court, making unnecessary any great elaboration of facts developed and issues decided in the main report. Effort is here made to direct attention chiefly to the particular findings and conclusions of the main report, and court decisions thereon, which relate to appellee contentions herein, that fact differences remove these cases from application of *Ex Parte 104* principles applied in other cases with court approval. Aside from the question of evidence support for Commission findings, differences claimed by appellees, and stated in the district court findings of fact as basis for its conclusions, particularly in findings (13), (14), (15), (16), and (17) (R. 455-457, incl.), refer largely if not entirely to provisions of carrier tariffs, covering transportation to and from these industries, and the custom and practice concerning switch-

ing or spotting service at these particular plants.

As a result of the country-wide general investigation of hundreds of industrial plants operated by a wide variety of industries, the fact was established that there was a decided difference in the terminal service rendered by railroads at some plants as compared to others, in the same or different industries, on the lines of the same or different carriers, and even in some sections of the country as compared to others. At many plants spotting service, or all plant switching, was performed by industries, with all inbound and outbound traffic being delivered or received by carriers on designated interchange tracks. Under that manner of delivery it was found that some plants were paid an allowance by the carrier, ostensibly for performing spotting within the plant, mutually recognized as the line-haul transportation of the carrier, while at other plants, similarly performing their own spotting, no such allowances were paid. In other instances cars were placed upon such interchange tracks and subsequently moved by carrier motive power, assigned to and operating under plant direction substantially the same as industry-owned power, spotting cars as needed by the industry, and without charge in addition to the line-haul rate. Many plants were served by two or more carriers resulting in confusion.

The main report further recognized that delivery is a part of line-haul transportation, and

that plant interchange tracks correspond to spurs or sidings on which the practice of spotting had its origin. In this respect it was found that industries, heard upon the general record, had systems of tracks varying in extent from a few tracks of a few hundred feet to extensive systems many miles in length.

The record of the general investigation shows the wide difference in spotting service, and payment of allowances, performed or paid by carriers in different sections of the country. Based upon that record the main report found that payment of allowances began in the Indiana-Illinois industrial area and spread to nearby areas, some to north-central and northwest sections, with only New England, the Southeast and extreme Southwest excluded from this favoritism. New England carriers maintained that allowances were improper, and that placing or receiving cars upon interchange tracks constituted "delivery or receipt by the carrier under its line-haul freight rates, and that a further movement by industrial locomotives is a matter of internal arrangements of such industry and is no concern of the carrier." In the Southeast no allowances were paid, and southern carrier conception of transportation obligation to perform plant spotting was illustrated by the practice to cease spotting for plants when the service required constant use of one or more carrier engines.

Another fact noted in the main report, pp. 39-40, from the general record evidence was industrial weighing, necessary or required by the industries at many plants. The weighing service, sometimes of both loaded and empty cars, enabled plants to keep accurate records of materials and grades used in the operation, and is an indispensable part of production and merchandising of products. Ordinarily industry weights were accepted by carriers for assessing freight charges. In practically all cases the use of industry scales involved extra plant switching, and usually requires delivery or receipt on tracks from which cars can later be moved to scales, weights ascertained, and thereafter placed at locations desired by industry. Industrial weighing, common in production of heavy commodities, usually requires a second movement of cars by carriers.

Another fact-finding of the main report, p. 44, as based upon the general investigation of hundreds of industries, was that line-haul rates have not been fixed to compensate carriers for performance of spotting service. In that connection it was found that many industries now receiving allowances, or carrier-performed spotting service, had previously performed their own service without compensation or assistance, with no change being made in line-haul rates at time of beginning allowance payments or performing free spotting service, resulting in carrier assumption of a burden not previously borne.

General conclusions based upon record evidence of the general investigation are stated in the main report, and have been so often sustained by this court as to become established law.* Only those conclusions deemed pertinent to issues presented by this appeal are here referred to, as follows:

“The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is merely a substituted service, which is substantially a like service to that included in the line-haul rate, is a question of fact to be determined in each case (p. 24).

No legal obligation rests upon a carrier to perform switching and spotting service solely at a shipper's convenience, * * * (p. 30).

To summarize, it is well settled that car-load freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed

* *United States v. American Sheet & Tin Plate Co., et al.*, 301 U. S. 402; *United States v. Pan American Petroleum Corp., et al.*, 304 U. S. 156; *Inland Steel Co. v. United States*, 306 U. S. 153; *United States v. Wabash R. Co., et al.*, 321 U. S. 403; *Corn Products Refining Co. v. United States*, 331 U. S. 790.

upon by him and the carriers. See *Chesapeake & O. Ry. Co. v. Westinghouse, Church, Kerr & Co., Inc., supra*, the case affirmed by it, and cases cited therein. See also *Industrial Railways Case, supra*. It is likewise clear from these same authorities that service beyond such reasonably convenient point is not a service which the carrier is obligated to perform or pay for under its line-haul rates (pp. 32-33).

* * * Manifestly it is not the amount but the kind of service required which must be considered in determining whether the performance of such service is an obligation of the carrier under its line-haul rates (p. 43).

The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team-track or simple switch placement by the carriers involved herein cannot be made. We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team-track or simple switch placement can readily be ascertained at any individual industry by experienced railroad-operating men or committees if honestly performed without consideration of traffic reasons (p. 38).

The tariffs publishing the line-haul and switching charges constituting the carrier's

holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience (p. 18)."

The most important general finding of the main report was that some industries were extended preferences as compared to many others, in the form of plant spotting service performed by carriers without a charge in addition to line-haul rates, or in the payment of allowances where the industries performed the spotting service upon the theory that it was a part of the line-haul obligation. And the most important general conclusion of the main report was that the preference and prejudice in terminal spotting service resulted in waste of revenues, discriminations against shippers generally, and the payment of indirect rebates to some shippers, all of which could and should be eliminated under Commission authority to determine the point where line-haul transportation begins and ends, and what is transportation and what is plant or industry service, all as a means to determine violations of section 6 (7) of the Act. These important general findings and conclusions have been sustained and approved by this Court in many cases, as above cited, to the extent that requires legal acceptance thereof without question.

The proceedings here involved were instituted as supplemental to *Ex Parte No. 104*, the American Smelting as the Seventy-fifth and the United States Smelting as the Seventy-sixth, just as in all other such proceedings, upon the Commission's own motion (R. 70 and 575). The two cases involve similar industries and practically the same character of plant operations, methods of switching, tariff provisions, and line-haul rates. The proceedings were contemporaneously instituted, completed and decided in similar reports, with orders requiring the same kind of switching changes, and alike in practically every respect to all prior supplemental proceedings. Obviously the same principles and decisions are applicable to each case. As in other such proceedings the Commission first investigated the switching conditions at each plant involved, through its assigned agents, and thereafter formally ordered a hearing in each case. The order stated the purpose of the hearing in each instance as, "with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plants of * * *, with a view of determining whether and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act" (R. 575). Hearings

were held in Denver, Colorado, that in American Smelting on May 26, 1944 (R. 873-1397, incl.), and that in United States Smelting on May 29, 1944 (Vol. 1, 578-756, incl. and Vol. 2, 757-780, incl.).

Record evidence in American Smelting relates to switching conditions at industrial plants of that company located at Garfield and Murray, Utah, and Leadville, Colorado. Testimony and exhibits were submitted by carrier witnesses and Commission investigating agents as to each plant. By stipulation of counsel maps showing the plant area, building, and system of tracks, were offered by the industries, that of the Garfield plant as Intervener's Exhibit No. 1, that of the Leadville plant as Respondent's Exhibit No. 32, Witness Moriarty, and that of the Midvale (United States Smelting) as Intervener's Exhibit No. 1, Witness O'Brien.¹⁰

Following submission of the examiner's proposed reports,¹¹ and the filing of exceptions thereto and briefs by interested parties, Division 3 of the Commission entered its reports and orders on October 1, 1945.¹² After the filing of petitions for

¹⁰ The above three maps are the original exhibits, which could not be included in the printed record, and photostats of which will be submitted separately.

¹¹ That in American Smelting on January 6, 1944 (R. 86-123, incl.); that in United States Smelting on November 22, 1944 (R. 780-791, incl.)

¹² That in American Smelting, 263 I. C. C. 719 (R. 55-85, incl.); that in United States Smelting, 263 I. C. C. 749 (R. 832-844).

reconsideration and oral argument thereon the Commission entered its reports on reconsideration and orders on October 14, 1946.²³ The second reports in each case incorporated as parts thereof the prior Division reports, in order to include the complete statement in first reports, of all material facts of record, including description of track layouts, loading and unloading points, volume of traffic, and amount and kind of services performed at each plant. These facts appear in the Division report on the American Smelter as to the Garfield plant, 263 I. C. C., pp. 720-730, inclusive (R. 55-67, incl.), and as to the Leadville plant, pp. 738-744, inclusive (R. 77-84, incl.), and in the report on United States Smelter, as to Midvale plant, 263 I. C. C., pp. 749-758, inclusive (R. 832-841, incl.).

With the exception of immaterial differences in plant lay-out, plant track mileage, terrain, and carrier performing switching service, practically the same or similar situations, conditions, methods of industry operation, and manner of car movements, exists as to each of the three plants involved. These facts are stated in the Commission hearing records by agents of the D. & R. G. and U. P. railroads, who had supervision of the switching service,

²³ That in American Smelting, 266 I. C. C. 349 (R. 29-54, incl.); and that in United States Smelting, 266 I. C. C. 476 (R. 271-279, incl.).

and is confirmed by the testimony of industry agents and Commission investigating agents."

The record evidence, without reference to tariff provisions, rates, and compensation, is of the same type and character as has been held sufficient by this Court to support such orders. In effect the Commission in these supplemental proceedings has applied approved legal principles in the manner prescribed by this Court. Court opinions appear to leave no doubt of the procedure and evidence required for Commission decisions, as to where line-haul transportation begins and ends and what is carrier transportation as contrasted with industry services, at a particular plant.

The evidence relating to the Staley plant, deemed sufficient to support that order, as summarized in *United States v. Wabash R. Co., supra*,

"Garfield plant was covered by testimony of Witness Moriarty, Superintendent of the Salt Lake Division of the D. & R. G. which railroad performed all switching in that plant (R. 877-908, incl.), by Mr. Daingerfield as Garfield Smelter weighmaster and yardmaster (R. 1013-1047, incl.), and by Commission Agents McCormick, Higgins, and McDonald (R. 918-944, incl.). Leadville plant was also covered by Witnesses Moriarty (R. 1081-1095, incl.), and McDonald (R. 1102-1112, incl.), and by Witness Hanebach, Superintendent of the Leadville plant (R. 1113-1132, incl.). That at Midvale was covered by testimony of Witness O'Brien, General unloading foreman for United States Smelter (R. 580-624, incl.), Witnesses Kelley and Wengert, Assistant General Yardmaster, and Terminal Train Master of U. P., which railroad performed all switching at that plant (R. 625-631, incl.), and by Witness McDonald, Commission agent (R. 631-642, incl.).

page 409, is practically the same kind of evidence as in this record shows switching conditions at each plant, and is here quoted, with deletion of "Staley," as a correct description of the switching at the three plants here involved.

"It found that inbound cars are in the first instance placed upon interchange tracks from which they are later spotted at the points of loading and unloading, a service requiring in numerous instances two or more car movements performed by engines and crews regularly and exclusively assigned to it; that the interchange tracks are reasonably convenient points for the delivery and receipt of cars; that the movements between the interchange tracks and the points of loading and unloading are not performed at the carrier's convenience but are "coordinated with the industrial operations of the * * * Company and conform to its convenience"; that the service beyond the interchange points is in excess of that involved in switching cars to a team track or ordinary industrial siding or spur, and is consequently not a part of the transportation service which ends at the interchange tracks."

It does not appear that appellees question the physical facts relating to the three plants here involved, as placed in the record by industry, carrier, and Commission agent witnesses, in full agreement, and as stated in the Division and Commission reports. Appellees rather contend that claimed dif-

ferences in tariff provisions, rates, and compensation, differentiate these cases from prior supplemental *Ex Parte* 104 orders sustained by this court. The lower court did find that the orders herein are unsupported by record evidence, which, as here believed and as will later appear, relates largely to difference in legal and fact interpretations and applications. Desiring to avoid an unnecessary burden of fact detail, and because of the closely similar switching situation at all three plants, a summary of facts, typical of all plants, and believed unquestioned by all parties, is here submitted, as taken from the Division report of October 1, 1945, relating to the Garfield plant of American Smelter (R. 56-57, incl.).

The plant is located on the side of a mountain, upon three levels, with 21.58 miles of standard gauge tracks, of which some 4.5 miles are used exclusively by plant equipment. On the upper level in south portion of plant is a plant yard, other tracks, thaw house, scale, and smelter and sampling facilities. On the middle level are various plant operations served by a number of tracks on trestles, over 2,600 feet long, which connect with U. P. tracks in west end with tracks which extend over 2,000 feet eastwardly to the B. & G. R. lead. The lowest level is on north side of middle level, where other plant operations are located, and served by tracks leading from the switch back track in western part of plant. The plant

yard on upper level contains ten parallel tracks numbered north to south 1 to 10, from 1,800 to 2,400 feet in length. Two lead tracks from the east connect D. & R. G. and B. & G. R. with plant yard, and U. P. enters plant from west over lead track connected with the plant yard. All in- and out-bound loaded and empty cars are delivered and received on the plant yard tracks by the three carriers serving the plant. By carrier arrangement D. & R. G. performs all switching in the plant with engines operating three shifts, seven days per week, one shift assigned to east end of plant yard, one to west end, and one to plant generally. The east end engine devotes 95 percent of time to weighing cars and switching copper concentrates to sampler, and the other two shifts operate generally in west end on all three plant levels.

For the twelve-month period ending March 31, 1944, a total of 22,982 carloads of a variety of shipments, a majority being Utah Copper Concentrates, were delivered to the plant by the three railroads, and 6,960 carloads shipped out-bound, consisting principally of bullion. In-bound cars are held in plant yard, except Utah Concentrates, until ordered moved under industry-written instructions issued four times a day. Except for concentrates, ore shipments received in plant yard are first weighed, moved to west end of yard by gravity, then moved by west en-

engine to yard to await industry-spotting instructions, unless frozen when west engine moves cars to thaw house and, after thaw, returns to plant yard where east engine again weighs cars, and then returns to yard, as with unfrozen ores, to await spotting orders. Of 431 in-bound cars of miscellaneous materials 99 percent were switched from plant yard to scale, weighed, and upon specific orders moved to switch back leading to lower level. Loaded copper bullion cars, a preponderance of outbound interstate shipments, are switched from lower level to plant yard over excessive grades, limiting engine capacity to five cars, the distance from loading point to yard being over a mile. All out-bound loads of copper move over B. & G. R., whose tariffs provide for receipt and delivery of all freight at the plant yard, with specific charge for any movement, performed by D. & R. G. beyond that point, \$2.25 per car for spotting concentrates, clay, and sand, and \$3.96 for other carload interstate freight (R. 1139-1140).¹⁸

Prior to 1908, free switching within Garfield plant was performed by D. & R. G., without tariff in accord with the agreements made at the time of plant construction. In 1908, a tariff was filed providing for free switching (R. 1243). On

¹⁸ The B. & G. R. (Bingham and Garfield R. Co.), serves only the Garfield plant, and no comparable switching situation or tariff exists at any other plants here involved.

February 23, 1920, by authority of the Director General of Railroads (R. 910), a tariff providing for intraplant switch charge of \$2.50 per car was filed, also providing for delivery to include one movement over track scales to and from sampler to designated unloading point, with amendment November 14, 1920, to include in delivery, movements to and from thaw house and to and from sampler to unloading point (R. 1243-1244). As mutually devised by understandings of the railroads and smelters, in purported compliance with Commission findings in *Ex Parte 104*, decided May 14, 1935, a new tariff (R. 910) was filed, providing in substance that line-haul rates¹⁸ include movement from road haul delivery point to scales and subsequent delivery to any designated plant track, which can be accomplished by one uninterrupted movement, that being interpreted by tariff "note," and that line-haul rate includes outbound move from loading points to scale and subsequently to switch line for road haul carrier. The tariff provides a \$1.00 charge for other movements, and 50 cents per car for move to and from thaw house and for empty car weighing, and \$2.70 for described intraplant movements (R. 1256-1257). Prior to 1920, road haul and intraplant switching was done without charge, and changes thereafter to June 1938

¹⁸ Applies only at Garfield, Murray, and Midvale, but not at Leadville.

represent increases and decreases under Commission *Ex Parte* proceedings, that is of general application not related to plant switching obligation and performance (R. 910). Practically the same evidence was submitted as to tariff provisions at Midvale plant of U. S. Smelter, showing same rates and services as those at Garfield plant of American Smelter (R. 627-28-29).

Freight rates on ore shipments are based upon a graded scale according to valuation of metal content (R. 912). Tariffs governing such valuation rates provide for waybilling at origin on basis of approximate value, or if not ascertainable, at the rate applicable on \$100.00 per ton values. Upon arrival at the consignee industry, and settlement between shipper and consignee is made on basis of return on industry assay, a revision of rates is made in accordance with "value determined and certified to carrier by such mill, smelter, or other industry," with carrier right to verify valuations by special assays (R. 1145).

At the 1944 Commission hearing Mr. Carey, the Freight Traffic Manager of D. & R. G. testified that the free switching prior to 1920 including intraplant switching, and since then specific switching, as to and from thaw house, was not in fact free, but was switching included in line-haul rates. In support of that testimony an excerpt of the testimony of Mr. Williams, General Freight Agent of D. & R. G., given at the

Salt Lake City hearing on May 19, 1932 (page B-44 of the Commission transcript), in connection with the general *Ex Parte* 104 investigation, was identified by Mr. Carey. The excerpt testimony was to effect that the carrier had to get the weight, and assay certificate, and switching would be performed for scaling, moving to sampling plant, and to and from thaw house when necessary, all as included in line-haul rate, (R. 916-917). The testimony is a very minor part of the voluminous record in the general *Ex Parte* 104, which was considered, under the main report entered May 14, 1935.

The Division report in American Smelter (R. 66) held that the furnishing of values for rate purposes is the obligation only of the smelters and not of the carriers. It was found that switching at the plant must be coordinated with industry operations, that line-haul carriers could not deliver and remove cars to and from plant unloading and loading points without interference from each other, intrastate traffic, and industry operations. It was also found that the plant yard was a reasonable point for receipt and delivery of cars by the carriers, that transportation under line-haul rates begins and ends at the "plant yard," that movement beyond that point within the plant is not carrier duty, and if performed without charge in addition to line-haul rates is a violation of Section 6 (7) of the Act. Similar

findings respecting the Leadville plant (R. 79-84, incl.), were made upon the basis of the same type of evidence, fixing the "flat yard" of that plant as the point where line-haul transportation begins and ends. In the same manner the U. S. Smelter report of October 1, 1945, the Division entered similar findings upon the same type of evidence, and fixed the "assembly yard" at the Midvale plant as the point of beginning and ending of line-haul transportation.¹⁷

Acting upon petitions for reconsideration of the Division orders, in both cases, and after oral arguments in each case, the Commission entered its reports on Reconsideration on October 14, 1946. The Commission reports include a careful and full consideration and analysis of these facts, and its own conclusions thereon, and in practical effect affirmed the prior Division findings. The American Smelting report includes the material parts of the tariff effective at Garfield and Midvale as of July 5, 1938 (R. 35). Another fact finding as to Garfield plant switching was that frozen traffic is handled in six distinct switching moves (R. 33). And in the U. S. Smelting report it was held significant that neither prior to or subsequent to the first published tariff provision for free switching, was any change made in transportation rates (R. 277). The orders en-

¹⁷ *American Smelting*, 266 I. C. C. 349, that of *U. S. Smelting*, 266 I. C. C. 476.

tered with each report required carriers concerned to conform to the report findings respecting switching service at the several plants involved.

Upon complaints filed June 13, 1947, by American Smelting, et al. (R. 1), and by U. S. Smelting, et al. (R. 256), the District Court temporarily enjoined and remanded the orders of October 14, 1946, to the Commission for further consideration. Thereafter the Commission reopened the proceedings and vacated the orders of October 14, 1946, and after consideration, upon the existing record, entered its Second Reports on Reconsideration. The report in American Smelter is a full and careful analysis of established procedure and principles under *Ex Parte 104*, as has been applied in many other supplemental proceedings, and as applied in the prior reports herein. The report concludes with nine numbered findings. It is in effect adopted as a part of the report in U. S. Smelting," without repeating what was said in the American Smelting report. As stated in the American Smelter report (R. 366-367), the Commission interpreted the court findings of fact and conclusions of law, in remanding the prior action, as requiring the basis of prior findings and orders to be clarified, particularly as to whether based

¹⁰ U. S. Smelting report, 270 I. C. C. 385; American Smelting, 270 I. C. C. 359.

in whole or part upon tariff provisions, sufficiency or insufficiency of published rates, or entirely upon authority established in *Ex Parte 104*. The report states (R. 373), that no further hearing was held, as no parties requested it, and the existing record contained a complete statement and description of material facts. These reports speak for themselves, and it appears unnecessary to repeat or further summarize them at this point. In effect findings in prior orders were affirmed, and new orders, entered the same day, required carriers concerned to conform to lawful switching of plants involved as defined in the reports.

PROCEEDINGS IN THE DISTRICT COURT

Complaint in the U. S. Smelter case was filed October 6, 1948 (R. 303), that in American Smelter case was filed October 11, 1948 (R. 342). The U. S. Smelter complaint alleges twenty grounds as the basis for its prayer to enjoin and annul the Commission order (R. 311). The American Smelter complaint alleges eight grounds as the basis of its prayer to enjoin and annul the Commission order (R. 359-360). The allegations of each complaint may here be stated generally, as follows: The Commission findings are unsupported by evidence; the orders are made without requisite findings; the reports and orders do not follow or conform to the District Court order in prior cases, remanding prior orders to the Com-

mission; the orders ignore tariff provisions and evidence that line-haul rates include compensations for terminal services involved; the reports misconstrued or misinterpreted record facts respecting certain features of plant switching; the order requires carriers to depart from provisions of their published tariffs; and that the orders require carriers to charge for terminal services at these plants, provided for by tariff provisions, and compensated for in line-haul rates.

Answers generally denying allegations of each complaint were filed by the United States (R. 438 and 440), and the Commission (R. 442). At the Court hearing on October 18, 1948, all the records of the prior actions were incorporated in the respective new actions, by stipulation of parties and court approval (R. 516-521, inclusive). Without objection interventions were permitted in behalf of the States of Utah and Colorado, Public Service Commission of Utah and Public Utilities Commission of Colorado, and the Utah and Colorado Mining Associations, and petitions in support of both plaintiff industries were filed in the first court action."

Following hearing on October 18, 1948 the three-judge District Court entered Findings of Fact, Conclusions of Law, and Final Order and Decree on January 10, 1949 (R. 449-464, inclusive). Findings of fact and conclusions of law

¹⁹ (R. 377-383-391-396-401-408-412-416-422-426-431).

entered in the prior action were adopted and stated in full in the findings herein (R. 451-452). Proposed Findings of Fact, and Conclusions of Law were submitted by defendants and denied by the Court (R. 446-448). Circuit Judge Phillips filed a statement of concurrence with the Court findings and conclusions in the first actions, which is incorporated in the findings herein (R. 452-453).

The important Court findings and conclusions are, in effect, that carrier tariffs provide for the terminal or spotting services which they perform without a specific charge, that line-haul rates include compensation for such services, and that the Commission is required to find that line-haul rates do not include compensation for such service, as a basis for prohibiting the same on the ground that it is not a part of the line-haul obligation, and would violate Section 6 (7). The Court held that the only evidence before the Commission was that line-haul rates include compensation for the controversial services. The Court further found that the practice of carriers at these plants for some fifty years has been to deliver and receive carload freight at points of unloading and loading within the plants, and that the several plant tracks, designated by the Commission as the end of line-haul transportation and the beginning of industry operations, in other words the appropriate interchange tracks, are

nothing more than railroad yards. In short the primary basis of the lower court's findings and conclusions is, that a legal prerequisite to exercise of the Commission authority, to decide the point in time and space where line-haul transportation begins and ends, is to determine reasonableness of line-haul rates, whether sufficient in amount to cover cost of both that transportation and plant spotting, and what is or is not included in such compensation in respect to each particular industrial plant. The effect of the lower court holdings would, if sustained by this court, destroy Commission authority previously recognized, to determine upon the facts and conditions at each particular plant, what is transportation and what is plant operation, in order to compel equal delivery service to all, and root out favoritism already removed from services to many other industries, in prior proceedings supplemental to *Ex Parte 104*.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deciding that the Commission orders are invalid and enjoining enforcement thereof.
2. In deciding, court finding 12, that no evidence before the Commission supports any of the findings upon which its orders are based, and (court conclusions 13, 14, 15, and 16) that there was no evidence to support the specific Commission findings described therein.

3. In deciding that the only record evidence before the Commission was contrary to each Commission finding, upon which its orders are based, that carrier tariffs have for years provided for delivery of freight at loading and unloading points with the plants involved, that plant tracks, designated by the Commission as the point where transportation begins and ends, are in fact railroad terminals and have for years been used as such, that line-haul rates of carriers include compensation for all switching services within the plants, incident to ore value determination, and that tariffs prior to 1938 expressly provided for all terminal switching necessary to determine value of ores, and have, since 1938, provided that line-haul rates include compensation for the service at the Garfield and Midvale plants.

4. In deciding, court finding 17, that service beyond points of interchange designated by the Commission, in connection with movements to and from unloading and loading points within the plants, do not involve any "interrupted movements."

5. In deciding, court conclusion 1, that the question as to line-haul rates including compensation for all terminal services involved, is res adjudicata, because, under finding 6, no appeal was taken from the prior court order remanding prior Commission orders for further consideration.

6. In deciding, court conclusion 3, that the Commission orders require carriers to collect and industries to pay twice for the same services, under section 1 (5) (a) of the Act.

7. In deciding, court conclusions 4 and 5, that a Commission finding upon the subject of compensation for terminal service as included in the line-haul rate, is necessary to a finding that section 6 (7) has or will be violated.

8. In deciding, court conclusion 6, that the orders here involved are contrary to principles determined in the basic *Ex Parte 104*, Part II report, as defined in court finding 18, and on such basis that industries here concerned would be required to pay terminal switching charges, from which all other industries have been exempted in all other supplemental proceedings.

9. In deciding, court conclusions 7 and 8, that line-haul rates include compensation for services here involved, including terminal switching in connection with ore value determination, and that the measure of such compensation determines the carrier obligation under line-haul rates.

10. In deciding, court conclusions 9 and 10, that the Commission orders herein do not merely require carriers to state charges separately, as to spotting services and line-haul rates, which is authorized under section 6 (1) but not under section 6 (7).

11. In deciding, court conclusion 11, that the orders herein by requiring carriers to collect

charges in addition to line-haul rates for all switching, including that involving no so-called "interrupted movements," as is here determined by the industries and railroads, would compel the carriers to disregard and depart from their published tariffs.

SUMMARY OF ARGUMENT

(a) The statutory authority

The Commission has determined what constitutes complete delivery, or where "transportation" (sec. 1 (3) (a)) begins and ends, with reference to plants here involved, by finding that the transportation services which the carrier appellees are obligated to perform under their line-haul rates, begin and end at designated interchange tracks; that service beyond such points is plant service; and that if performed by carriers without reasonably compensatory charges, would result in a preferential service not accorded shippers generally, and would constitute an unlawful refund of a portion of line-haul rates in violation of section 6 (7) of Part I of the Interstate Commerce Act. The determination of what constitutes delivery (or where transportation begins and ends) is one of fact for the Commission, to be decided upon evidence disclosing the actual conditions of operation.

This court has consistently recognized the Commission's authority to decide the limits of line-haul obligations.

The Commission is expressly charged with the administrative responsibility of applying statutory provisions to determine what is or is not a part of the line-haul obligation. Sections 1 (3) (a), 6 (7), 12 (1), and 15 (1) of Part I of the Interstate Commerce Act; see also *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402.

(b) Evidence of record supports the Commission orders

The evidence abundantly supports all the facts found in the supplemental reports as to "actual conditions of operation" (*United States v. Wabash R. Co., et al.*, 231 U. S. 402-409) at the industrial plants in question. The reports provide a precise description of the plants, the work of carriers in delivering and receiving cars upon the interchange tracks, the spotting services within the plants, the conditions under which spotting services must be performed because of the nature and requirements of the industrial operations, and the special conditions in the plants, which prevent carrier performance at the carriers' convenience. As to these findings, it appears that there is no serious claim of lack of evidentiary support. It is only contended that tariff provisions and rates include the service in question and compensation therefor, and therefore prohibit exercise of Commission authority to decide what is carrier transportation and what is industry operation at the several plants here involved.

The evidence in this case is similar in type and probative effect to that held sufficient to support the

orders in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States v. Pan American Petroleum Corp.*, 304 U. S. 156, and *United States v. Wabash Railroad Company, et al.*, 321 U. S. 402. It is clearly sufficient under the language of the *Los Angeles Switching Case*, 234 U. S. 294, 311, where the rule was stated that questions of this type are "to be determined according to the actual conditions of operation."

The same finding as to "preferential service not accorded to shippers generally" was included in all *Ex Parte 104* supplemental reports, where the service was held to be beyond the line-haul obligation, including those approved by the courts. That all shippers did not receive the same terminal services, and that some were afforded a preferential service, is clearly shown by findings of fact in the main report in *Ex Parte 104* (209 I. C. C. 11, 33-43), which report in part provides the basis for all the other supplemental reports, including those in these cases. The lower court ignored the nature of proceedings here involved, as being supplemental to and a part of original proceedings in *Ex Parte 104*, and the court approved method of applying facts of that voluminous record, and legal principles established in the main report, to the particular plants here considered. This basic error led the lower court to base its decision solely upon the partial record of these supplemental proceedings, as augmented by a slight bit of testimony taken from the 1932

hearing, and therefore to regard these cases as intended to decide the reasonableness of rates and the applicability of tariff provisions. The contentions of appellees, sustained by the lower court, is nothing less than insistence that these are rate cases without legal kinship to *Ex Parte 104* proceedings.

There is ample evidence of record, including the voluminous record of the general investigation which was before the Commission but not before and considered by the lower court, to support the orders herein. The holding of the lower court that the Commission findings are unsupported by evidence, is based upon a partial record since the voluminous general record was not before the court.

c) The lower court erred in substituting its judgment, for that of the Commission, in respect to administrative questions

In several material, if not vital respects, the lower court has erroneously substituted its own judgment for that of the Commission, upon administrative questions, in some instances immaterial fact questions not decided by the Commission. Some fact questions have been decided contrary to the Commission, while other fact decisions are based upon the relatively small records of these supplemental proceedings, without reference to the great volume of facts developed in the general investigation, except for a

very small excerpt, selected to support contentions relating to rate compensation.

These and other facts decided by the court in order to reach its judgments upon administrative questions, evidence its error and misconception of function in reviewing these Commission orders. The district court has here decided that the several "yards" described and determined by the Commission as interchange tracks, are in reality railroad yards (R. 452-453). Again the court decides that the movement of cars from interchange tracks to points of loading and unloading involve only one move other than those for which tariff charges are prescribed. The Commission found that there were as many as six moves of frozen ores to reach unloading points in the Garfield plant. On the basis of the partial record, relating solely to the plants here involved, the lower court has decided fact questions and stated its own judgment upon administrative questions based thereon. Appellees did not offer to the lower court the large Commission record compiled in the main or general proceedings, and that record was not considered by the lower court. The two records together constitute the entire record in applying general *Ex Parte 104* principles to particular plants, where questions are injected, as here, relating to custom, practices, tariff rate compensation, and what constitutes equality of delivery, under line-haul transportation compared to that accorded shippers generally.

(d) Tariff provisions and rate compensation thereunder

In practical effect the lower court found and held that established tariffs provide for the spotting services in the plants here involved, and compensation therefor in the line-haul rates specified in such tariffs. On that basis the court sustained appellee contentions that where tariffs provide for the service in question, and compensation therefor in line-haul rates, it is not a violation of section 6 (7) to perform the service without compensation in addition to those rates. A part of the court fact finding in support of its tariff and compensation conclusions, relate to custom and practices at these plants for many years, because of which the court held that yards designated as interchange points are in fact railroad yards, and that free spotting for years, as a part of delivery, must be continued in the future.

It is here urged that tariff provisions do not give immunity to preference, prejudice, and discrimination prohibited by the Act, and that carriers may not lawfully decide, by tariff provisions, where transportation begins and ends, so as to supersede the established Commission authority to render such decisions, in application of *Ex Parte 104* principles to particular industrial plants.

It is also urged that court findings and holdings, as to custom, practices, tariff provisions, compensation coverage, and transportation obli-

gations, are in error, as unsupported by record evidence as to these particular plants, are contrary to the record evidence in these supplemental proceedings, which is a partial record, since the court did not have before it or consider the voluminous record evidence in the main *Ex Parte 104* proceedings, relating to these subjects.

It is the position of the Commission as explained in the 1948 American Smelter report (R. 368-372, incl.), that questions as to what compensation is or is not included in line-haul rates, and whether such rates are sufficient in amount to cover both line-haul transportation and plant spotting, are not required to be decided in *Ex Parte 104* supplemental proceedings. Those questions were not decided in connection with the orders herein entered. Railroads may, through new tariffs, provide for separate rates and charges for line-haul transportation and plant services, on the basis of fairness and reasonableness for each. Orders herein do not prohibit such tariff adjustments, or require payment twice for the same service. Those are matters which may be determined in a different proceeding, and doubtless will be if that should be found necessary to fair and reasonable treatment.

(e) The orders here involved are not unreasonable or arbitrary

Having heretofore applied established facts and principles, as stated in the main report in *Ex*

Parte 104, to many industries and individual plants, the Commission by the orders here involved has only continued to perform its duty, recognized by this court, to suppress violations found in performance of spotting services, by applying those same principles to the great smelting industry, particularly to plants involved in these supplemental proceedings.

ARGUMENT

I

THE COMMISSION ORDERS WERE AUTHORIZED BY THE INTERSTATE COMMERCE ACT

The procedure and method here adopted by the Commission to administer and enforce Congressional statutes is common to agency administration. The Commission is charged with administrative responsibility to apply statutory provisions. Here it is a problem of applying to the several smelter plants involved, the principles established in other prior court cases involving supplemental proceedings under the general investigation and main report in *Ex Parte 104*. The chief purpose of this application is to require the carriers serving these plants to render to them no more in delivery and receipt of freight than is rendered to other industrial plants throughout the country. Equality in service as between shippers, and removal of preferential service accorded a particular shipper

as compared to service rendered shippers generally, is a main objective of the Interstate Commerce Act, and was one of the important results expected from the proceedings in *Ex Parte 104*. On the basis of the tremendous volume of evidence in the record of the general investigation, and appearing in the many supplemental proceedings, it must now be an established and certain fact that many industries, usually those with the power of great traffic volume, obtain from many railroads a very great economic advantage in the form of terminal services, as compared to industries generally. In its *Ex Parte 104* proceeding the Commission fashioned the legal implements by which interstate railroad transportation could be rid of such favoritism.

In the supplemental proceedings herein the same type, kind, and amount in degree of terminal delivery service, has been ordered applied in three industrial plants of the great copper industry, as has heretofore been applied in some one hundred other similar supplemental proceedings. The extent of removal of this favoritism by voluntary action of railroads, in cases not heard by the Commission, is unknown. With the well defined principles of *Ex Parte 104* thoroughly established by court approval, and doubtless known to and understood by railroads generally, there is literally no reason why those principles should not be applied universally to all indus-

tries, rather than by legally enforced applications as here required of the Commission and Courts under this tedious process. Yet here, as in *United States v. Wabash R. Co., et al., supra*, we find the railroads concerned continuing their abject collaboration with these powerful shippers, to the end that they may enjoy a great advantage over those less fortunate in positions of influence. They seem not to realize that the expensive favor of this terminal service extended to these shippers, is a waste of carrier revenues that must be recouped in these parlous times for railroads, from even higher rates charged the general public. If the Wierton Steel Company, Crane and Company, The Staley Company, Corn Products Company²⁰ have been legally and justly forced to pay for their terminal switching, beyond points

²⁰ *Wierton Steel*, 209 I. C. C. 445, was a case where railroad performed free plant spotting, under similar conditions as at the plants here involved, and the Commission order to discontinue such free service was sustained in *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, 405; *Crane & Co.*, was another case involving free spotting condemned by the Commission, 210 I. C. C. 210, and sustained by the District Court, without appeal, along with several other *Ex Parte* 104 cases in *Inland Steel Co. v. U. S.*, 23 F. Supp. 291, 295; *The Staley Company*, 245 I. C. C. 383, was another free spotting case, the subject of controversy in *United States v. Wabash R. Co., et al.*, 321 U. S. 402; and *Corn Products Co.*, 266 I. C. C. 181, is the latest free spotting case approved by this Court, and in which the facts relating to custom, practice, tariff provisions, and compensation included in line-haul rates, are almost identical with facts herein relating to the same subject.

determined by the Commission for each case, in addition to line-haul rates it would appear simple justice that the plants here involved be compelled to pay the same kind of charges for the same kind of service.

Here the Commission, conforming to standards and methods approved by this Court, particularly in *United States v. American Sheet & Tin Plate Co.*, *supra*, at page 411, and in *United States v. Wabash R. Co., et al.*, *supra*, at pages 407, 408, and 409, examined the record evidence relating to each of the three plants involved, and entered its findings based upon that evidence. It has found that "transportation" (Section 1 (3) - (a)) begins and ends at the "plant yard" for the Garfield plant, and at the "flat yard" for the Leadville plant both operated by American Smelter, and at the "assembly yard" of the U. S. Smelter. It was found that it is the duty of the smelters to ascertain and certify value of ore shipments to determine freight charges under the valuation rates applicable to each plant, and that carriers are under no obligation to perform any switching in connection with that plant function. It was found that carriers moved loaded and empty cars between the yards, designated as the point of beginning and ending of transportation at each plant, and points within the plant areas, a service held to be in excess of that rendered shippers generally in delivery and receipt of

traffic on team tracks, or industrial spurs. It was found that services between the described interchange tracks and points served within the plants cannot be performed in a continuous movement without interruption or interference caused by industrial operations, are in excess of services performed in simple switching, and are industry services, which carriers are not obligated to perform at line-haul rates. And finally it was found that performance of such industry spotting services, without reasonably compensatory charge, in addition to line-haul rates, would be a preferential service, not accorded shippers generally, and would result in refunding of a portion of rates collected, in violation of Section 6 (7) of the Act.²¹

The lack of uniformity and unequal treatment of shippers in respect to industrial switching or plant spotting, or in payment of allowances to industries for performing their own switching, has, long before the institution of *Ex Parte 104* proceedings, been a matter of concern to many railroads, and a burdensome problem upon the Commission. The history of early efforts to eliminate this favoritism is related in the main report in *Ex Parte 104*, and includes citations to many court cases in which decisions upon different

²¹ A summary of the nine numbered findings entered identically in both cases in reports of May 18, 1948, that in American Smelter is found at R. 374-375.

phases of the subject were made. In some instances, as in the *Los Angeles Switching Case*, 234 U. S. 294, railroads were imposing a charge for switching from their yards to the site of industries within the switching limits of Los Angeles. The Commission order held that charge unlawful, on the ground that the switching was a part of delivery service under line-haul obligations, and that was approved by this Court. At the same time the railroads were trying to impose a charge upon Los Angeles industry for switching which it was their duty to perform, they were performing all switching and spotting in the plants here involved, including that recognized as intraplant, without any kind of charge and for years, without reference to tariff provisions or what compensation was included in the line-haul rates.

The *Los Angeles* case is just one of many instances found by the Commission, in all the tedious years spent in trying to rid railroads of this favoritism, where a great difference in the kind of delivery or terminal switching service existed. Each supplemental proceeding under *Ex Parte 104* is a legal milestone on the long hard road toward the goal of equal terminal switching service for all shippers. The case of *New York Central & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, with the *Los Angeles Switching case*, provides ample evidence

of the extremes of terminal service which railroads were expected to accord different shippers. In the *Los Angeles* case they made a charge to move a car from the railroad yard to the plant entrance within the switching district. In the *General Electric* case that industry, within the city switch limits, received delivery at the plant interchange track, and petitioned the Commission to compel free spotting within the plant, somewhat in the manner as performed within the smelter plants here involved. After denial of that petition the New York action was filed, seeking a court order to compel free plant-spotting. In denying that complaint the court, perhaps for the first time, clearly marked the line between railroad transportation obligation, and the industrial service involved in movement of cars within plants. The court there said, pages 117-118:

The decisive question must therefore be whether the switching done by the defendant within its plant between the storage tracks and the platforms of its mills is work that the plaintiff was bound to do as a part of transportation. To put it in another form, the question is, Where does transportation begin and end? The published tariffs to Schenectady establish switching limits extending from Sandbank to Carmen and Stony Lane. Delivery within those limits is paid for when rates are collected to Schenectady. Since the

limits embrace the defendant's plant, there is no dispute that delivery at the plant is covered by the rate. The difficult thing is to ascertain when delivery at the plant is made.

Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminals. *Los Angeles Switching* case, 234 U. S. 294, 34 Supp. Ct. 814, 58 L. Ed. 1319. But reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. * * * The engines that move within this plant are not doing work that the plaintiff ought to do, or effectively could do. They are doing the defendant's work. They are "plant facilities."

Later decisions of this Court clearly recognize Commission authority to remove preference and prejudice resulting from lack of uniformity in terminal services rendered at different plants and in different sections of the country. We need only refer to *United States v. American Sheet & Tin Plate Co.*, *supra*, and *United States v. Wabash R. Co.*, *et al.*, *supra*, to remove all questions as to this Commission authority. In the *Tin Plate* case, page 408, the Court held, "The Commission is clearly empowered to de-

termine what is embraced within the service of transportation and what lies outside that service." In the *Wabash* case, it is stated, page 408, "This Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

The orders herein are merely an exercise of that Court-established authority, in the manner defined and approved by the Court, and fully supported by the kind of record evidence as is held sufficient, and do not hold that plant service for which there is a tariff charge would violate Section 6 (7). They only hold that service within the plants beyond the points of interchange, are industrial operations, and if performed free would violate section 6 (7). In fact, these orders condemn only the performance of services within these plants, beyond the designated points of interchange, for which there is no charge, in addition to the line-haul rates. The lower court has here regarded the tariffs as sacred contracts which cannot be disturbed, even to the extent of interpretation of terms to suit the necessity of the moment, and as constituting an insurmountable obstacle to court-recognized Commission authority to decide where transportation begins and ends. In *Merchants Ware-*

house Co., et al. v. United States, 283 U. S. 501, 510-511, this Court sustained a Commission order which forbade carrier performance of certain carload transportation for warehouses, under established tariffs, on the ground that such service would nullify published rates. The Commission has here acted upon the court-stated principle that immunity is not given to discrimination and preferences, merely because extended in tariff form.

It is here believed that the Commission authority to apply principles established under *Ex Parte 104* to particular industrial plant has been so long established, recognized, and applied as to leave no room for further controversy, even in the habel of confusion created in these proceedings, relating to custom, practice, tariff, and rates at the plants here involved.

II.

RECORD EVIDENCE SUPPORTS THE COMMISSION ORDERS

The lower court held as a fact (R. 449-459, incl.), that no evidence before the Commission supports the orders of May 18, 1948. It is doubted that appellees or the lower court have or could question facts relating to switching conditions. They appear to contend herein that these cases have no relation to the general proceedings, investigation, voluminous record evidence, and main report in *Ex Parte 104*, and that the only proceeding and evidence here pertinent and material is that contained

solely in these supplemental records. This clearly reveals the fatal error of the Court below in basing its consideration and decision upon a partial record. Evidencing this error are contentions of appellees sustained by the Court, that these smelter plants have been given free spotting service since beginning operations, that railroads have for a part of this time provided in tariffs for the spotting service free, that current tariffs define the terminal service considered as a part of the line-haul obligation, and that line-haul rates were always intended to include compensation for the plant switching performed. These subjects will be later discussed in more detail. It is sufficient to state at this point that the lower court has fallen into a serious misconception, in respect to custom and practice of carriers, which it has decided relates only to the plants here involved.

That appears to be the only reasonable basis for court findings of fact in that respect, particularly with reference to findings 12 to 17, inclusive (R. 455-457, incl.). Otherwise the findings would completely disagree with the holding of this Court in *United States v. American Sheet & Tin Plate Co.*, *supra*, page 410, where in referring to such custom and practice, it was held, "The record fails to establish any such custom." Obviously, the Commission consideration in its main report in *Ex Parte 104*, relating to custom and practice of carriers, tariff provisions, and compensation under

line-haul rates, relates to the record evidence on those subjects, procured in the general investigation, of hundreds of plants throughout the country, and not just that which may apply to a single plant or industry. Equally obvious is that the Court reference is to the general situation not to a particular industry. This is supported and emphasized by the interpretation and opinion of the district court in Corn Products Refining Co., page 872, a decision affirmed by this Court, where it held, in reference to custom and practice, that the Commission should not be compelled "to re-litigate the basic issues in each supplemental proceeding." To sustain the lower court decree herein, on that basis, would effectively destroy Commission authority to "determine what is embraced within the service of transportation," and repudiate the prior fact established by this Court that there is no such custom.

What the lower court really holds herein is that the railroads concerned, prior to these Commission supplemental proceedings, gradually amended the tariff provisions for switching these plants, eliminating the more obvious free plant services, and finally to define in the tariffs what is embraced in railroad transportation and what is embraced in plant service, and on that basis decides that the railroads, rather than the Commission, as held by all prior court decisions, have full authority to determine these questions. In

this way the lower court has, for its own purposes, transformed these cases from Supplemental *Ex Parte 104* proceedings, to rate cases under other provisions of the Act, not pertinent to exercise of the Commission authority herein, as recognized by this Court. The Commission has not here decided tariff and rate issues, insisted as necessary by the lower court, but confines its determination to the single question of what is embraced in the railroad transportation at each of the plants involved. The effect of that is to require a reasonably compensatory charge for all services performed by the railroads "beyond the point in time and space at which the carrier's transportation service ends."

The orders herein do not require payment twice for the same service, and the Commission has not here decided that tariff charges for plant spotting are or are not sufficient or reasonable. It has only been decided that such switching is not a part of line-haul transportation, and if performed without a reasonable charge in addition to the line-haul rate, would be a violation of Section 6 (7). Under contrary fact findings the lower court concluded (R. 459-463, incl.), that the carriers are obligated to perform the plant switching according to tariff provisions, as interpreted by railroad and industry officials, and directly in conflict with the Commission decision as to where transportation begins and ends. The court also concluded

that to require these industries to pay for services rendered within the plants, beyond the interchange tracks designated by these Commission orders, would require a second payment for the same service, since all the record evidence shows that compensation for the services is included in the line-haul rates. In short the lower court completely ignores all of *Ex Parte 104* proceedings, except that presented by these supplemental proceedings, and an erroneous interpretation of selected portions of the Commission's main report. This constitutes as complete and effective decision contrary to prior decisions of this court in other *Ex Parte 104* supplemental cases, as if the lower court had distinctly and directly stated its disagreement with this court.

The photostats of plant maps submitted separately with this brief, show the complicated and extensive network of plant tracks and buildings. The maze and extent of plant tracks, including the easily observed interchange plant yards designated by the Commission and identified on the map photostats by a red I imposed thereon, indicate the great distance of car movements between points within the plant. And the large traffic moved in the plant, with the complications of plant operations, show the obvious necessity for coordinated plant switching to meet the needs of industry. Obviously, all physical parts of these plants, including plant tracks, were designed to

contribute to the best industry operation, without reference to railroad convenience in performing the line-haul transportation used in that operation.

The Garfield plant is on a mountain side built on three levels, with more than twenty miles of plant tracks, over which the D. & R. G. switches the plant with standby engines operating three shifts each day seven days per week. Industry engines operate over some of the same tracks used by D. & R. G. The U. P., D. & R. G., and presumably the Bingham & Garfield now operating exclusively intrastate, deliver and receive all freight on tracks of the plant yard, consisting of ten tracks from 1,800 to 2,400 feet in length. Line-haul engines deliver to and receive all freight on the plant track, and D. & R. G. plant engines, operating for all carriers, moves all freight from plant track to the various plant facilities, and all loaded and empty cars to the plant track. D. & R. G. provides the engines, crew, and pays the cost of spotting performed, under the direction and written instructions of plant officials. One engine operates in east side of plant and devotes 95 percent of its time to weighing; another operates in west side and another operates throughout the plant for general switching. Some 25 hundred cars of a variety of commodities, largely concentrates and ores in-bound and bullion out-bound, pass in and out of the

plant each month, with all cars moving to and from the plant yard and moved by carrier engines. All cars come to rest upon the plant yard tracks, being moved if in-bound, as industry directs, by the D. & R. G. plant engine, to scales, thaw house, sampler, and points of unloading, sometimes involving as many as six movements, with ore cars being weighed a number of times loaded and empty, before and after moving through thaw house. Out-bound cars are moved from loading points over switch backs with excessive grades, sometimes with four or five cars at a time because engines can move no more, and after moving to plant yard thence to scales for weighing, are returned to yard where the line-haul engines pick up for that transportation.

Mr. Moriarty, D. & R. G. Superintendent, in describing the Garfield switching within the plant, referred to some car movements from plant yard to west entrance switch on lower level, that distance not stated but from map appears to be several thousand feet, and from the west entrance switch thence east some 4,000 feet to unloading point (R. 890). This witness also described frozen ore movement, a condition usually experienced from October to April, as cars being left on plant yard by line-haul engines, with first move from plant yard to scale, thence to thaw house, and after thawing to scale, and finally to unloading points, admitted by this witness as four move-

ments (R. 891). As construed by the Commission, this consists of six movements, after cars are cut off in the plant yard and prior to placement for unloading, (1) to scale, (2) to thaw house, (3) to plant yard, (4) to scale, (5) to plant yard, and (6) to unloading point. (R. 33.) Even the six movements described in the Commission report appears to be a modest estimate of such movements. As stated by Mr. Moriarty, cars are moved under direction of the plant with orders being accepted by the D. & R. G. yardmaster (R. 895), who, "as nearly as possible, carries out the wishes of the smelter in placing these cars and the time which he places them" (R. 899). Description of movements of ore was given by Mr. Daingerfield, Garfield plant yard and weighmaster, American Smelter official (R. 1019-1020). The D. & R. G. engine couples to cars on either 3, 4, or 5 track in plant yard, pulls cars to east over switch that connects with scale house, then pushes cars to scale where each car is weighed, uncoupled and will drift down to No. 2 line almost to end of track, where the west end engine places them back on the plant yard, awaiting orders from the smelter. Upon this description and by reference to map distances, it appears that frozen ore cars move first east to scale switch, thence to scale, two moves each of some 2,000 yards, and after weighing, which requires an engine stop and push for each car, the cars drift down to west

end track, some several thousand feet, to be there picked up by west engine and returned to plant yard; another movement of several thousand feet, awaiting smelter orders to thaw house, another switch move of several thousand feet. Then after several days thawing, cars are again picked up and returned to plant yard, another movement, then switched as in first instance in two moves to scale, and finally to drift by gravity to unloading points. This appears to be at least six distinct switch moves, not counting the engine stop and push for each car at scale, necessary in weighing, and obviously required by industry operation. Certainly such complex, long distance switching with multiple car movement, as is here necessary in this plant operation, cannot be a part of railroad line-haul obligation, or even remotely resemble delivery service at carrier convenience. It is correct that a part of these moves come under the charge provided in carrier tariffs, as the 50 cent per car charge for movement to thaw house, then after thaw to scales for weighing and thence to unloading points. Apparently no other charge is made for these ore movements, except 50 cents for empties as required by the smelter, all other of these multiple movements, being regarded as uninterrupted movements (R. 12).

To illustrate the similarity of switching at each of these three plants, reference is made to the division report in U. S. Smelter, where switching

conditions are described at the Midvale plant, upon the record evidence in that case (R. 330-341, incl.). The plant is located in mountainous terrain, has 48 standard gauge tracks totaling 14 miles, serving 16 plant loading and unloading points. The plant is served by U. P. and D. & R. G. with plant switching performed by the carriers under joint provisions of two engines with four crews. U. P. owns and maintains five tracks, each 600 to 1,000 feet long, located at the northeast corner of plant, and used as an interchange where line-haul engines receive and deliver freight. The D. & R. G. crosses the plant east to west, and operates two parallel tracks about 800 and 1,100 feet long, used for receipt and delivery of freight by line-haul engines. Eleven parallel plant tracks, 400 to 1,500 feet long, called the "assembly yard," are used by both railroads for general switching, passing and storage. The general practice is to switch all cars to the "assembly yard." Movements of cars to and from various points in the plant are under direction of plant officials. Final point of ore delivery depends upon and awaits the plant assay, and is unknown until after sampling. Cars of ores are usually moved to the "assembly yard," held there pending plant instructions, then moved to scale for weighing, thence either to combined concentrator and sampler in south yard or the sampler in north yard, unloaded at

the sampler and after sampling reloaded in other cars, then switched to storage tracks in the "assembly yard" to await further plant orders. All of Lark ore cannot be spotted when received as engines are unable to switch more than 8 cars at a time, up the steep grade to the trestle (R. 336). The report recites a number of delays noted by Commission agents in their 5-day investigation (R. 334). In practical effect the same tariff and rates apply to Midvale as at Garfield.

To show by other typical evidence the switching conditions at these plants, excerpts from the testimony of Mr. McDonald, the Commission agent and supervisor of the 4-day investigation made in March 1944 are set forth as follows (R. 631-642, incl.): Witness is experienced in railroad operations and participated in the investigation of the Midvale plant. Excessive grades of over three percent exist in track approach to trestles in flotation mill, smelter mill, and of two and a half or three percent on track to bullion house in the bullion hole. In some cases loaded cars from flotation mill, when moved to scale and weighed, were found insufficiently loaded, returned to mill for added load and moved a second time to scale for reweighing (R. 633-634). Witness did not consider all unloading tracks of plant of sufficient capacity to accomodate all loaded cars at one time, and at the flotation mill

and north trestle, even if the track capacity were sufficient, two movements would be required to place all these cars, because of the heavy grades. Written reports of four other Commission investigators were submitted in evidence by Mr. McDonald, showing check of movements in this plant for the four days observed, by car numbers (R. 672-754, incl.). To illustrate, the plant switching of a typical car movement, as shown in these reports, was described by witness McDonald as follows (R. 638-639): A car of ore, 21915, arrived at plant over U. P., on March 27, 1944; on March 29, at 8:15 a. m., it was taken from the U. P. delivery yard by engine No. 2, to scales and weighed; on same day at 8:45 a. m., the same engine moved car from scales to belt track of new flotation mill; at 10:05 a. m., the same engine moved car from the belt track to trestle into mill; at 12:05 p. m., the same car, empty, was moved by the same engine from the high line to scales, weighed light; and at 1:35 p. m., the car was moved from scale to U. P. interchange track, with one 50-cent charge for move of empty car to scale for weighing.

The same type of evidence was submitted to show switching conditions at the Leadville plant of American Smelter, and is stated in detail in the Division report (R. 108-116, incl.). Further record reference to this type of evidence seems unnecessary since these facts cannot be

questioned. All this mass of physical facts showing switching conditions was ignored or disregarded by the lower court.

There is a difference in the tariff provision at Leadville, where the 1920 tariff applies. For some unexplained reason the 1938 tariff applicable at Garfield and Midvale was not applied to Leadville. The 1920 tariff still in effect at Leadville (R. 11) provides that delivery will include movement over track scales, to and from thaw house, to and from sampler, to designated unloading point indicated by the Company. This tariff does not provide that the delivery and other service rendered is compensated for out-of-line-haul rates, as is done or attempted in the 1938 tariff. The 1920 tariff frankly decides for itself where line-haul transportation begins, on a basis that could only be dictated by industry interest, without mention or conception of interruptions, which are recognized and require a charge, in addition to the line-haul rate, under the 1938 tariff. Leadville pays nothing under its tariff for movement to and from the thaw house, for additional interrupted movements, or for empty weighing movements, for which Garfield, Murray, and Midvale are compelled to pay, fifty cents, one dollar, and fifty cents, respectively. About the most obvious difference in conditions at these plants is that Leadville is given free service for which Garfield and Midvale must pay, even though that pay is,

on its face, quite insignificant. The frankness of the 1920 tariff is in the fact that it makes no pretense of compensation in line-haul rates, for this free switching, as does the 1938 tariff.

The lower court, in order to provide a basis for its holding that the Commission findings are without evidence support, and that all the record evidence before the Commission is contrary to its findings, has failed completely to note the evidence of physical facts and switching conditions existing at these plants, as above noted, or has disregarded the same. It is difficult to believe that the lower court is unfamiliar with prior opinions of this court, to the effect that the type and kind of evidence above related is precisely and only that required for Commission decision as to the point where transportation begins and ends.

Findings of fact by the lower court are not explained by opinion, except by the statement of the Honorable Circuit Judge, member of the Court, made at the conclusion of the first court action, and incorporated as part of the findings herein (R. 452-453). The adoption of that statement may indicate the real basis of the final decision of the lower court. Nowhere in any statement of the court is mention made or note taken of the location and terrain of plant sites, the size of plant and number of points to be served, the number and extent of plant tracks,

the volume and kind of traffic passing in and out, how that traffic is handled by standby engines and crews furnished by the railroads, the amount of coordination necessary to industry operation or sacrifice of carrier convenience to that operation, the provision and use of interchange tracks, of the manner and detail of car movements in, through, and out of these plants. These are the items upon which the Commission based its decisions, and which the lower court failed to note or ignored in reaching its decision.

Court findings 13, 14, and 15 (R. 456), find that the only evidence before the Commission is that for more than fifty years the railroads have never delivered or received freight at the several yards designated by the Commission as convenient points for such receipt and delivery at each plant, that such designated tracks are not industrial tracks, as the Commission held, but instead are railroad terminal facilities used as any railroad yard, and that line-haul rates include compensation for all terminal switching beyond such designated points, including so-called "interrupted movements" incident to determination of ore values. Court conclusion 3 (R. 460) is to the effect that the Commission orders, requiring payment for the switching concerned in addition to line-haul rates, would result in payment twice for the same switching service. These findings and conclusions appear sufficient

for the effort here made, to ascertain, if possible, the basis or specific record evidence used by the court to support its findings. The statement of the Honorable Circuit Judge, above cited, may account for the findings and conclusions of the entire court, upon which the final decree herein is based. The Honorable Circuit Judge stated that he would find that the yards designated by the Commission as points for receipt and delivery of freight, are "actually used by the railroads as terminal facilities," that line-haul transportation includes one uninterrupted switch placement or customary and reasonable terminal service not in excess of simple switching or team track delivery, that the only record evidence supports the conclusion that tariffs include compensation for switching beyond points designated by the Commission as the beginning and end of transportation, that there is no record evidence to overcome the presumption they are not performing services gratuitously, and that the Commission orders would require two charges for the same services. In practical effect these findings, which the Honorable Circuit Judge stated he would adopt, are adopted in the final findings and conclusions of all three members of the court below. The problem of the moment is to locate evidence, if possible, used as support for these court findings, which in reality constitute very obvious substitution of court judgment for that

of the Commission, upon administrative questions.

There is a modicum of record evidence stating the opinion of industry and friendly railroad witnesses, that the yards designated by the Commission as industrial yards and convenient points for receipt and delivery of freight, are "receiving yards" for railroad use, or "railroad terminals." Under close questioning by industry counsel (R. 898), Mr. Moriarty, division superintendent of the D. & R. G., agreed that the plant yard at Garfield was used as such railroad yard or terminal. The lower court failed to note, or merely ignored the earlier testimony of this witness (R. 883-884), that all three railroads serving that plant *delivered* their freight *at the plant yard*, that *all movements are controlled by switch orders issued by the smelter*, and (R. 895), that *the railroad yard or engine master receives all instructions from the plant*. The same witness (R. 902), further stated that the plant yard operated as any railroad terminal, suggested as a proper answer by the questioning, and followed immediately with a reference to plant service as "industrial switching" and added (R. 903), *"Regardless of its name under the tariff it is still industrial switching after we get hold of it."* [Italics supplied.] Mr. Moriarty has quite frankly and sincerely stated the conception of the railroad men, who handled the switching at these plants, and clearly indicates that they considered the spotting an industry service, not a

railroad obligation, regardless of the obvious effort to give it a different appearance. It is evident that the Commission decision, based upon all the evidence of physical facts and switching conditions, agrees with the opinion of railroad workers who actually perform the switching. Equally evident is that the lower court did not agree with this conception of railroad workers, but chose to accept the views expressed in tariffs, intended to extend all the free service possible to these favored industries.

The record of the Midvale and Leadville plants contain little or no direct opinion that the designated yards there are railroad yards. The Leadville superintendent, an industry employee, did refer to the flat yard as a railroad yard used for railroad convenience (R. 1119). That is the expressed opinion of an official of American Smelter at that plant, not the opinion of railroad workers who actually performed the service. It is hardly possible that any industry or high-railroad officials, here obviously trying to please these industries, would concede that any part of the switching at these plants is other than railroad convenience, or that any movement is "interrupted," or that the delivery service is in excess of that involved in simple switching or team track delivery.

It is practically impossible to conceive the findings and conclusions of the lower court as being based upon the physical facts and switching conditions at these plants, as shown by these supplemental rec-

ords. The court findings follow in practically the same sequence, express the same conceptions, and use almost the same language as that of the American Smelter complaint. The court has failed to state or indicate any specific record evidence support for its findings and conclusions. There is nothing to indicate that the court has considered all or any part of the facts of record. It appears to have relied upon opinion of witnesses or complaint allegations, and on that basis to have evaluated the weight and probative value of the evidence. By that process the court arrived at a conclusion completely different from that of the Commission.

It seems certain that no other conclusion is possible than that facts related in the Commission reports involved are taken from the records in these supplemental proceedings, relate to the physical operations of the industry plants concerned, and is distinctly the evidence required for Commission decision as to what is industry service in contrast to railroad transportation, and as to where that transportation begins and ends in respect to a particular plant. Prior decisions of this court in similar supplemental *Ex Parte* 104 proceedings, and in other similar cases, leave no doubt of this legal fact. It seems legally certain that findings and conclusions of the lower court, that the orders involved are unsupported by record evidence and, that all record evidence is contrary thereto, is wholly unwarranted.

III

THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION UPON ADMINISTRATIVE QUESTIONS

The discussion above concerning the facts of these cases, constituting evidence support for the Commission orders, appears to fully justify the assumption that the lower court ignored the record facts, completely accepted appellee complaint allegations as a correct statement and interpretation of fact and law, and on that basis proceeded to decide such fact questions, as it deemed desirable, and to substitute its judgment upon administrative questions involved, for that of the Commission. It also appears that the lower court was not concerned over, or has disregarded the very definite limits to court review of such Commission orders, as has been thoroughly established by this Court. Those limits are so well known to courts generally that they are usually considered elemental. This is plainly the principle stated in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139-140, as follows:

Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Com-*

merce Commission v. Illinois Central R. Co., 215 U. S. 452, 470; *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541.

In *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 352-353, substitution of the court judgment for that of the Commission upon a question of preference and prejudice was condemned on the ground, as said by the court, that the lower court had "obviously exerted an authority not conferred upon it by statute." In that connection the court further said: "°

It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. * * * And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination.

Upon the assumption, here deemed fully justified, that the lower court has actually decided the

²² *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541; *Board of Trade of Kansas City v. United States*, 314 U. S. 534; *Interstate Commerce Commission v. Hoboken Manufacturers Railroad Co.*, 320 U. S. 368; *United States v. Wabash R. Co., et al.*, 321 U. S. 403, 408.

fact question presented, in order to provide support necessary for its findings, the error is patent under many prior opinions of this court, and is plainly an invasion of the exclusive function of the Commission. There can now be no doubt that in a review of Commission orders the courts have no legal authority to decide fact questions. That was plainly stated in *Virginian Ry. v. United States*, 272 U. S. 658, 663:

There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested.

And to dispose of all questions relating to court authority to decide facts and substitute its judgment upon administrative questions, reference is made to the language in *United States v.*

Pierce Auto Lines, 327 U. S. 515, 535-536, where it was said:

We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that " * * * the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission had done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

Here the Commission decided under all the facts of these supplemental records relating to the plants involved, and the switching conditions there prevailing, and the great volume of facts contained in the general investigation record considered first in the main report in the *Ex Parte* 104

proceeding, relating to hundreds of plants all over the country and to switching conditions existing therein, that according to established standards, spotting or terminal services at the plants here involved, is not a part of the railroad transportation obligation, is in fact a part of the industry operation, that such switching when considered as a part of receipt and delivery of freight is in excess of that required in simple switching or team track delivery, and that performance thereof by railroads without a compensatory charge in addition to the line-haul rates, would result in a preferential service not accorded shippers generally, and constitute a violation of section 6 (7).

In contrast the court has here, as based upon a partial record, consisting only of the records in these supplemental proceedings, the record of hundreds of plants contained in the general *Ex Parte 104* proceedings not having been submitted to or considered by the lower court, decided that spotting or terminal services at the plants here involved is a part of the railroad obligation, is not in fact a part of industry operations, is a part of receipt and delivery service at the plants, is not in excess of that required in simple switching or team track delivery, is the duty of railroads to perform as a part of their line-haul obligation without charge in addition to the line-haul rate which provides compensation therefor, and that such service without additional charge is not a

preference compared to service rendered shippers generally.

These court fact decisions and judgments upon administrative questions are first stated by the court as lack of evidence support for Commission findings. There immediately follows a second court finding that, "On the contrary, the only evidence before the Commission," supported the court fact decisions and judgments. Clearly the lower court disregarded the voluminous general record in *Ex Parte 104*, which was not before the court but was before the Commission, or considered it immaterial or not related to these supplemental proceedings. Where the court finds that all the evidence shows, for instance, that the designated plant tracks are railroad yards used for railroad purposes, and not interchange tracks used for industrial purposes, there is no question of review of the Commission finding, but rather contrary court fact finding and statement of its judgment. The court finding that the only record before the Commission was that of these supplemental proceedings, appears to hold that the large general record in *Ex Parte 104*, which was not before the court, also was not before the Commission. This is an erroneous assumption contrary to fact, and well known to this court. The general record was before this court in *United States v. American Sheet & Tin Plate Co., supra*, and the opinion therein and in other supplemental

proceedings since have held that all supplemental proceedings are a part of that general record.

On the basis of its fact decisions and exercise of judgment upon administrative questions, the decree of the lower court should be reversed.

IV

TARIFF PROVISIONS AND COMPENSATION INCLUDED IN RATES THEREUNDER DO NOT PRECLUDE COMMISSION DECISION AS TO WHAT IS OR IS NOT A PART OF THE RAILROAD TRANSPORTATION

So many supplemental orders similar to those here involved have been sustained by the courts, that it was necessary for appellees to interpret from the records herein some different legal basis for their complaints. In all prior cases courts have sustained these orders as a valid exercise of Commission authority. That would indicate legal compulsion to apply the same principles and standards of evidence to these supplemental orders, to determine their validity.²²

²² A total of 38 such supplemental orders have been sustained by the courts, 22 by this court, and 17 by district courts without appeal; six orders in *United States v. American Sheet & Tin Plate Co., et al.*, 301 U. S. 402; nine orders in *United States v. Pan American Petroleum Co., et al.*, 304 U. S. 156; single orders in *Goodman Lumber Co. v. United States* and *A. G. Smith Corp. v. U. S.*, both reported in 301 U. S. 669, affirmed without opinion; two orders upon limited review in *Inland Steel Co. v. United States*, and *Chicago Ry. Products Coke Co.*, 306 U. S. 153; one order *United States v. Wabash R. Co.*, 321 U. S. 402; one order *Hanna Furnace Corp. v. United States*, 323 U. S. 667, affirmed per curiam; one order *Corn Products Refining Co. v. United States*, 331

Appellees here contend that the tariff provisions for services, and the rate compensation thereunder, are different from those in prior supplemental proceedings, and prohibit application of *Ex Parte 104* principles as applied in the prior cases. Particular differences claimed are that rates on ore shipments, the principal inbound traffic, are based upon valuation of the metal content, that tariffs provide for the plant switching or spotting and that rates thereunder include compensation for the services rendered, both for line-haul delivery and for specific plant switching as set up in the tariffs. This contention is that rendition of the plant spotting services conforms to tariff provisions, is paid for by rates thereunder, and that the railroads have already determined what is and is not a part of their transportation obligation, where that obligation begins and ends, and just what these plants should receive in delivery and spotting service. In short it is claimed that the railroads have already decided

U. S. 790, affirmed per curiam; and of the seventeen orders sustained by district courts only those deemed of any importance are here cited as follows: *Elgin, Joliet & Eastern Ry. Co. v. United States*, and *East Chicago Dock Terminal Co. v. United States*, 18 F. Supp. 19; and *Inland Steel Co., et al. v. United States*, 23 F. Supp. 291, where six orders were sustained, two upon limited appeal to this court, and with particular reference here to one of the other four, the 34th Supplemental Report in *Crane & Company. Kingan & Co. v. United States*, decided April 28, 1944, unreported, in which the court dismissed the complaint for want of equity.

what and how *Ex Parte 104* principles shall be applied to the switching of these plants. Having expressed these railroad decisions in tariff form, at least satisfactory to railroad and industry ideals, both claim that the Commission orders herein threaten, as they interpret the proceedings, to disturb their tariff contracts.

The lower court, in full agreement with contentions of appellees, held, in its conclusions of law, that the line-haul rates include compensation for, and that tariffs provide for the services as rendered, that spotting service within these plants and beyond the tracks, designated by the Commission as the end of railroad transportation, constitutes carrier obligation under tariff and rates, and that the Commission order would require the industries to pay twice for the same service. This court conclusion is based entirely upon the finding that line-haul rates include compensation for all plant switching services, for which no additional charge is made under tariffs. The compensation finding is based solely upon the record of these supplemental proceedings, and takes no account of the voluminous record relating to hundreds of plants investigated in the main *Ex Parte 104* proceedings. This holding alone shows the court conception that these cases could be decided only as separate from and unrelated to the main *Ex Parte 104* proceeding. Because of this misconception the lower court has erroneously based

its decisions upon the partial record, as to questions of compensation, custom, practices, and tariff control of plant spotting.

The only evidence considered related solely to the plants involved in these supplemental proceedings. Nothing relating to these subjects, as found to exist at hundreds of other plants throughout the country, which is in the general record not before the lower court herein, was considered as having any bearing upon the kind and amount of spotting service rendered to shippers generally. Facts and principles established by prior court decisions were not applied or deemed relevant to the issues herein. By no other process of reasoning can conclusion of law 8 (R. 462), be accounted for. By that conclusion the court decided, as a fact, that service to these industries does not result in a "preferential service not accorded shippers generally," as the Commission decided. The Commission decision in that respect rests upon the evidence of the general record, and the records in these supplemental proceedings. The court decision rests solely upon the record in these supplemental proceedings, only a part of the record considered by the Commission. How could the lower court here decide what service other industries generally received, where no record evidence on that subject was before it? Without evidence relating to other industries, such as is contained in the general

record not before the lower court, how could the lower court know anything about custom, practice, tariff, compensation, or spotting service at other industries? Practically the same contentions were made in *Corn Products Refining Co. v. United States, supra*, respecting custom, practice, tariff, compensation, and switching conditions, upon the same kind of evidence. The district court in that case sustained the Commission order in that supplemental proceeding, under procedure, evidence, and manner of switching similar to that herein. Affirmance of the Corn Products decree by this court points to the error of the lower court herein, in respect to its findings and conclusion upon these questions. Nevertheless it appears that the questions, particularly tariffs and compensation, should here be further clarified.

The differences claimed by appellees and sustained by the lower court appear to relate to the variable valuation rate applicable to ore shipments, the provisions of existing tariffs, and the service for which line-haul rates compensate the railroads. The lower court has frankly based its decisions respecting custom and practice in spotting service to that existing at these particular plants. The lower court appears to hold that the custom and practice at these plants must continue, even though that may continue a favoritism of long standing.

No logical or legal reason is stated by appellees or in the lower court findings and conclusions, to support the contention that line-haul delivery, under a valuation rate, should be greater to an industry chiefly concerned with mineral bearing ores, than the other industries dealing only in shipments under normal rates. Testimony of Mr. Carey, Freight Traffic Manager of the D. & R. G., in relating the history of these rates, provides an explanation for the contention that a delivery service, different from that accorded shippers generally, should be afforded smelters in receiving ore shipments (R. 914). After explaining the switching necessary in establishing ore values, and offering his opinion that free service under line-haul rates should be restored with Commission approval, he added that difficulties in ore delivery could only be changed by abandoning the valuation rate, and that would result in the closing of marginal mines. This appears to be another way of saying that railroad operation should be such as to protect some unidentified interests in continued operation of marginal mines. Production of minerals needed in the war and peace economy of this country is most desirable; but certainly that cannot be a proper railroad function where that requires a type of service not accorded shippers generally. Under the Interstate Commerce Act no industry or shipper may legally be given a preference.

The Commission approved this valuation rate upon the insistence of the mining and smelting interests, as designed to meet the needs of that industry." Except for general increases applicable to practically all rates, no increase or decrease in this valuation rate has been made to meet the changing cost under changing tariffs. Another reason, stated in the record, for continuing the valuation rate and determination of freight charges, is the testimony of the General Traffic Manager of American Smelter (R. 950), that the assay process enables the private industry to conceal (from supposedly competitive interests) details of value and weights, which might otherwise be revealed in public tariffs. Protection of its legitimate trade secrets is not objectional, unless that involves a railroad service not a part of the transportation obligation, as here. In approving this method of rate making, no question of what terminal service was included in the rate compensation, or what spotting service for determining the rate was to be performed by carriers, was presented to or considered by the Commission. There appears to be no factual, logical or legal reason for a different application of *Ex Parte 104* principles under a valuation rate than under any other type of rate.

" Non-Ferrous Metals, 204 I. C. C. 319.

The second difference contended by appellees and sustained by the lower court, is that of tariff provisions. It is not here understood how the lower court could decide this question, where the only evidence considered in the partial record before it related to the plants here involved. Certainly the court had no record information upon the tariffs applying to the hundreds of plants generally considered in the main report, and particularly those applicable to the American Sheet & Tin Plate Company and the other five industries sustained in that decision, to Corn Products Refining Company and to Elgin, Joliet and Eastern R. R. Co., as were considered and sustained in those supplemental proceedings. So far as appears within the information available to the lower court, the tariffs in other cases above referred to, may present quite similar provisions as those here involved.

The above statement may not be fully applicable to the tariff provisions and questions of compensation involved in Anaconda Cooper Mining Company, the seventy-seventh supplemental proceedings, considered practically as a companion case with those of American and U. S. Smelters, and first decided under a Division report entered the same day, October 1, 1945.²⁸ The *Anaconda case* involved the same valuation rate, the same tariff provisions, the same processes for ore value de-

²⁸ 264 I. C. C. 103.

termining, including switching, and the same kind of contention and evidence relating to compensation under line-haul rates. The dissenting opinion of Commissioner Alldredge in the *Anaconda case*² (R. 52-54, incl.), was based upon the tariff provisions, valuation rates, and compensation included in line-haul rates, which was referred to in the complaint of American Smelter herein, as being based upon evidence that line-haul rates include compensation for terminal switching services, beyond the points designated by the majority report. Commissioner Alldredge also dissented to the report in American Smelter (R. 51-52), with the explanation that his dissenting expression in the *Anaconda case*, decided concurrently, "apply with equal force to the situation at Garfield, Murray, and Leadville plants here considered." The Commissioner dissented in the *U. S. Smelter case* (R. 280-283, incl.), on practically the same grounds. Although the lower court did not have the record details in the *Anaconda case*, it did have knowledge of the sameness of valuation rate, tariff provisions, and compensation in line-haul rates, with those here involved. Action by Anaconda in the District of Montana, seeking to enjoin and annul the Commission order in that proceeding, on practically the same grounds as those involved in these actions in the District of Utah, was dis-

² 266 I. C. C. 394-396, inclusive.

missed (77 F. Supp. 611-612). The Commission order sustained by that court, was described in the per curiam opinion, as follows:

* * * the Great Northern and the Milwaukee Railroads serving plaintiff's plant at Black Eagle, Montana, were ordered to cease and desist from switching within said plant of loaded and empty cars for weighing and the further movement of cars such as from the thaw house to the sampling track or from the sampling track to points of unloading or other points within the plant, beyond the named and described interchange or hold tracks, which was held not to be a part of the transportation service under the line-haul rates and required additional charges to be made therefor.

The Anaconda Company apparently accepted that court decision entered December 19, 1947, as no appeal was taken therefrom. For some two years Anaconda has been paying terminal charges for services which the lower court herein held must be rendered to these appellees without charge. It appears certain that the District Court of Utah erred in its decision herein, or that the District Court of Montana erred in sustaining legality of the Anaconda order. All courts that have heretofore decided *Ex Parte 104* supplemental orders, except district courts reversed upon appeals, appear to completely agree with the Montana Court Anaconda decision.

The lower court finding 14 (R. 456), is that under *expressed provisions of duly published tariffs* railroads have for some fifty years delivered and received freight at actual points of loading and unloading within these smelter plants. Had the court omitted the statement "under the *express provisions of their duly published tariffs*," it would be difficult to disagree with the finding, since doubtless these railroads have performed all the service now in question, and at one time even intraplant switching without any charge. History of these tariff provisions refute the court finding that for more than fifty years under *express tariff provisions* carriers have performed this switching.

The General Traffic Manager of American Smelter testified as to tariffs covering plant switching, since the first was published in 1908. His testimony was based upon company records and obviously not a matter of personal knowledge of witness who was employed in 1942 (R. 944). The first tariff was effective April 16, 1908 (R. 946). Company records offered as exhibits to testimony of the General Traffic Manager (R. 1243), show switching within the Garfield plant from 1905 to 1908 was performed free by the D. & R. G., in accordance with agreement reached at time the plant was built. The 1908 tariff provided for switching all cars of freight within the plant, "*which has paid transportation*

*charges to the plant * * * free.*" [Italics supplied.] The 1908 tariff was unchanged until February 25, 1920, when, *for the first time*, a charge of \$2.50 per car for intraplant switching was made, along with the provision for delivery at all these plants to include one movement within a smelter plant, over track scales, to and from sampler, to an unloading point designated by the smelter. In November 1920, the intraplant charge was increased on all freight except coal and ore to \$3.00 per car, and the delivery at plants was amended to include "movement" (not "one movement"), "to and from thaw house," to and from sampler to designated unloading point (R. 1244-1245). Effective in December 1923, a new tariff was published again increasing the intraplant switch charge, defining "Inter-Terminal," "Intra-Terminal," and "Intra-Plant" switching, the last as "A switch movement from one track to another within the same plant or industry" (R. 1247). This tariff provided rates for Bingham and Garfield R. R. *transportation to the Garfield plant yard*, and a charge of \$2.25 per car for switch of concentrates from plant yard to unloading point, including "movement within Smelter plant yards over track scales to and from the thaw house, and to and from the Smelter sampler" (R. 1823). By its tariff effective September 10, 1931, the D. & R. G., provided that "all carload rates * * * covering traffic on which it receives a line or road

ul, include the switching service to and from
e side tracks, warehouse tracks, or industry
acks within the switching limits of the D. & R.
W. R. R." (R. 1251). In the same tariff pro-
ion was made at Garfield for delivery to in-
ide movement over track scales, to and from
aw house, to and from sampler, to designated
loading point (R. 1252). Effective July 5,
38, the tariff was published which has, in prac-
al effect, remained in force to present, and
hich is the particular tariff here concerned.
R. 1256-1257).

As shown by exhibits to testimony of the freight
affie manager of the D. & R. G., the tariff
ffective December 22, 1915, provided for switch-
g from track to track within smelter plants
rved by D. & R. G., of cars of freight upon
hich transportation charges have been paid,
"free." [Italics supplied.] (R. 1141.) Another
hibit to testimony of this witness shows pres-
t tariff provisions for the Leadville plant,
ractly the same as the 1920 tariff at all
ants (R. 1151). Just why the 1938 tariff
nendments, which attempted to apply, by inter-
retation extremely favorable to industry, the
r *Parte 104* principles to the smelter industry,
as not also applied to the Leadville plant, re-
ains unexplained. Perhaps this is just another
vidence of favoritism extended this particular
ant, as for instance furnishing and maintaining

free plant tracks (R. 1128), which were not furnished to U. S. Smelter at Midvale, or even to other American Smelter plants at Garfield and Murray.

Another confusion and error of the lower court respecting tariffs, is found in its finding 16 (R. 456), to the effect that for some 30 years prior to 1938 carrier tariffs provided that *the specific terminal switching movements necessary to determine ore values were included in line-haul rates*, and that the present Leadville tariff continues that provision. That goes back to 1908. As appears from above cited record evidence, there was no tariff provision applicable to any plant switching until 1908 when that was provided for "*free*." Before that all switching was performed, including intraplant, without charge and without bother of tariff. The 1915 tariff provided for plant switching of all cars in which line-haul transportation was paid, again for "*free*." And the February 1920 tariff, still in force at Leadville, provided that delivery would include "*one movement of a commodity*" over track scales, to and from sampler, to unloading point. When found deficient in "*free*" service to industry, that tariff was amended in November 1920, to add "*to and from thaw house*" as a part of delivery. Prior to the 1938 tariffs none provided or mentioned "*specific terminal switching*," necessary to determine ore value, as found by the

part. The switching done first, free without tariff, next free under tariff, and then specific part of delivery, never referred to switching determine ore value, although a part of the movements were connected with that process. Apparently the tariff provision for valuation rates always provided for determination by better assay with certification of value to railroads, upon which the charges were figured. These tariffs clearly made it the function of smelters, as the Commission held (R. 1153).

For the first time the July 5, 1938 tariffs provided, under specific language, that the line-haul rate included movement of loaded cars to track scales with subsequent movement to designated plant tracks, which can be accomplished by "one uninterrupted movement * * * *from the head-haul point of delivery to the switching line.*" [italics supplied.] The "uninterrupted movement" is described as "one continuous movement switching locomotive and crew without interruption resulting from orders from or requirements of, the smelter." The tariff further provides a charge of "\$1.00 per car for additional specified movements, \$2.70 per car for intraplant movements, and 50 cents per car for empty cars to scales for weighing, and for frozen cars and from thaw house, and after thawing, to track scales for weighing thence to designated point for unloading (R. 1273).

The testimony of rail and industry officials provides this evidence of tariff provisions, covering the more than forty years up to present time. The tariff provisions in their own terms, not only do not support the court findings 14 and 16, but actually refute those findings. Actually the tariffs did not make the same provisions for all four plants involved, as at Leadville where the 1920 tariff still applies, and different railroads had different charges at the same plant, as at Garfield where U. P. and D. & R. G., for long years did everything in the plant free, and the Bingham & Garfield R. R., made deliveries and received cars upon tracks of the plant yard, and made a charge of \$2.25 per car or more, for movements to and from points within the plant, under the tariff of 1924 (R. 1250). Apparently one B. & G. R. movement within the plant, for which the tariff charge is made, is described by counsel for American Smelter and approved by D. & R. G. division superintendent (906), as pushing cars from east over the scale, and when cut off just drifting down to unloading point. As shown above the B. & G. R. receives and delivers all freight at the plant yard, under tariff provision, and that freight is spotted by the D. & R. G. within the plant, at a charge of \$2.25 and \$3.96 per car. Also all out-bound bullion cars are routed over B. & G. R., apparently incurring a charge from loading points to plant yard, and

redelivered by B. & G. R. to the U. P. and D. & R. G., a few miles out of the plant, with the long distance interstate haul completed by or through U. P. and D. & R. G. Since the B. & G. R. has discontinued its interstate service, it is assumed that copper bullion is now delivered to U. P. and D. & R. G. at the plant yard, without the switch charge formerly made under prior tariffs, and without dividing line-haul charges with the B. & G. R.

The reason for abandonment of interstate service by B. & G. R., does not appear in this record. The Commission order will doubtless not concern future intrastate operations of that railroad. Its past operations are material here only as that may serve to explain, understand, and account for the strange changes, complexities, and maneuvering of railroad tariffs, obviously seeking to render as much spotting service free, as long as was possible, to these plants of the great copper industries. It is very strange that the Bingham & Garfield R. was given a great advantage over the other two railroads serving the Garfield plant. While D. & R. G., and U. P., were spotting their own freight for no charge or for a relatively small charge, D. & R. G., was being paid for a much less difficult spotting service of B. & G. R. freight, practically in the form of an allowance.

Although B. & G. R., operated wholly within Utah and did not itself reach interstate points, all

copper shipments out-bound interstate were billed through B. & G. R., for transport some few miles, to be redelivered to D. & R. G. and U. P., both of which railroads could have received that freight directly from the industry at the plant yard. Apparently B. & G. R. shared in this interstate transportation upon some kind of joint rate agreement, only because of some unrevealed industry preference. It would be interesting to know the economic kinship represented in the word "Garfield" appearing both in the railroad and the American Smelter plant. It is revealing that all these facts point to continuous effort on the part of U. P. and D. & R. G. to give as much free spotting to these plants as long as they could do so, while B. & G. R. participated in the bulk of in- and out-bound shipments, on the basis of interchange and delivery service, that the larger railroads never dared to apply.

Perhaps the strangest part of the B. & G. R. operations at Garfield is the fact that carload freight was delivered and received by that railroad upon the plant yard, designated by the Commission to be the point of receipt and delivery for the D. & R. G. and U. P. Very clearly the former practices, customs, tariffs, and service of B. & G. R. conform completely to the orders herein respecting future service of D. & R. G. and U. P. It seems obvious that where appellees and the lower court mention custom, practice, tariffs, and compensation, no consideration was given to the utterly contrary custom,

practice, tariffs, and compensation, as evidenced in operations of B. & G. R. The record shows that B. & G. R. has conformed to *Ex Parte 104* principles without compulsion, while U. P. and D. & R. G. have at the same time sought, through devious tariff provisions to evade and delay conformance to those principles. Surely, if it were proper and agreeable for the B. & G. R. to receive and deliver freight at the Garfield plant yard, necessitating a charge for plant spotting in addition to its line-haul rate, it will not now be improper or illegal to compel U. P. and D. & R. G. to perform the same service, in the same manner, and for the same kind of charge.

The lower court finding 15 and conclusions 3, 5, 6, 7, and 8, to the effect that compensation for services involved is included in line-haul rates, is not only immaterial and unnecessary to the proceedings here involved, and based upon consideration of a partial record which does not include all the general investigation record, but also is not supported in substantial degree and warranted by the record in these supplemental proceedings, considered alone. The Commission held in its Second Report on Reconsideration, entered May 18, 1948, that questions of applicability of tariffs and reasonableness of published rates and charges for performing industrial services, do not require consideration and decision in *Ex Parte 104* proceedings. The Commis-

sion interpreted the remand of the court in the prior action as requiring clarification of the basis of orders involved. The court had found (1) that the 1946 order was based upon the premise that line-haul rates did not include the plant services in controversy, (2) that on such basis the order was void because no evidence supported it, (3) that all evidence was contrary thereto, (4) that the Commission may, under Supreme Court decisions, assume authority to decide where transportation begins, and (5) that the Commission had not specifically based the orders upon its *Ex Parte 104* authority (R. 367-368). The court remanded the orders to the Commission "for such action as it may find justifiable in the premises" (R. 302). On the basis of these court findings, conclusions, and order, the Commission understood that the court desired a definite statement of the basis for its orders, particularly as to whether based upon *Ex Parte 104* principles, or upon the question of compensation for services involved.

The Commission interpreted the remand as clear indication that the court would sustain validity of the orders, if based solely upon *Ex Parte 104* authority, and would hold them invalid if based solely upon the question of compensation. In that situation it was believed less of a burden upon the courts to reconsider and restate the basis upon which the orders had in fact been

issued. It is believed that the plain language of the court findings, conclusions, and order of remand, support interpretation made by the Commission and demanded the action taken. The report of May 18, 1948, was a most sincere effort to conform to the court requirements, and to restate the basis of these orders under *Ex Parte 104* authority, entered with absolute confidence that the court would approve. This accounts for the careful explanation in the report as to compensation questions not requiring decision and the definite statement that only *Ex Parte 104* principles were relied upon as basis for the orders. The report itself is a full exposition of what is and is not necessary to application of *Ex Parte 104* principles to the plants here involved, with references to ample court authority to support conclusions stated.

As noted in the report on reconsideration (R. 373), counsel for the industry (American Smelter), in oral argument to the Commission has perhaps stated the crux, if not the single question of consequence here involved, in stating the contention that "tariffs superseded our authority to declare where transportation ends, urging that it would not be violative of section 6 (7) of the Act to perform the services at the rates and charges set forth in the tariffs." The above stated history of curious tariff manipulations lead inevitably to the conclusion that prior to 1905, the free plant

switching was performed without reference to tariffs and compensation therefor, either under line-haul rates or otherwise. Private arrangement between industries and carriers for that free service, much of which has since been recognized by both parties as being no part of carrier transportation, must now be plainly recognized as a rebate. The private rebate was changed into a tariff-recognized rebate under the 1908 and 1915 tariffs. This continued until the 1920 tariff, still in force at Leadville, where for the first time a charge was made for what both parties agreed was intraplant switching. That tariff undertook to define what spotting was to be performed as part of the delivery service. The 1920 tariff definitely decided the point in time and space at which the transportation service began and ended, and did not bother to add that compensation for the delivery service was included in the line-haul rates charged. This tariff was changed in 1938, obviously as an effort agreed upon by industries and carriers, to forestall Commission decision upon the vital question as to what is plant or industry service and what is carrier transportation. If more were needed the statement of counsel for American Smelter, above quoted, is convincing that the 1938 tariffs were not an effort to conform these carrier operations to *Ex Parte 104* principles, but rather a device which would or might prohibit the Commission from later applying

those principles upon a basis less favorable to the industry. The system used by these carrier and industry tariff arrangements have been slow to give up favoritism first born some 50 years before when rebates were a common practice.

To provide some semblance of fact support for this free service it was necessary to claim that compensation therefor is and was always included in the line-haul rates. The evidence to support that idea is extremely meager, and as a basis for the court findings, is taken from a partial record. The only part of the general investigation record, submitted to the court below, was that part relating to American Smelter as developed at the Salt Lake City hearing on May 19, 1932 (R. 535-573, incl.). The 1931-1932 hearings, as this court has noted in several cases, was a part of the general investigation of hundreds of plants throughout the country, never intended to do more than to provide the basis for general findings and conclusions which were entered in the main report, and no order was entered under that report, because particular plants were to be later considered in supplemental proceedings. That procedure has been followed in every subsequent consideration given to a particular plant, including those here involved. Some forty pages of the printed record here contains the portion of the general investigation record which was submitted to the court below, and this relates to switching at the Gar-

field Smelter and to the plant of the Columbia Steel Co., also served by the D. & R. G. and U. P. railroads.

Several witnesses testified as to the Garfield switching. Reference is here made only to such parts of the evidence as is deemed pertinent. The Assistant General Manager of D. & R. G. stated that his railroad exclusively assigned switch engines only at the American Smelter plant (R. 548). He stated that the railroad considered movement of cars for determining ore value, a common carrier duty (R. 560). After describing the comparatively simple switch of B. & G. R. concentrates, he said the D. & R. G. collected \$2.25 per car for spotting from the Smelter (R. 561). This is a service obviously the same in type as that performed by D. & R. G. without charge, for all other freight. He further stated that the tariff provided what the railroad determined to be a part of road haul common carrier delivery, which explained why that duty was not fully met by delivery at the plant yard (R. 559). He stated that he did not know of any instance where two or more carriers make the same terminal charges or arrangements, "that a single carrier makes when it gets a line-haul" (R. 561). And finally he stated that their line-haul rates were made to include "this terminal service," which he had just described (R. 563).

This witness unintentionally clarifies some of the confusion as to why tariffs were changed over

the years. Apparently it was to meet increasing threat to cancel rebates. He makes it clear that railroads customarily rendered different kinds of terminal services, as here free spotting of D. & R. G. and U. P. freight, and a charge of \$2.25 per car for practically the same spotting of B. & G. R. freight. He claimed frankly that it was the railroad duty to switch cars in the process for determining ore value, although as later discovered in this record, the tariff itself made that process plainly the duty of the smelter. He explained that where tariffs provided for specific switching it was a duty to perform it. That means, of course, that a favoritism that could not lawfully be extended in the absence of a tariff provision, is made lawful when included in the tariff. And finally, in securing justification for these brash interpretations, he stated that line-haul rates were made to include compensation for the services. It is beyond belief that line-haul rates could intend inclusion for the service to ascertain ore value, which the tariff itself plainly provides is the duty of the smelter, not the railroad. As if to emphasize this the freight traffic manager in 1944 testified that, in connection with application of *Ex Parte 104* principles, he thought free service should be reinstated "for that portion of those services that are necessary for the railroad to have the information required to assess their freight charges." Those charges must be

certified by the smelter after its assay and settlement with shippers, and the railroad is not permitted to know details of the industry secret assay. This appears to be a clear admission that switching in connection with the assay is prohibited by *Ex Parte 104*, in the understanding of the railroad. The 1938 tariff recognized that part of the switching to determine ore values is plant service, not railroad transportation, and makes a small charge therefor. If a part of that switching deserves a charge, in addition to line-haul rates, it seems that all should be paid for in the same way. That is what the Commission has here required. This witness offered the excerpt from the 1932 general investigation and added his opinion that some of the tariffs, referring to free switching, was switching included in the line-haul rates (R. 916).

A strange part of the 1932 general investigation offered herein to the lower court, by the American Smelter, is the part (R. 565-573, incl.), relating to the custom and practices at the plant of Columbia Steel Company, also served by D. & R. G. and U. P. The evidence is that at this steel and iron plant, with some 10 miles of plant tracks and switching inbound some 25 cars per day of various commodities, the railroads receive and deliver all freight upon interchange tracks of the carriers, outside the plant, and that all plant switching to and from those

interchanges is done by the plant engines, without allowance from or free spotting by the railroads. This evidence affords a vivid contrast between the terminal services extended to the Smelter plants here involved and the Columbia Steel Plant, which was just one more of the hundreds heard and considered as the basis for findings in the Commission's main report.

Except for general *Ex Parte* increases the valuation rates here concerned were not changed in all these years (R. 910). When it is realized that these rates were determined and published more than forty years ago, it must be understood that no railroad or industry official who took part in planning and preparing those rates is now available to state that any service, in addition to line-haul, was intended to be compensated for thereby. The private arrangement for free plant switching prior to 1908, the frank tariff provision for "free" service thereafter to 1920, and with the first tariff statement of compensation being included appearing in 1938, more than thirty years after first adoption, is convincing that line-haul rates did not intend compensation for anything more than the line-haul transportation. Witnesses in these late years may only express an opinion on the subject, justifiably influenced by the fact that they have performed the service for years. The frank testimony of rail officials that carrier judgment expressed in tariffs deter-

mines what is and is not line-haul transportation, indicates railroad thinking without reference to legal principles, of which they are uninformed. Counsel for American Smelter carries out this railroad thinking in his contention that tariff provisions supersede and prohibit Commission authority to decide where transportation begins and ends. Even though it is unnecessary here to decide reasonableness of rates, as the Commission explains in its last report, the meager evidence of this record upon the subject does not warrant the findings and conclusions of the lower court, that line-haul rates include compensation for the services in question.

This court has long recognized that unlawful preference, prejudice, and discrimination is not made lawful simply because it is committed under a published tariff. In *Merchant Warehouse Co., et al., v. United States*, 283 U. S. 501, railroad tariffs purported to make a number of Philadelphia warehouses a part of station facilities of the carriers, and provided allowances to the warehouses for loading and unloading package freight. The Pennsylvania Railroad provided for such allowances in its published tariffs, and others received allowance under contract with carriers. Other competing warehouses received no allowances, and they complained to the Commission, seeking to annul the terminal service arrangements, on the ground of discrimination and

preference, and that the allowances were unlawful rebates. The Commission found the practice to be discriminatory and unlawful, and ordered the carriers to cease and desist from paying the allowances.²⁷ This court stated, page 509, that an important question related to the services for which allowances were paid, as to whether that was transportation, for which carriers may discriminate by payments to some warehouses and not to others. It was noted, as of vital importance upon questions of discrimination and rebate, that the favored warehouses were permitted to assemble, distribute, and reship package freight, of less than carloads, into carload lots and ship at carload rates. This was labeled, page 510, as a service which carriers are not authorized to render, even at their public stations, and "if performed would nullify its published rates for carload transportation." On this basis it was held, page 511, that the allowances were forbidden, as departures from published tariff rates on carload traffic, and amounted to rebates.²⁸ It was further held that carriers might lawfully perform or pay for some of the services at warehouses, but may not "extend the privilege to some and withhold it from others," since "Section 2 forbids the carrier to discriminate by way of al-

²⁷ 160 I. C. C. 563.

²⁸ Citing *Lehigh Valley R. Co. v. United States*, 243 U. S. 441, 446; *United States v. Union Stock Yard Co.*, 226 U. S. 286, 307.

lowances for transportation services given to one, *in connection with the delivery of freight at his place of business*, which it denies to another in like situation."²⁸ [Italics supplied.] The opinion noted, page 512-513:

The evil of discrimination was the principal thing aimed at by the Act, see *Louisville & Nashville R. Co. v. United States*, *supra*, p. 749, and its language is certainly broad enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. *Shreveport Case*, 234 U. S. 342, 356. Section 3 makes it unlawful for any rail carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever. * * *"

In sustaining the Commission order the opinion, as if foreseeing the situation here involved, held, page 511, that:

Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co. v. Interstate Commerce Commission*, 282 U. S. 740.

²⁸ Citing *Union Pacific R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220.

Again this court, in *Baltimore & Ohio Railroad Company v. United States*, 305 U. S. 506, squarely condemned a warehouse storage in transit service, at the Port of New York, then rendered under tariff provisions, under the guise of transportation. The Commission instituted proceedings, upon its own motion, concerning practices of railroads in the warehouse and storage of property in the Port of New York. The proceeding was under *Ex Parte* 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part IV, Warehousing and Storage of Property by Carriers at Port of New York, similar to but not the same as Supplemental Proceedings, Part II, Terminal Services.³⁰ The railroads there undertook to provide free storage and other services for shipments in transit, under published tariffs. The Commission held, page 201, that a part of such services were not transportation under the Act, and that, pages 198-199:

When carriers by their tariffs extend their service beyond their legal obligation as common carriers, as, for example, beyond a delivery equivalent to team-track delivery, we have ordinarily found that such extra service must be paid for by the shipper in order to avoid preference and prejudice. *General Electric Co. v. N. Y. C. & H. R. R.*, 14 I. C. C. 237; *Pressed Steel Car Co. v. Director General*, 93 I. C. C. 224.

³⁰ The Commission report is in 198 I. C. C. 134.

109 I. C. C. 75; *Carnegie Steel Co. v. Director General*, 96 I. C. C. 527, 132 I. C. C. 689.

The Commission report further said, p. 200, "these practices lead also to violations of section 6 (7) of the Interstate Commerce Act," and ordered carriers to correct the practices. In the court action, opinion 525-526, the railroads insisted, just as here, that the service was under tariff provisions, and even if in-transit warehousing was not technically transportation, that would protect it from the charge that it violates section 6. The opinion then followed with a quotation from the Commission report, as follows:

What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act.

Following this quotation the opinion said, page 526:

We accept this conclusion. If the service is nontransportation, the fact that it is in a tariff does not save it from the condemnation of section 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances.

A case which appears to be, in all respects, directly in point, with the issues here presented, is that of the *Elgin, J. & E. Ry. Co., et al. v. United States*, 18 F. Supp. 19. This case was heard and decided before a statutory three-judge court and sustained the Commission order involved. The facts of that case involved terminal services by the carriers for the East Chicago Dock Terminal Company. The Elgin, J. & E. Ry. Co. operated a belt line railroad around the City of Chicago. Under its published tariffs it provided for, as included in the delivery service of line-haul traffic, the placement of cars where shippers

and consignees desired them to be placed for loading or unloading. In certain cases where consignees desired to place their own cars, the Elgin Railway agreed thereto and published tariffs providing for payment to the consignee for performing such spotting service. That was the relationship between the railway and the dock company. The Commission order therein was entered in another of the supplemental proceedings under *Ex Parte 104*, and was the application of the principles established in that main report to this particular railroad service. There, as here, the Commission found that the line-haul obligation was completed and ended when the line-haul freight was delivered at designated interchange tracks, that the service performed by the carrier beyond those points was plant service, and that payment of an allowance for such service performed by the consignee was a violation of section 6 (7) of the Act. In that case there was no question but that the performance of the service involved by the carrier, or in lieu thereof, the payment of an allowance to the consignee when it performed that service, was completely and strictly a conformance with the provisions of the tariff. The tariff involved in that case, with respect to performing the spotting terminal service, appears to be practically the same as here involved in the 1920 tariff, applicable at present only at the Leadville plant, which simply states that a part of the de-

livery will be the spotting and movement of cars within the plant. Courts have so often held or indicated that there is no difference in the principles involved between the spotting service performed by carriers ostensibly as a part of their line-haul obligation, and, in lieu thereof, the performance of such service by industry motive power, with an allowance therefor paid to the industry by the carrier, that it is here taken as a subject foreclosed from further consideration. To further emphasize the situation, the Commission order in that case was based clearly upon the finding that the service beyond the designated interchange tracks was a plant service, not an obligation of the carrier under the line-haul obligation, and that the compensation to the carriers under the line-haul rates began and ended at such designated tracks, all as constituting a violation of section 6 (7) of the Act. The statutory court sustained that order despite the tariffs involved and no appeal was taken therefrom. Other cases, above cited, clearly indicate that this court ruling was in complete accord with principles that have already been enunciated by this Court, and that such an appeal would have been a futility.

The court opinion in the *Elgin Ry. Co.* case first notes, p. 21, that whether a published tariff rate is unjust, unreasonable, or discriminatory, is a matter which the Interstate Commerce Commission, by law has been empowered to determine under the

existing facts and conditions. It next notes, p. 22, the authority for the publication of tariffs, by carriers, and the provisions under section 15 (1), 49 U. S. C. A. 15 (1), that in setting aside or canceling such tariffs, the Commission must first reach the conclusion that a rate or practice is unjust or unreasonable or unjustly discriminatory, or unduly prejudicial or preferential, or otherwise in violation of the provisions of the Act. In passing it is to be noted that plaintiffs' contentions herein appear to be directed to an effort to force the Commission to consider the tariffs involved under the provisions of section 15 (1). That very question was considered and overruled by the court in the above opinion, where it was said, p. 22, "It is first contended by plaintiffs that the Commission's authority to make the order, which they deny, must be found, if at all, in section 15 (1) of the Act." The court further said, in this same connection, that "Under this section, it is obvious that, before the Commission can act, it must first reach the conclusion that a rate or practice of the carrier is or will be unjust or unreasonable, * * * or otherwise in violation of any of the provisions of the act." This is followed on the same page of the opinion with the following court statement of principle:

Plaintiffs' argument assumes with certainty that the so-called spotting services involved in these controversies constituted transportation within the meaning of the act; that the railroads were lawfully bound

to perform those services under their contractual obligations of the published tariffs; and that the tariff rates must be considered as just and reasonable compensation for such services, and undiscriminatory until the Commission find to the contrary.

With this contention we are unable to agree. * * *

That court opinion further stated, concerning the Commission authority with reference to the principles established in *Ex Parte 104*, at p. 24:

While no exact formula can be applied, yet certain principles can be followed which will be both helpful and equitable as applied to all cases. We think it was within the province of the Commission under the act to promulgate and enforce the principles which they announced, as hereinbefore referred to. They seem to us to be fair, and are sufficiently flexible in their application to cover all cases, and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible.

And this is followed by the further statement of the court on the same page, as follows:

It is true that the Commission made no finding or conclusion that the allowances for what it termed "plant services" constituted unreasonable compensation for

fully find to the contrary. And major question 3 is:

"3. Whether the Commission may treat as wholly inoperative and not binding upon the railroads or the appellant a tariff schedule which by its terms is applicable at appellant's plant and defines the circumstances under which charges in addition to the line-haul rates will be made in connection with the switching of cars, which schedule has not been ordered cancelled or held to be unreasonable or discriminatory or otherwise in violation of the Act."

There is no question that the facts concerning tariffs and compensation, as stated in the Corn Products brief and above referred to, were uncontradicted and was the only evidence in that record upon the subject. The argument there is unmistakably the same, on the questions of tariff and compensation, as herein argued by appellees and adopted by the lower court in its findings and conclusions. Major question 3 of that brief, above quoted, could not more clearly state the legal basis of the lower court decision herein. It appears beyond question that the decision, conclusions of law, and final decree of the lower court, upon questions of tariff and compensation, are in clear and distinct conflict with prior decisions and opinions of this court.

THE COMMISSION ORDER IS NOT ARBITRARY

Under facts and law above stated it seems certain that the Commission has here only applied principles established in the *Ex Parte 104* proceedings, in the manner approved by decisions of this court, and which have previously been applied to many other industries. That cannot be arbitrary. The Commission has given the most careful consideration to every claim and contention made by these industries, in opposition to the proceedings and orders herein. Even when the lower court in the first action remanded the orders for further clarification of the basis of the Commission decision, with apparent recognition of the legal authority to so order if based upon *Ex Parte 104* principles, the proceedings were reopened, reconsidered, and new reports containing nine specific findings were entered. The Commission interpreted, as here believed fully justified, that the lower court, in its remand findings, indicated its inability to determine the precise basis for the orders, expressed the view that the orders would be lawful if based upon a holding other than that the railroads were not compensated for the services, and practically invited the explanations and findings which were incorporated in the 1948 reports.

Actually the Commission, in entering the report, believed that it was precisely what was de-

such services. It was unnecessary to do so because it found that all such services were unlawful. Hence they were inherently unreasonable and unjust by reason of their unlawfulness. For the same reason, it was unnecessary for the Commission to specifically find that the rates were discriminatory.

And as here, the Commission made no finding that the service involved, as provided for under tariffs, constituted unreasonable compensation for such services, *since it was found that such services were unlawful*. That is precisely the point we are here attempting to make, viz, that the Commission having found that the transportation obligation under line-haul rates begins and ends at the designated tracks, the performance of that service beyond such designated tracks, is not a part of the line-haul obligation of the carriers, and for that reason the tariff provisions to the contrary are unlawful, and it is not necessary, in prohibiting that service as a violation of section 6 (7), that the Commission first find that the tariff is unreasonable or otherwise a violation of the Act or what compensation is or is not included under the line-haul rates.

The allegation of errors in the Commission order, in appellee American Smelter's first complaint, and practically adopted in toto by the lower court findings of fact and conclusions of

law, relate almost entirely to the contention that railroad tariffs provide for the questioned services, and line-haul rates compensate therefor, and therefore the Commission cannot here compel the carriers to stop performing all or part of the service. In short appellees contend, and the lower court agrees, that railroad tariffs are sacred contracts and services therein provided for must be performed at the rates and charges prescribed, although, as stated in paragraph XXII (5) of said complaint (R. 21), "such charges be 'nominal,' 'unreasonably low,' or 'less than the full cost of service for those services,' and although thereby violation of other sections of the Act might be involved." This is quite an understandable claim, which the lower court approved, that tariffs may require service which is not a part of transportation, and which may constitute a discrimination or preference, without danger of being declared unlawful, except possibly under sections of the Act other than 6 (7). It also is the plain contention that railroads alone, and not the Commission, have authority to interpret and apply such tariff provisions, to decide what is and is not transportation, and what shall or shall not be included in the delivery service under the tariffs. If that sort of power were recognized as belonging to railroads, and as having been taken from the Commission, as is practically held by the court below, the Interstate Commerce Act may be disregarded,

and railroads could return to the old days of rebates, where, as here before 1908, intraplant and every kind of service could be given industries, under private arrangement without bother of tariff or interference of the Commission.

Claims of appellees and holdings of the court below herein, are strangely alike and reminiscent of those same complainings, urged in brief of counsel for appellees, in the *American Sheet & Tin Plate Case*, *supra*. The similarity is so great as to warrant quotation from that brief, as follows:

In every one of these cases (as appears from the Bills of Complaint, answers filed and admissions read into the record (R. 516)), tariffs covering the allowances now condemned were regularly published by the carriers and filed with the Commission. Hence the payment of the allowances was *not in violation of paragraph (7) of Section 6, but in accordance therewith*. A violation would have resulted had the Railroads failed to pay the allowances as provided in their published tariffs.

The Commission and the Courts have uniformly held that the published tariffs of the Railroads are absolutely controlling in the matter of rates applied and charges exacted of shippers for all transportation services: *A. J. Poor Grain Co. v. C., B. & Q. Ry. Company*, 12 I. C. C. 418, 422 (1907); *Texas & Pacific Railway Co. v. Abilene Cotton Oil Company*, 204 U. S.

426, 51 L. ed. 553 (1907); *Davis v. Portland Seed Company*, 264 U. S. 403, 425, 68 L. ed. 762, 769 (1924); *Beaumont, Sour Lake & Western Ry. Co. v. Magnolia Provision Company*, 26 Fed. (2d) 72 (1928). In the case last cited the Fifth Circuit Court of Appeals said (p. 73):

“* * * The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915 A. 315.”

It inevitably results that for a carrier to comply with its published tariff which “is to be treated as though it were a statute” cannot possibly be held to subject the carrier to the granting of a rebate in violation of Section 6 (7) of the Act, and such has been the uniform view of the Courts.³¹

To know that these conclusions of the lower court are completely in error, it seems necessary only to quote what this court held, in the *American Sheet & Tin Plate case*, *supra*, pages 406-407, in respect to these subjects; and in response to the same arguments as are here urged:

The appellees urge that the orders are fatally defective because the Commission

³¹ Brief for appellees, pp. 42-43, Records and Briefs in United States Cases, United States Supreme Court, October term 1936, No. 734. That brief bears the names of eminent counsel and the case was orally argued in the Supreme Court by Senator Reed.

failed to make the necessary quasi-judicial findings. They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rate for transportation in violation of section 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on sections 2, 3, and 15 (1) of the Act, that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting section 6 (7) they say that as, by that section and section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible, if tariffs setting forth the nature and amount of the allowances are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of

interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight.

Also the court below overlooked, in considering these questions, what this court held in *United States v. Wabash R. Co., et al., supra*, where tariffs, seeking to abolish charges for spotting at the Staley plant under prior tariffs forced by the Commission, were ordered cancelled. By application of *Ex Parte 104* principles, carriers had been compelled to establish a charge for spotting at that plant, and that L. & S. issue became a part of the Staley supplemental proceeding, which was decided in the *Wabash R. Co.* case. The point here is that the tariffs ordered cancelled provided for free spotting service, and was held by the Commission not to be transportation. In this tariff situation the railroads there contended that the order compelled a discrimination against the Staley Company. The opinion there held, page 10:

This argument ignores the nature of the present proceeding which is to enforce section 6 (7), not sections 2 and 3 (1). Section 6 (7) prohibits departures from the filed tariffs and it is violated, as the Commission has pointed out, when carriers pay

the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge.

The legal situation in *Corn Products Refining Company v. United States*, *supra*, respecting tariff provisions and compensation for services rendered, was very similar and almost identical as to the compensation, ~~to~~ the same questions here involved. Corn Products was the seventy-fourth supplemental proceeding under *Ex Parte 104*, decided first on April 2, 1945,³² and on rehearing July 1, 1946.³³ At the Commission hearing the industry offered evidence respecting switching at large terminals other than Chicago, respecting what counsel called "characteristics of the American rate structure," respecting services at other industrial plants, data relating to car movement in the industrial district of Chicago, cost studies, descriptions of switching in the Chicago terminal, and evidence of switching involved at particular team tracks and industrial sidings. This evidence was excluded, and sustained in the first Commission report, page 75, as being unnecessary to determine questions relating to spotting the Corn Products plant, or what was meant by "the equivalent of team track or simple switch placement." The report explained that; "We are not

³² 263 I. C. C. 54.

³³ 266 I. C. C. 181.

here confronted with the interpretation of a statute or a rule of practice published in a tariff, but only with the question of the meaning of expository phrases used in it." In the second report entered July 1, 1946, consideration was given to the Raasch tariff, which became effective in official territory on January 1, 1946, a coordinated railroad attempt to determine a general application of specific time charge for interruptions, interferences, and delays involved in delivery services at industrial plants. That tariff does not apply west of the Mississippi River. The Commission held, pages 196-199, incl., that the tariff did apply at the Corn Products plant, and described its terms fully. The point relevant to questions here considered, is that industry there contended that legality of services at their plant could be determined only in "a proceeding involving the tariff." Answering these contentions the report said:

"It may not properly be contended that we are deprived of jurisdiction to determine an issue pending before us by the filing of a tariff or that the filing of the tariff automatically requires the institution of another proceeding."

The order, similar to others entered in *Ex Parte 104* proceedings, was attacked in and sustained by the court for the Northern District of Illinois, 69 F. Supp. 869. Only Commission records in that supplement proceeding were

offered. Plaintiff argued that the custom and practice, since construction of the plant, to deliver carload freight without charge in addition to line-haul rates, with the uncontroverted evidence of tariff provisions to provide that spotting service and rates therein to include compensation therefor, controlled and made the Commission order to the contrary unlawful. The court opinion resulted from plaintiff's motion to amend findings of fact and conclusions of law, previously entered, or permit submission of the complete record which was the basis for the main report in *Ex Parte 104*. One of the court findings was that the "partial record produced by plaintiff before this court does not contain the evidence of record as to the practice and custom at these (other) plants." The district court there held, page 873:

However, even if the record were "complete" in the sense that all the evidence in the original proceeding had been introduced, this court does not have the power to reach a conclusion opposite to that of the Supreme Court in the previously mentioned cases concerning the standards to be applied in determining where the carriers' transportation duty ends. It would therefore have been a futile gesture to have introduced herein the record in the original proceeding. It seems clear that since each supplementary proceeding involves merely the application of the stand-

ards established in the original proceeding to the physical facts found at the plant under investigation, and since the standards to be applied have already been determined by the Commission and approved by the Supreme Court, the record in each supplementary proceeding is essentially complete in itself.

The court opinion did not discuss the question of tariff provisions and compensation for the services, evidently regarding those as closed or settled issues under prior court decisions. This appears from the court statement, above quoted, which described established standards necessary to application of *Ex Parte 104* principles to a particular plant, which did not include the question of tariffs and compensation. On the general question the court held,

While an administrative agency should not impose rules based on an inadequate investigation of a problem, it should also, in a case of this sort, not be compelled to re-litigate the basic issues in each supplementary proceeding brought to enforce the rules in situations where violations are found to occur.

Upon appeal to this court the decree of the district court, sustaining the Commission order, was affirmed without opinion. It is here important to know that questions of tariff and compensation applicable to the services there involved, were issues before this court, and apparently

considered in affirming the district court decree. Brief of appellant¹⁰, in opposition to the motion to affirm, appears to clearly show that these questions were presented and argued in that appeal."

On page 2 of that brief it is alleged that, continuously since 1910, when the plant was constructed, railroads have performed spotting of cars at loading and unloading points, at line-haul rates without added charge, the Chicago rates being regarded as covering the service and including compensation therefor. This is practically identical with the situation herein, as urged by appellees and held by the lower court, as that existed prior to the 1938 tariffs, and as has continued to the present under the Leadville tariff. On page 3 of appellants brief in that case it is stated that witnesses for railroads testified that the questioned switching had always been performed by the railroads, and that line-haul rates were intended to compensate for the spotting service. On page 4 it is stated that at all Chicago industrial plants, where railroads performed the spotting line-haul rates were treated as including compensation therefor, that at no such industry was a charge made in addition to line-haul rates, and that "the Chicago rates were

¹⁰ In the Supreme Court of the United States, October Term 1946, No. 1309, *Corn Products Refining Company, Appellant v. United States of America and Interstate Commerce Commission, Appellees*, Brief in Opposition To Motion To Affirm.

constructed with this very idea in view." On page 6 it is stated that during pendency of the proceedings before the Commission, railroads filed the Raasch tariff for the first time specifying with considerable particularity, the circumstances, under which charges in addition to line-haul rates would be made in spotting industrial plants and that the Commission allowed the tariff to go into effect. Appellant argued that since it provided for the extent of terminal services, that matter was no longer for Commission inference or determination, under standards previously used, and that after its effectiveness charges could lawfully be collected only in accordance with and under its provisions. It is then stated that although the Commission found the tariff applicable at the Corn Product plant, and that it was not found to be unreasonable or otherwise unlawful, it was ruled as inoperative, and that the lower court sustained that ruling without opinion, merely adopting its conclusion.

The brief stated, pages 8-9, three major and six subordinate questions, of which two subordinate and one major related to the question of tariff provisions and compensation for services being included in the line-haul rates. One of those questions, 2 (c), was whether, in the face of uncontradicted evidence that line-haul rates do include compensation for the service, without contrary testimony, the Commission could law-

sired and expected by the lower court. This belief was based upon the findings, particularly (4) and (5) (R. 300), and the order (R. 302), which stated that the cases were remanded to the Commission "for such action as it may find justifiable in the premises." Astonishingly finding (6) and (7) in the last action (R. 453-454), is to the effect that no appeal was taken from the prior decisions, that the orders of October 14, 1946, were vacated, that reconsideration was based upon the existing record, and that no further hearing was held, no further evidence received, and no further briefs permitted. Upon these findings conclusion (1) held res adjudicata the question as to compensation for service being included in the line-haul rates (R. 459). If any arbitrariness should attach to any part of proceedings before the Commission and in court, that would certainly attach to these court findings and conclusions. If the finding that no further hearing was held, no further evidence received, and no further briefs permitted, intend to imply that the Commission affirmatively refused a petition for rehearing, an offer of further evidence, and submission of further briefs, that is unsupported and unwarranted by the facts, record or otherwise. The Commission report is the only record evidence on that subject (R. 372-373). After stating that all proffered evidence had been received, that the existing record contained all

material facts and that a further hearing would serve no purpose, the report concluded, "This was impliedly conceded by all parties as no request for further hearing to introduce additional evidence was made." The lower court could not know whether or not further briefs were submitted, since there is no record on that subject. We may be certain that no such briefs were submitted to the Commission or were refused consideration, for had that happened the record thereof would have been submitted to the court. Such findings relate to arbitrariness and if supported by record facts would justify annulment of the orders. The findings appear to represent a desperate effort to locate some valid legal reason as support for the court decree, which appears hopeless on any other basis. Here the court findings are in error because unsupported by and contrary to the facts.

The conclusion that questions relating to compensation are res adjudicata is obvious error, if for no other reason because the prior court decision did not annul the orders but only temporarily enjoined them, pending reconsideration expected to restate and clarify the bases for those orders. Also under the court remand and the findings of fact and conclusions of law herein entered, the entire record in the first actions are incorporated as a part of the actions here appealed. In effect this is an appeal from both

the first and last decisions of the lower court. Also, as the court finding (6) noted, the prior orders were vacated, and only the legality of new orders, never before decided by the court, are concerned in this appeal. It is believed beyond the realm of possibility, to find any reasonable basis for a charge of arbitrariness, in the Commission's painstaking considerations and decisions in these cases.

CONCLUSION

For the foregoing reasons the decision of the district court should be reversed, the injunction ordered dissolved, and the petition dismissed.

ALLEN CRENSHAW,

Assistant Chief Counsel,

Interstate Commerce Commission.

DANIEL W. KNOWLTON,

Chief Counsel,

Interstate Commerce Commission.

JANUARY 1950.

APPENDIX I

Interstate Commerce Act, February 4, 1887, c. 104, Part 4, 24 Stat. 379, as amended.

Section 1 (3) (a) provides:

The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier, operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigera-

tion or icing, storage, and handling of property transported. * * * (49 U. S. C. 1 (3) (a).)

Section 2 provides:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 3 (1) of the Act provides:

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect

whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. (49 U. S. C. 3 (1).)

Section 6 (1) provides:

That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the

use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part. (49 U. S. C. 6 (1).)

Section 6 (7) provides:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 12 (1) provides:

The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the

business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (49 U. S. C. 12 (1).)

Section 13 provides in part:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on

its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. * * * (49 U. S. C. 13 (1), (2).)

Section 15 provides in part:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such

carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that ~~the same does or will exist~~, and shall not thereafter publish, demand, or collect any rate, fare or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a rea-

sonable charge as the maximum to be paid by the carrier or carriers for the services so rendered for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part. (49 U. S. C. 15 (1), (13), (14).)

The Commission's 57th Annual Report to Congress (November 1, 1943), in discussing the Commission's attempt to correct problems of rebates given under the guise of terminal service, states (pp. 57, 58-59):

After this decision of the Supreme Court, an effort was made to have the railroads canvass the situation at other plants where the industry was either performing the spotting service with its own power and receiving an allowance from the railroads, or where the latter were performing the spotting service under direction of the industry without charge in addition to the line-haul rate, with a view to bringing such practices into conformity with the principles announced by us and approved by the Supreme Court. We have met with no success in this effort. The carriers have failed voluntarily to apply these established principles, with the result that the practice of paying allowances or performing free switching services is not uniform in all parts of the country or even on the lines of single carriers.

The task of enforcing compliance with these understandable principles is of gigantic proportions, but seemingly one that must be met if uniform practice in respect to allowances and switching services and equality of treatment is to be provided for all shippers. We are investigating the situations at a number of plants.

Because of the time that has elapsed since the original hearing, conditions have changed at some of the plants, necessitating further hearings. In view of the reluctance of both the carriers and the industries voluntarily to give us all the facts upon which we can make a proper determination, we have found it necessary to conduct field investigations through our own employees. This is time consuming. In at least one case, where the industry was performing the spotting service with its own power and the allowance received therefor was condemned as unlawful, the industry disposed of its power and requested the respondents to perform the service. This the respondents did, making a charge against the industry for spotting services. We approved the imposition of the spotting charge. The case is now before the Supreme Court for decision. In attacking our order in the lower court, the industry contended that it was unjustly discriminatory and unduly prejudicial to require it to pay a spotting charge when its competitors receive such service from the carriers without charge. We are investigating all such alleged preferred services with a view to determining whether the service performed at such plants by the carriers is in excess of that which the carriers are obligated to perform under their line-haul rates.

APPENDIX II

CONTINUATIONS OF EX PARTE 104, PART II AND SUPPLEMENTS THERETO

	<i>Decided</i>
Parte No. 104, Practices of Carriers Affecting	May 14, 1935
Operating Revenues or Expenses—Part II, Terminal Services.	209 I. C. C. 11
Sup. Rep.—Interlake Iron Corporation, Toledo, Ohio. Iron corporation.	May 14, 1935 209 I. C. C. 51
Sup. Rep.—Detroit Edison Company, Detroit, Mich. Power plant.	May 14, 1935 209 I. C. C. 55
Sup. Rep.—Universal Atlas Cement Company Steelton, Minn. Cement manufacturing plant.	May 14, 1935 209 I. C. C. 61
Sup. Rep.—Sheffield Steel Corporation, Kansas City, Mo. Steel plant.	May 14, 1935 209 I. C. C. 64
Sup. Rep.—Standard Oil Co. of Louisiana, North Baton Rouge, La. Oil refinery.	May 14, 1935 209 I. C. C. 68
Report on Rehearing in 5th Sup. Rep.	July 12, 1943 256 I. C. C. 5
Sup. Rep.—East Chicago Dock Terminal Co., East Chicago, Ind. Commercial dock.	May 14, 1935 209 I. C. C. 73
Sup. Rep.—Ford Motor Company, Detroit, Mich. Automobile manufacturer.	May 14, 1935 209 I. C. C. 77
Sup. Rep.—Keystone Steel & Wire Company, Peoria, Ill. Steel plant.	May 14, 1935 209 I. C. C. 82
Sup. Rep.—Pittsburgh Steel Company, Monessen, Pa. Steel plant.	May 14, 1935 209 I. C. C. 87
Report on Rehearing in 9th Sup. Rep.	Oct. 1, 1940 241 I. C. C. 562
Sup. Rep.—Magnolia Petroleum Company, Chaison, Tex. Refinery.	May 14, 1935 209 I. C. C. 93
Sup. Rep.—Allegheny Steel Company, Brackenridge, Pa. Steel and alloy products manufacturer.	June 7, 1935 209 I. C. C. 273
Sup. Rep.—Minnesota By-Products Coke Co., St. Paul, Minn. Coke-manufacturing company.	June 24, 1935 209 I. C. C. 421
Sup. Rep.—Humble Oil & Refining Company, Baytown, Tex. Oil refinery.	July 8, 1935 209 I. C. C. 727
Sup. Rep.—Timken Roller Bearing Company, Canton, Ohio. Steel products manufacturer.	June 24, 1935 209 I. C. C. 441
Sup. Rep.—Weirton Steel Company, Weirton, W. Va. Manufacturer of tin plate, sheet iron, strip steel, slabs, billets, sheet bars, and coke byproducts.	June 24, 1935 209 I. C. C. 445

Decided

16th Sup. Rep.—Mexican Petroleum Corporation of Louisiana, Inc., Destrehan, La. Refinery.	June 25, 1935 209 I. C. C. 394
17th Sup. Rep.—Pittsburgh Plate Glass Company, Pittsburgh, Pa. Industrial plant.	June 25, 1943 209 I. C. C. 467
18th Sup. Rep.—American Sheet & Tin Plate Company, Vandergrift and Scottsdale, Pa., and Wellsville, Ohio. Steel manufacturer and tin plate company.	July 5, 1935 209 I. C. C. 719
19th Sup. Rep.—Inland Steel Company, Indiana Harbor, Ind. Producer of iron and steel articles and coke by-products.	July 11, 1935 209 I. C. C. 747
20th Sup. Rep.—Wickwire-Spencer Steel Company, Harriet, N. Y. Manufacturer of pig iron, wire, wire rods, wire fence, wire mesh, and wire nails.	July 11, 1935 269 I. C. C. 751
21st Sup. Rep.—Gulf Refining Company, Port Arthur, Tex.	July 11, 1935 209 I. C. C. 756
22d Sup. Rep.—Granite City Steel Company, Granite City and Madison, Ill. Steel-manufacturing plant.	July 11, 1935 209 I. C. C. 761
23d Sup. Rep.—Celotex Company, Marrero, La. Celotex board manufacturer.	July 11, 1935 209 I. C. C. 764
Report on Rehearing in 23d Sup. Rep.	Apr. 17, 1941 245 I. C. C. 105
24th Sup. Rep.—Texas Company, Houston, Tex. Refinery.	July 11, 1935 209 I. C. C. 767
25th Sup. Rep.—Western Paving Company, Dougherty, Okla. Paving Company.	July 11, 1935 209 I. C. C. 770
26th Sup. Rep.—Detroit Harbor Terminals, Inc., Detroit, Mich. Warehouse and dock.	July 13, 1935 209 I. C. C. 787
27th Sup. Rep.—Great Southern Lumber Company-Bogalusa Paper Company, Bogalusa, La. Logging and lumber business and paper company.	July 12, 1935 209 I. C. C. 793
28th Sup. Rep.—St. Louis Gas & Coke Corporation, Granite City, Ill. Coke and coke by-products producer.	July 12, 1935 209 I. C. C. 797
29th Sup. Rep.—Kansas City Power & Light Company, Kansas City, Mo. Electric power plant.	July 19, 1935 210 I. C. C. 103
30th Sup. Rep.—Great Lakes Steel Corporation, Ecorse (Detroit), Mich. Steel plant.	July 12, 1935 210 I. C. C. 9
31st Sup. Rep.—Iron Ore Mining Companies Stock Pile, Mesabi Iron Range district of Minnesota. Iron ore mining company.	Aug. 12, 1935 210 I. C. C. 254
32d Sup. Rep.—Studebaker Corporation, South Bend, Ind. Automobile manufacturing plant.	July 19, 1935 210 I. C. C. 137
33d Sup. Rep.—Interlake Iron Corporation, Duluth, Minn. Engaged in production of pig iron, coke, coke oven byproducts, and selling of coal.	July 29, 1935 210 I. C. C. 205

Decided

- 34th Sup. Rep.—Crane Company, Chicago, Ill. July 29, 1935
 Manufacturer of plumbing and steam-fitting supplies, pipe, and valves. 210 I. C. C. 210
- 35th Sup. Rep.—West Leechburg Steel Company, July 29, 1935
 Leechburg, Pa. Producer of cold-rolled strip and skelp steel. 210 I. C. C. 213
- 36th Sup. Rep.—Alabama By-Products Corporation, Sept. 25, 1935
 Tarrant (N. Birmingham), Ala. Producer of coke, benzol, acids, tar, and other coal byproducts. 210 I. C. C. 644
- 37th Sup. Rep.—Petoskey Portland Cement Company, Petoskey, Mich. Cement manufacturing plant. Aug. 6, 1935 210 I. C. C. 242
- 38th Sup. Rep.—Louisville Cement Company, Speeds, Ind. Manufacturer of cement. Aug. 12, 1935 210 I. C. C. 293
 Report on rehearing in 38th Sup. Rep. Feb. 1, 1937. 220 I. C. C. 88
- 39th Sup. Rep.—Standard Steel Car Company, Hammond, Ind. Manufacturer of railway equipment and cars. Aug. 12, 1935 210 I. C. C. 296
- 40th Sup. Rep.—General American Tank Car Corp., East Chicago, Ind. Engaged in building repairing, and leasing freight cars of various types, including tank and refrigerator cars. Aug. 14, 1935 210 I. C. C. 383
- 41st Sup. Rep.—Pacolet Manufacturing Company, Pacolet, S. C. Operates a cotton mill. Aug. 23, 1935 210 I. C. C. 475
- 42d Sup. Rep.—Marion Steam Shovel Company, Marion, Ohio. Power-shovel and machinery manufacturing plant. Sept. 28, 1935 210 I. C. C. 655
- 43d Sup. Rep.—Pittsburgh Plate Glass Company, Crystal City, Mo. Plate glass manufacturer. Sept. 12, 1935 210 I. C. C. 527
- 44th Sup. Rep.—Texas Company, Port Arthur, Tex. Engaged in refining, manufacture, and sale of petroleum and its products. Jan. 15, 1936 213 I. C. C. 583
- 45th Sup. Rep.—Goodman Lumber Company, Goodman, Wis. Lumber and chemical company. Feb. 8, 1936 214 I. C. C. 89
- 46th Sup. Rep.—Wheeling Steel Corporation, Steubenville, Ohio, East Steubenville, W. Va., Berwood, W. Va., and Martins Ferry, Ohio. Industrial plants. Feb. 3, 1936 214 I. C. C. 53
- 47th Sup. Rep.—Uvalde Rock Asphalt Company, Cline, Tex. Quarries, crushes, and ships phosphoric stone. Aug. 24, 1936 218 I. C. C. 271
- 48th Sup. Rep.—John Morrell & Company, Ottumwa, Iowa. Meat-packing plant. May 8, 1936 215 I. C. C. 431
- 49th Sup. Rep.—Commonwealth Edison Company, Chicago, Ill. Electric generating stations. Apr. 1, 1936 215 I. C. C. 173
- 50th Sup. Rep.—William Wharton, Jr., & Co., Inc., Easton, Pa. Steel company. May 19, 1936 215 I. C. C. 623

Decided

51st Sup. Rep.—Midvale Company, Nicetown, Pa.	May 19, 1936
Manufactures and sells steel products.	215 I. C. C. 626
52d Sup. Rep.—Acme Steel Company, Riverdale, Ill.	Apr. 28, 1936
Manufacturer of strip steel.	215 I. C. C. 373
53d Sup. Rep.—A. O. Smith Corporation, Milwaukee, Wis.	May 19, 1936
Manufacturer of automobile frames, gear frames, and axle housing for automobile industry, heavy pipe and pipe couplings, petroleum cracking and distilling vessels for oil industry.	215 I. C. C. 534
54th Sup. Rep.—Warren Foundry & Pipe Corporation, Phillipsburg, N. J.	May 21, 1936
Manufacturer of cast-iron pipe fittings and special fittings.	215 I. C. C. 553
55th Sup. Rep.—A. E. Staley Manufacturing Company, Decatur, Ill.	May 22, 1936
Grain products manufacturer.	215 I. C. C. 536
Report on rehearing in 55th Sup. Rep.	May 6, 1941
	245 I. C. C. 383
56th Sup. Rep.—Chicago By-Product Coke Company, Chicago, Ill.	May 28, 1936
Producer of gas, coke, and coke by-products such as sulphate of ammonia and tar.	216 I. C. C. 8
57th Sup. Rep.—American Steel Foundries, Indiana Harbor, Ind.	May 28, 1936
Manufacturer of steel castings and railroad specialties.	216 I. C. C. 13
58th Sup. Rep.—Louisiana Development Company, Winnfield, La.	Aug. 24, 1936
Conducts a rock-salt mining operation.	218 I. C. C. 276
59th Sup. Rep.—Red River Lumber Company, Westwood, Calif.	July 26, 1939
Lumber company.	234 I. C. C. 287
Report on rehearing in 59th Sup. Rep.	Oct. 4, 1943
	255 I. C. C. 370
60th Sup. Rep.—J. Neils Lumber Company, Libby, Mont.	May 27, 1940
Lumber mill.	238 I. C. C. 543
Report on rehearing in 60th Sup. Rep.	Dec. 2, 1941
	248 I. C. C. 283
61st Sup. Rep.—Medford Corporation, Medford, Oreg.	Sept. 4, 1940
Conducts lumbering and mill-work operations and ships finished and rough materials.	241 I. C. C. 407
62d Sup. Rep.—Chiloquin Lumber Company, Chiloquin, Oreg.	Sept. 28, 1940
Lumber company.	241 I. C. C. 495
Report on rehearing in 62d Sup. Rep.	Apr. 17, 1941
	245 I. C. C. 112
63d Sup. Rep.—Lamm Lumber Company, Modoc Point, Oreg.	May 27, 1941
Lumber mill and box factory.	245 I. C. C. 575
64th Sup. Rep.—Silver Falls Timber Company, Silverton, Oreg.	May 27, 1941
Powerhouse, sawmill, planing mill, sheds for storage of lumber, yard for storage of rough lumber, and log pond, and auxiliary facilities.	245 I. C. C. 509

Decided

65th Sup. Rep.—Inland Empire Paper Company, Millwood, Wash. Paper manufacturer.	July 9, 1941 246 I. C. C. 127
66th Sup. Rep.—Republic Steel Corporation, Buffalo, N. Y. Steel company.	Nov. 7, 1942 253 I. C. C. 595
67th Sup. Rep.—Hanna Furnace Corporation, Buffalo, N. Y. Producer and shipper of pig iron and occasional loads of other freight, including machinery.	Nov. 11, 1942 253 I. C. C. 643
68th Sup. Rep.—Tonawanda Iron Corporation, North Tonawanda, N. Y. Manufacturer of pig iron.	Feb. 13, 1943 255 I. C. C. 231
69th Sup. Rep.—Kingan & Company, Indianapolis, Ind. Packing company (meat).	June 2, 1943 255 I. C. C. 531
Sup. Rep.—American Bridge Company, Ambridge and Pencoyd, Pa.; Trenton, N. J.; Elmira Heights, N. Y.; and Toledo, Ohio. Engaged in fabrication of steel.	Sept. 11, 1943 Unreported
Sup. Rep.—Sharon Steel Hoop Company, Sharon, Pa. Operates steel mills.	Sept. 11, 1943 Unreported
Sup. Rep.—Wickwire Brothers, Inc., Cortland, N. Y. Manufacturing of wire nails, rods, fencing, wire screen cloth, blooms, bars, etc.	Sept. 11, 1943 Unreported
Sup. Rep.—McClintie-Marshall Corporation, Leetsdale, Pa. Manufacturer of stand pipes, blast furnaces, gas holders, barges, transmission towers, etc.	Sept. 11, 1943 Unreported
Sup. Rep.—Worth Steel Company, Claymont, Del. Manufacturer of steel plates, blue annealed sheets, flange and dished heads and nozzles.	Sept. 11, 1943 Unreported
70th Sup. Rep.—Decatur Soya Bean Products Co.	Feb. 6, 1945 259 I. C. C. 471
71st Sup. Rep.—Archer-Daniels, Midland Co.	Feb. 6, 1945 259 I. C. C. 455
72d Sup. Rep.—Phelps Dodge Corp.	Apr. 23, 1945 262 I. C. C. 371
73d Sup. Rep.—Spencer Kellogg and Sons, Inc.	Mar. 5, 1945 262 I. C. C. 205
74th Sup. Rep.—Corn Products Refining Co.	Apr. 2, 1945 266 I. C. C. 181 262 I. C. C. 57
75th Sup. Rep.—American Smelting	Oct. 1, 1945 263 I. C. C. 719
76th Sup. Rep.—U. S. Smelting	Oct. 1, 1945 263 I. C. C. 749
77th Sup. Rep.—Anaconda Copper Mining Co.	Oct. 1, 1945 264 I. C. C. 103 266 I. C. C. 387 268 I. C. C. 167

Decided

78th Sup. Rep.—Union Tank Car Co.....	Apr. 15, 1947
	264 I. C. C. 479
	268 I. C. C. 338
79th Sup. Rep.—National Malleable and Steel Cast- ings Company.	Feb. 28, 1949
	273 I. C. C. 639
Wickwire Brothers, Inc., Terminal Allowance.....	June 16, 1949
	274 I. C. C. 307

BRIE

for t

U.S

ef

the

S.

M

INDEX

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Questions presented	3
Statement	3
Summary of argument	12
Argument:	
Introduction	13
I. The Interstate Commerce Commission has the power and duty to determine where railroad line-haul transportation begins and ends and to forbid railroads to render services in excess of their line-haul obligations unless adequate additional charges are made for the additional services	15
A. The lack of findings as to whether the line-haul rates include switching and spotting charges	19
B. The inclusion in line-haul tariffs of provision for spotting and switching services	21
C. The power of the Commission to require separation of line-haul and terminal switching charges under Section 6(7) of the Act	23
II. There was evidence to support the Commission's determination with respect to the point in each plant at which line-haul transportation ended and intra-plant service began	25
Conclusion	26

CITATIONS

Cases:

<i>Anaconda Copper Mining Co. v. United States</i> , 77 F. Supp. 611	4, 18, 23
<i>B. & O. Railroad Co. v. United States</i> , 305 U. S. 597	20, 23
<i>Corn Products Refining Co. v. United States</i> , 331 U. S. 790	4, 17, 20, 21, 23
<i>Elgin, J. & E. Ry. Co. v. United States</i> , 18 F. Supp. 19	18
<i>Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services</i> , 209 I.C.C. 11	4, 10, 11, 13, 14, 16, 17, 19, 20, 22, 24
<i>Goodman Lumber Co. v. United States</i> , 301 U. S. 669	17
<i>Hanna Furnace Co. v. United States</i> , 323 U. S. 667	17
<i>Inland Steel Co. v. United States</i> , 23 F. Supp. 291, affirmed, 306 U. S. 153	18, 23

Cases—Continued

	Page
<i>Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.</i> , 320 U. S. 368	18
<i>Merchants Warehouse Co. v. United States</i> , 283 U. S. 501	23
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 332 U. S. 194	10
<i>A. O. Smith Corp. v. United States</i> , 301 U. S. 669	17
<i>United States v. American Sheet and Tin Plate Co.</i> , 301 U. S. 402	4, 12, 17, 18, 20, 22, 24
<i>United States v. Pan American Petroleum Corp.</i> , 304 U. S. 156	17, 18, 23
<i>United States v. Wabash Railroad Company</i> , 321 U. S. 403	4, 5, 12, 17, 18, 25

Statutes:

Interstate Commerce Act, 24 Stat. 379, as amended, 49

U.S.C. 1 *et seq.*:

Section 1 (5)	11
Section 3 (1)	11
Section 6 (1)	11, 14, 24
Section 6 (7)	2, 14, 15, 24

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

**THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS**

v.

**UNITED STATES SMELTING REFINING AND MINING
COMPANY, AMERICAN SMELTING & REFINING COM-
PANY, THE DENVER & RIO GRANDE WESTERN RAIL-
ROAD COMPANY, ET AL.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 474) is unreported. The basic report of the Commission is reported at 209 I. C. C. 11. The supplemental report of the Commission concerning the United States Smelting Refining and Mining Company

(R. 315) is reported at 270 I. C. C. 385; the supplemental report concerning the American Smelting and Refining Company (R. 364) is reported at 270 I. C. C. 359.

JURISDICTION

The final decree of the three-judge district court was entered on January 10, 1949 (R. 463). Petition for appeal was filed March 7, 1949 (R. 464) and allowed the same day (R. 465). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted on October 10, 1949 (R. 1403).

STATUTE INVOLVED

Section 6(7) of the Interstate Commerce Act provides as follows:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor

extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. [49 U. S. C. § 6(7).]

QUESTIONS PRESENTED

1. Whether in proceedings supplemental to, and designed to implement the policies enunciated by, a basic report of the Interstate Commerce Commission concerning the practices of carriers in furnishing to industries services in excess of line-haul transportation, which basic report has been approved by this Court, it is enough for the Commission to determine the points at each plant where line-haul transportation begins and ends in order to forbid as a violation of Section 6(7) of the Interstate Commerce Act the furnishing of "spotting" services beyond such points without receiving compensation for such services in addition to the rate for line-haul transportation.

2. Whether the Commission's determination of the points at each plant where line-haul transportation ended and intra-plant service began was without evidentiary support.

STATEMENT

The facts are stated in considerable detail in the brief of the Interstate Commerce Commission, to which the Court is respectfully referred. For the purposes of the arguments advanced in this brief, they may be briefly summarized.

The orders of the Commission here concerned resulted from the seventy-fifth and seventy-sixth in

a series of supplemental proceedings instituted by the Commission in order to implement, with respect to particular industrial plants and carriers, the policies enunciated by the Commission in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, 209 I. C. C. 11 (May 14, 1935). That report set forth standards for the determination of the amount of terminal switching and spotting service which may properly be supplied by carriers under their line-haul rates. The standards laid down in this basic report were upheld in *United States v. American Sheet and Tin Plate Company*, 301 U. S. 402, and the orders of the Commission in other supplemental proceedings similar to those here concerned have invariably been upheld upon review by the district courts or this Court.¹

The basic report expressed the conclusions of the Interstate Commerce Commission after proceedings which the Commission instituted on its own motion in July, 1931, and which were the culmination of an investigation, during a period of nearly four years, of hundreds of industrial plants in every section of the country. The findings and conclusions of the Commission, and the subsequent implementation of these findings and conclusions, were summarized by Chief Justice Stone for the Court in

¹ E.g., *United States v. Wabash R. Co.*, 321 U.S. 403; *Corn Products Refining Co. v. United States*, 331 U.S. 790; *Anaconda Copper Mining Co. v. United States*, 77 F. Supp. 611 (D. Mont., 1947). See p. 17, *infra*.

United States v. Wabash R. Co., 321 U. S. 403, 406-408:

In *Ex parte 104*, the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, or the payment to the industries of allowances for its performance by them, is in violation of § 6(7) of the Act.

The Commission, in its main report in *Ex parte 104*, recognized that by railway tariff practice in this country the rates on carload traffic moving to or from any city or town apply to so-called "switching" or "terminal" districts and entitle each industry within such a district to have the traffic delivered directly to and taken from its site. By this method of delivery and by use of private tracks of the industry the railroads are saved the expense

of maintaining more extensive terminal facilities, the service and cost of delivery within the switching district being comparable to that of delivery on team tracks or sidings or at way stations. But in the case of large industries having extensive plant trackage the Commission found that cars hauled to the industry usually come to rest at nearby interchange tracks, after which the intraplant distribution of the cars is made at times and in a manner to serve the convenience of the industry rather than that of the carrier in completing its transportation service.

In determining in such circumstances the point at which the carrier service ends and the service in placing the cars so as to meet the convenience of the industry begins, the Commission stated that the line of demarcation "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant," 209 I. C. C. at 34. It added, "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that per-

formed in simple switching or team-track delivery" 209 I. C. C. at 44-5.

The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered. It is for this reason that the Commission, in carrying into effect the principles announced in *Ex parte 104*, has found it necessary to proceed to a series of supplemental investigations of the spotting service rendered at particular plants. Accordingly the Commission made no order on the foot of its main report, but following a series of supplemental reports, including the present one, each detailing the facts found as to the spotting service rendered at the particular plant investigated, the Commission has made cease and desist orders, applicable to that service, a number of which this Court has upheld on review. See *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co. v. United States*, 301 U. S. 669; *A. O. Smith Corp. v. United States*, 301 U. S. 669; *United States v. Pan American Petroleum Corp.*, 304 U. S. 156. In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. *United States v. American Sheet &*

Tin Plate Co., supra, 408; *United States v. Pan American Petroleum Corp., supra*, 158; *Interstate Commerce Commission v. Hoboken Mfrs. R. Co.*, 320 U. S. 368, 378 and cases cited.

In the instant cases, the Commission, through its own agents, made on-the-spot investigations of switching conditions at each smelting plant concerned and thereafter, on May 8 and 29, 1944 (R. 156, 578), held formal hearings in each case. At these hearings there was voluminous testimony both by the investigating agents of the Commission and by witnesses for the carriers and the industries. Numerous and varied exhibits were introduced, including analyses and breakdowns of switching operations at the plants in question and maps of the plant area, buildings and system of tracks at each plant. Thereafter, on October 14, 1946, the Commission entered a report and order in each case.² The Commission determined, with respect to each smelting plant here concerned, the points within each plant constituting reasonably convenient points for delivery to and receipt from the respective smelters, of carload freight by the carriers—*i.e.*, the respective points within each plant where line-haul transportation begins and ends.³ It

² That relating to American Smelting (R. 28) is reported at 266 I.C.C. 349; that relating to United States Smelting (R. 271) at 266 I.C.C. 476. Commissioners Alldredge and Mahaffie dissented in each case.

³ Specifically, the Commission found, with respect to the plants of American Smelting, that the reasonably convenient points were the "plant yard" at Garfield, Utah, the "hold tracks" at Murray, Utah, and the "flat yard" at Leadville,

further determined that the carriers' line-haul rates did not include compensation for any terminal switching services beyond such designated points and, finally, that the carriers' performance of terminal switching services beyond such designated points, without charge in addition to the line-haul rates, was in violation of Section 6(7) of the Act. Accordingly, the Commission's orders required the carriers to cease and desist from such violations.

The district court, upon review of these orders, found ~~that~~ the Commission had based them "upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants"; that there was no evidence before the Commission to justify such a finding; and that the Commission had not "presumed to exercise the authority which is intended to be conferred under *Ex Parte 104* in that the order made is not specifically based upon that authority" (R. 451). The court temporarily enjoined the enforcement of the orders and remanded the cases to the Commission "for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent powers to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in *Securi-*

Colorado. It found such point to be the "assembly yard" at the Midvale, Utah, plant of United States Smelting (R. 450.)

ties and Exchange Commission v. Chenery Corporation ' . . . ' (Fng. 5, R. 451-452).

On December 5, 1947, the Commission reopened the proceedings for reconsideration upon the existing record (R. 453), and on May 18, 1948, issued the orders here involved, together with the reports upon which they are based. The Commission made findings substantially similar to those upon which it had based its prior orders, except that it expressly based its orders on the authority of *Ex Parte No. 104* and eliminated any findings as to whether the line-haul rates are reasonable and do or do not include compensation for terminal switching service beyond the designated points.³

Upon the district court's review of the new orders, the court in substance reaffirmed and re-

⁴ 332 U.S. 194.

⁵ The Commission's reports explicitly stated (Fng. 8, R. 454) that:

It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in *Ex Parte No. 104*, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas.

In addition, the Commission's report involving the smelters of the American Smelting & Refining Company, states (*ibid.*):

We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein.

made its original findings and, in addition, found (Fng. 11, R. 455) that there was no evidence before the Commission to support any of the findings upon which the Commission had based its orders of May 18, 1948, including the Commission's determinations with respect to the location of reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the carriers (Fngs. 12, 13, R. 455-456). It concluded that as a matter of law the carriers were obliged, under *Ex Parte No. 104*, to perform the terminal switching services here involved without charges in addition to their line-haul rates and that consequently the carriers had not been violating Section 6(7). It further concluded as a matter of law (R. 460) that the Commission's explicit disclaimer of findings as to whether the carriers' line-haul rates included compensation for the terminal switching services involved had deprived its finding of violations of Section 6(7), and its orders to cease and desist, of basic findings of fact essential to their support.* The district court permanently enjoined the enforcement of the Commission's orders of May 18, 1948 (R. 463).

* The district court also concluded that the Commission's orders violate Sections 1(5) (a) and 3(1) of the Act, and that findings under Section 6(1) are necessary in order to require carriers to state line-haul and terminal switching charges separately (R. 460-462).

SUMMARY OF ARGUMENT

I

In execution of its duty to administer the Interstate Commerce Act, the Commission is empowered to prescribe the extent of the legal obligations of rail carriers in performing line-haul transportation. *United States v. American Sheet and Tin Plate Co.*, 301 U. S. 402. The Commission's basic definition of line-haul transportation and its specific applications of that definition have been uniformly upheld by this Court. And the Commission's power to prohibit the rendering of services by a carrier in excess of its line-haul obligation unless it makes separate charge for such services is likewise established. *United States v. American Sheet and Tin Plate Co.*, *supra*. That power may not be frustrated by the publishing of line-haul tariffs which purport to include charges for services not part of line-haul transportation.

II

The Commission's determinations with respect to the points in the particular plants where line-haul transportation begins and ends are supported by ample evidence, and it is settled that in such circumstances the Commission's findings on such questions should not be disturbed by the courts. *United States v. Wabash R. Co.*, 321 U. S. 403, 408.

ARGUMENT

Introduction

In *Ex Parte No. 104*, 209 I.C.C. 11, the Interstate Commerce Commission established general standards for determining the amount of switching service which may properly be performed by carriers as a part of line-haul transportation. Its purpose in establishing these standards was to lay the basis for the removal of the many discriminations which it found to result from carriers rendering varying services at industrial plants without specific charges therefor. Since the physical arrangements and switching needs of plants differ widely not only among industries, but among plants within an industry, it was obvious that discrimination would be inevitable unless the extent of line-haul transportation was defined, and the railroads required to make separate charges for services beyond those included within the line-haul obligation. If line-haul rates are interpreted as covering all switching and spotting services, it is evident that a plant which requires many such services (either because of legitimate industrial needs or as the result of an inefficient plant layout) will receive more service than a plant requiring little switching and spotting, but will pay the same rates. This obviously amounts to an unlawful discrimination of the sort which *Ex Parte No. 104* was intended to prevent.

In the supplemental proceedings, such as the present ones, to apply the general standards of *Ex Parte No. 104* to specific cases, the Commission has been confronted with the factual problem of determining in each situation precisely where line-haul transportation begins and ends. Its determinations in this regard have been uniformly sustained by this Court, and it has been repeatedly recognized that the questions involved are questions of fact upon which the Commission's expert judgment must be sustained if supported by evidence.

Without in terms challenging this general proposition, and in the face of voluminous evidence to support the Commission's findings, the court below set aside the Commission's fact determinations as to the limits of line-haul service to the plants here involved. And it held that the Commission had no power to require discontinuance of the switching and spotting services found by it to constitute unlawful rebates under Section 6(7) of the Interstate Commerce Act and that such an order would be possible only under Section 6(1) upon which the Commission did not rely.⁷ An order under Section 6(7) could not be sustained, the court held, unless the Commission determined

⁷ Section 6(1) requires rate schedules to "state separately all terminal charges * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed * * *." 49 U.S.C. 6(1).

that the line-haul rates did not cover the extra services, and that the tariffs contained no provision for such services. We propose to show that this holding cannot be reconciled with repeated decisions of this Court sustaining orders of the Commission which contained no such determinations.

I

The Interstate Commerce Commission Has the Power and Duty to Determine Where Railroad Line-Haul Transportation Begins and Ends and to Forbid Railroads to Render Services in Excess of Their Line-Haul Obligations Unless Adequate Additional Charges Are Made for the Additional Services

Section 6(7) of the Interstate Commerce Act provides as follows:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares,*

and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (Emphasis added.)

In *Ex Parte No. 104*, 209 I.C.C. 11, the Commission drew a line of demarcation between the service rendered by a carrier as a part of its line-haul transportation and the service rendered for the convenience of the industry before line-haul operations begin or after they end. The latter were found to constitute illegal rebates under the above section unless adequate separate charges were collected therefor. The Commission found that the line "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant" (209 I.C.C. at 34). And in elaboration of this principle the Commission stated:

When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, * * * the service beyond the point of interruption or

interference is in excess of that performed in simple switching or team-track delivery. [209 I.C.C. at 44-45.]

The principles of *Ex Parte No. 104* have been applied by the Commission in numerous supplemental proceedings, and in each case in which it has ordered the discontinuance of the granting of the illegal rebates involved in the gratuitous furnishing of services by the railroads in excess of their line-haul obligations, its determination has been sustained by the courts.* In the first of these cases, *United States v. American Sheet and Tin Plate Co.*, 301 U. S. 402, 408, the Court held:

The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

* *United States v. American Sheet and Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co. v. United States*, 301 U. S. 669; *A. O. Smith Corp. v. United States*, 301 U. S. 669; *United States v. Pan American Petroleum Corp.*, 304 U. S. 156; *United States v. Wabash R. Co.*, 321 U. S. 403; *Hanna Furnace Co. v. United States*, 323 U. S. 667; *Corn Products Refining Co. v. United States*, 331 U. S. 790.

This Court has consistently held that determination of where line-haul transportation stops presents a question of fact to be decided in each case and has given full scope to the familiar rule that the Commission's determinations of fact are conclusive if supported by evidence. Thus in *United States v. Wabash Railroad Company*, 321 U. S. 403, 408, the Court, through Chief Justice Stone, stated that "this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."⁹ That the court below failed to follow this standard in assessing the factual questions here presented is shown in Point II, *infra*, and in the comprehensive brief filed herein by the Interstate Commerce Commission.

Apart from its conclusions as to the facts, the court below found the Commission's orders defective as a matter of law in several respects discussed below. Each of these determinations rests on contentions which have been presented to and rejected by this Court in similar cases.

⁹ Accord: *United States v. American Sheet and Tin Plate Co.*, 301 U.S. 402, 408; *United States v. Pan American Petroleum Corp.*, 304 U.S. 156, 158; *Interstate Commerce Commission v. Hoboken Manufacturers' R. Co.*, 320 U.S. 368, 378 and cases cited; *Elgin, J. & E. Ry. Co. v. United States*, 18 F. Supp. 19 (N.D. Ind.); *Inland Steel Co. v. United States*, 23 F. Supp. 291 (N.D. Ill.), affirmed, 306 U.S. 153; *Anaconda Copper Mining Co. v. United States*, 77 F. Supp. 611 (D. Mont.).

A. *The Lack of Findings as to Whether the Line-Haul Rates Include Switching and Spotting Charges*

The court below held that the failure of the Commission to include a determination "as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved" deprived its findings of violation of Section 6(7) of the Act "of basic findings of fact essential to support such findings" (Concl. 4, R. 460; see Concls. 1, 2, 3, 5, 7, 8, R. 459-462). This holding is premised on the assumption that if line-haul rates are calculated to include adequate compensation for spotting and switching services, the Commission is powerless under Section 6(7) to require segregation of the line-haul rates from the switching rates. If this view were correct, *Ex Parte No. 104* supplemental hearings would be converted into rate hearings, in which the task of the Commission would be to determine in each case whether the line-haul rate represented fair compensation for the sum total of services performed.

The district court appears to have misconceived the scope and purpose of *Ex Parte No. 104* proceedings. In *Ex Parte No. 104* it was found that line-haul rates do not generally include spotting and switching services beyond a certain point. It was determined that to achieve uniformity and prevent discrimination, all line-haul rates should

be made to conform with this principle, and that additional services should bear additional and separate charges. If the Commission were to be prevented from accomplishing this result in a situation in which the line-haul rate might be thought to cover the additional services, uniformity in the line-haul obligation would be impossible of achievement. The segregation of rates required by *Ex Parte No. 104* would be wholly frustrated and discrimination in the character of services rendered to industries which pay identical rates would be facilitated. The Commission, having lawfully determined that line-haul rates should cover only line-haul transportation as that term is defined by it (*United States v. American Sheet and Tin Plate Co., supra*), a carrier charged with failure to conform to the prescribed standards should not be heard to raise as a defense the very fact that its line-haul rates are not, in fact, rates solely for line-haul transportation.¹⁰

The precise contention here accepted by the court below was rejected in *Corn Products Refining Co. v. United States*, 331 U. S. 790, which in-

¹⁰ A refinement of this argument which seems equally unsound is the suggestion that if the line-haul rates cover the switching and spotting services, the result of the Commission's order would be to require double payment for the same service. Even if this were true, there would be nothing to prevent necessary readjustment of the line-haul rate. It is obvious that if line-haul rates unlawfully include a charge for non-line-haul services, those rates are improper, and in case of a conflict between a valid Commission order and a tariff, it is plain that the latter must yield. *Cf. B. & O. Railroad Co. v. United States*, 305 U. S. 507, 525-526.

volved a similar *Ex Parte No. 101* supplemental proceeding. There, as here, the Commission made no finding as to whether the line-haul rate did or did not include compensation for switching and spotting services. In fact it excluded evidence on this question, and the appellant in that case laid great stress in this Court upon the exclusion by the Commission of evidence indicating that the line-haul rates there involved "have always been considered as including compensation to the railroads for the full service of placing cars for loading and unloading at all industries where the railroads perform the spotting, including appellant's plant at Argo and that therefore, the imposition of an added charge would require appellant to pay twice for a service already compensated for by the line-haul rates" (Statement as to Juris., O.T. 1946, No. 1309, p. 14; and see Brief in Opp. to Motion to Affirm, *ibid.*, p. 15). This Court granted the motion of the United States to affirm the decision of the district court upholding the Commission's order.

B. The Inclusion in Line-Haul Tariffs of Provision for Spotting and Switching Services

The district court concluded that the Commission's orders were defective in that they

would require the plaintiff carriers to disregard and depart from the express provisions of their duly published and effective tariffs, and are therefore unauthorized and beyond

the powers of the Commission under Section 6(7) of the Act, at least in the absence, as here, of any findings by the Commission that such tariff provisions themselves violate any section of the Act or are otherwise unlawful. [Concl. 11, R. 462.]

This conclusion suggests that the presence in the tariffs of unlawful provisions for switching and spotting operations without extra charge immunizes such provision against attack. That this is not the case is shown by *United States v. American Sheet and Tin Plate Company, supra*, the first case dealing with *Ex Parte* No. 104 proceedings. The tariffs involved in that case included allowances to shippers for certain functions performed by them which the Commission found not to be part of the carrier's responsibility. The argument was there made that "allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed" (301 U. S. at 406). This Court rejected the argument, pointing out that "These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service" (301 U. S. at 407), and specifically held that the Commission is entitled to require discontinuance of the practice under Section 6(7) of the Act (*supra*, p. 15). This principle has been uniformly followed up to the time of the

decision below.¹¹ Its most recent application was in *Corn Products Refining Company v. United States*, 331 U. S. 790, where it was unsuccessfully contended that a tariff validated the carrier's practice of furnishing spotting service without additional charges. There, as here, the argument was that "the only issue * * * became whether the provisions of the tariff were just and reasonable" (Statement as to Juris., O.T. 1946, No. 1309, p. 18), and that a finding that the line-haul rates were unreasonable was therefore indispensable.

The principle that illegality of a transportation practice may not be cured by publishing it in tariff form is not new. A violation of law by a carrier furnishing to favored shippers switching service in excess of its legal obligation is not clothed with immunity by the fact that the carrier makes a public announcement plainly stating its unlawful intentions. *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 511; *B. & O. Railroad Co. v. United States*, 305 U. S. 507, 525-526.

C. The Power of the Commission to Require Separation of Line-Haul and Terminal Switching Charges under Section 6(7) of the Act

The district court concluded that the Commission's order "cannot be construed as requiring the

¹¹ *United States v. Pan American Petroleum Corp.*, 304 U.S. 156, reversing 18 F. Supp. 624 (tariff aspect described in district court's opinion at 18 F. Supp. 628); *Inland Steel Co. v. United States*, 23 F. Supp. 291 (N.D. Ill.), affirmed, 306 U.S.

plaintiff carriers merely to state separately their line-haul charges and their terminal switching charges, since such orders are expressly based solely on Section 6(7) of the Act, which section *confers no such power* upon the Commission, and since the Commission has made no findings under Section 6(1) of the Act, under which section alone the Commission has power to require such separation of line-haul and terminal switching charges" (Concl. 9, R. 462; emphasis supplied).

The sweeping nature of this conclusion of law is apparent. *Ex Parte No. 104* and each of the 76 supplemental proceedings under it has been expressly rested on the power under Section 6(7) to prevent rebates or other illegal reductions in transportation rates. The Commission's method of attacking the problem has been to require that the transportation furnished at line-haul rates be limited to what it has found to constitute line-haul transportation. That method has resulted, necessarily, in requiring the carriers to state separately their charges for services additional to line-haul services. The court below has now for the first time held that this end result of segregation of rates cannot be attained under Section 6(7). In doing so it has placed its decision in irreconcilable

153 (tariff aspect described in this Court's opinion only at 306 U.S. 158-159); *Anaconda Copper Mining Company v. United States*, 77 F. Supp. 611 (D. Mont.) (facts essentially similar to those in case at bar).

conflict with the principles laid down in *United States v. American Sheet and Tin Plate Co.*, *supra*, at p. 406, and followed in every other case sustaining the Commission's orders under *Ex Parte No. 104*.

II

There Was Evidence to Support the Commission's Determination With Respect to the Point in Each Plant at Which Line-Haul Transportation Ended and Intra-Plant Service Began

The brief of the Commission in this case sets forth in some detail the nature of the evidence as to the points at which line-haul transportation began and ended, upon which the Commission issued its findings. Examination of the record and the reports of the Commission reveals that there was a large body of competent evidence, including maps and intensive studies by the Commission's own observers of traffic conditions at the various plants, to support the Commission's determinations. This Court has plainly stated that this question of fact, like other such questions, is to be determined by the Commission and that its findings will not be disturbed if supported by evidence. See *United States v. Wabash R. Co.*, *supra*, at 321 U. S. 408.

CONCLUSION

For the reasons stated, the decree of the district court is erroneous and should be reversed with directions to dissolve the injunction which now restrains the enforcement of the Commission's orders.

Respectfully submitted,

PHILIP B. PERLMAN,

Solicitor General.

HERBERT A. BERGSON,

Assistant Attorney General.

JOSEPH W. BISHOP, JR.,

J. ROGER WOLLENBERG,

*Special Assistants to the
Attorney General.*

JANUARY 1950.

FEB 6 1950

CHARLES ELMORE CROLEY

IN THE

Supreme Court of the United States

No. 173

**UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,**

Appellants,

v.

**UNITED STATES SMELTING, REFINING & MINING
COMPANY, DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY, AND UNION PACIFIC
RAILROAD COMPANY,**

Appellees,

and

**UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,**

Appellants,

v.

**DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, UNION PACIFIC RAILROAD COM-
PANY, AND AMERICAN SMELTING AND REFIN-
ING COMPANY,**

Appellees.

CONSOLIDATED CAUSES

**BRIEF FOR APPELLEE
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

**OTIS J. GIBSON,
604 Rio Grande Bldg.,
Denver, Colorado.**

February 1, 1950.—

INDEX

ARGUMENT:

PAGE

I. The Interstate Commerce Commission has been arbitrary and unreasonable in ignoring the economic situation of the mining industry as it affects the traffic and revenue of the Rio Grande.....	2
II. The Interstate Commerce Commission has been arbitrary and unreasonable in ignoring the practical results that would be effected by the enjoined order.....	3
III. The Commission's investigation, contrary to decision of this Court, has been perfunctory and superficial.....	4
IV. The evidence before the Commission does not support findings that the "plant yard" at Garfield and the "flat yard" at Leadville are reasonably convenient points for the delivery and receipt of earload traffic moving to and from these plants.....	6
CONCLUSION.....	8

IN THE
Supreme Court of the United States

UNITED STATES AND INTERSTATE COM-
MERCE COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING
& MINING COMPANY, DENVER & RIO
GRANDE WESTERN RAILROAD COM-
PANY, AND UNION PACIFIC RAILROAD
COMPANY,

Appellees,

and

UNITED STATES AND INTERSTATE COM-
MERCE COMMISSION,

Appellants,

v.

DENVER & RIO GRANDE WESTERN RAIL-
ROAD COMPANY, UNION PACIFIC
RAILROAD COMPANY, AND AMERICAN
SMELTING AND REFINING COMPANY,

Appellees.

No. 173
CONSOLIDATED
CAUSES

**BRIEF FOR APPELLEE
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

In addition to the reasons for sustaining the Statutory Court stated in joint briefs by the Appellees, the Denver and Rio Grande Western Railroad (hereinafter called Rio Grande) has the following particular answers to this Appeal.

I. THE INTERSTATE COMMERCE COMMISSION
HAS BEEN ARBITRARY AND UNREASONABLE IN

IGNORING THE ECONOMIC SITUATION OF THE MINING INDUSTRY AS IT AFFECTS THE TRAFFIC AND REVENUE OF THE RIO GRANDE.

II. THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE PRACTICAL RESULTS THAT WOULD BE EFFECTED BY THE ENJOINED ORDER.

III. THE COMMISSION'S INVESTIGATION, CONTRARY TO DECISION OF THIS COURT, HAS BEEN PERFUNCTORY AND SUPERFICIAL.

IV. THE EVIDENCE BEFORE THE COMMISSION DOES NOT SUPPORT FINDINGS THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE ARE REASONABLY CONVENIENT POINTS FOR THE DELIVERY AND RECEIPT OF CAR-LOAD TRAFFIC MOVING TO AND FROM THESE PLANTS.

I

THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE ECONOMIC SITUATION OF THE MINING INDUSTRY AS IT AFFECTS THE TRAFFIC AND REVENUE OF THE RIO GRANDE.

The Rio Grande was primarily constructed to serve the mining districts in Colorado and Utah. In 1922, 75% of its traffic came from the mining industry, and in 1940, 51% of its traffic came from the mining industry. (R. 1098)

An important part of this mining industry is that of metal mining in Colorado and Utah, which industry contributes heavily to Rio Grande traffic, and is an industry that is considered to be marginal. Its marginal character has been recognized in various rates cases by the Commission (see "Increases Intrastate Rates — 186 I.C.C. 615"), and it has been recognized by Congress in the subsidies granted the non-ferrous miners during the war period. (R. 1099)

Of all those engaged in this marginal industry it is the miner that will pay the duplicate switching charge that the Commission established in its enjoined order. Such charges along with other expenses are deducted from the value of the metal in the car of ore shipped to the smelter, and the value of the metal is determined by an international market over which the miner has no control. He can not pass on to the consumer this additional expense as is true of other industries considered by this Court in these Ex Parte 104 investigations.

Therefore, the payment of this duplicate charge would be an additional burden on the miner of non-ferrous ores and one of the results would be an undeterminable loss of mine and smelter traffic to the Rio Grande. (R. 1099)

The Commission has ignored this evidence and the Examiner for the Commission termed it immaterial. (R. 1099) This is directly contrary to the purpose of the Commission in instituting the Ex Parte 104 investigation and is an arbitrary and unreasonable exercise of its authority.

II

THE INTERSTATE COMMERCE COMMISSION HAS BEEN ARBITRARY AND UNREASONABLE IN IGNORING THE PRACTICAL RESULT THAT WOULD BE EFFECTED BY THE ENJOINED ORDER.

It has been the continuing purpose of the Rio Grande to develop mine traffic and because of the necessity of moving low grade ore and concentrates as well as high grade ore and concentrates to the smelter, a system of rates has been developed that is based on graded valuation. (R. 914) Such a system enables the shipper in this marginal industry to move at a reasonable freight rate to the smelter low grade ore that must be mined before he can block out the more profitable high grade ore.

Were rates based on declared values, shippers naturally would take advantage of the lowest declared value, to the detriment of the railroad company. If rates on a graded valuation basis were eliminated, and the railroad made a

flat rate, regardless of value, that rate necessarily would be of such volume as to eliminate the movement of low grade ore, and retard development of the industry.

A duplicate switch charge as ordered by the Commission would apply to all cars of ore, low grade and high grade alike, and concentrates, and would partially nullify the beneficial results of line haul rates based on actual graded valuations.

Thus the benefits of this practical and simple method developed by the railroads over many years of basing all charges for services to the shipper on the actual graded valuations would be removed by this enjoined order. This was also the conclusion of the Commission on the basis of similar facts in *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 L.C.C. 255.

III

THE INTERSTATE COMMERCE COMMISSION INVESTIGATION, CONTRARY TO DECISION OF THIS COURT, HAS BEEN PERFUNCTORY AND SUPERFICIAL.

In the basic report (209 I.C.C. 11) the Commission established a formula for testing the responsibility of the carrier. This Court has approved of that formula, but in the "Staley" case (*U.S. v. Wabash R.R. Co.*, 321 U.S. 407), advised the Commission as follows:

"The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered."

No such intensive study was made by the Commission at any of these plants as is proved by admissions of the investigators for the Commission. The testimony and admissions made by these witnesses are outlined briefly as follows:

William O. McCormick (R. 918-923) introduced an exhibit in evidence consisting of 15 pages (R. 1178) which is a record of car numbers and the movement of such cars

by engine 1024 at Garfield, Utah, covering an eight-hour shift each day for a four-day period. Upon cross examination, Mr. McCormick admitted that he kept no record of intra-plant moves for which the smelter pays a charge, nor moves made for the convenience of the carrier. He admitted that no record was kept of the commodities in these cars. He could only testify as to the numbers of the cars and the movements of each car.

C. B. Higgins (R. 923-926) introduced an exhibit in evidence of 17 pages (R. 1194) which is a record of car numbers and the movement of such cars by engine 1016 at Garfield, Utah, covering an eight hour shift each day for a four-day period. He admitted that he would make the same answers as Mr. McCormick did to the questions put to Mr. McCormick on cross-examination. He kept only a record of the physical movement of the cars.

F. C. MacDonald (R. 926-944) introduced an exhibit in evidence of 15 pages (R. 1214) prepared by Gordon Morris. This was a record of car numbers and the movements of such cars by engine 1024 at Garfield, Utah. It was admitted that Mr. Morris kept no record of the purpose of the various movements and had no knowledge of the commodities carried.

F. C. MacDonald (R. 926-944) who had supervised the investigation also introduced in evidence an exhibit of 28 pages (R. 1229) which was a statement compiled from the three preceding exhibits and covered movements from those exhibits chosen by Mr. MacDonald.

Mr. MacDonald on cross-examination stated that the "plant yard" at Garfield, Utah, was a railroad interchange yard (R. 928). He stated that he did not know why the various car movements were made and that he had no knowledge of the relationship between the movement of one car and other cars in the same train.

It is upon such a superficial investigation that the order of the Commission is founded. It is not an intensive study

of traffic conditions prevailing at the smelter plant at Garfield, Utah, as is required, according to the decision of this Court. A similar though less extensive investigation was made at the plant at Leadville, Colorado.

IV

THE EVIDENCE BEFORE THE COMMISSION DOES NOT SUPPORT FINDINGS THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE ARE REASONABLY CONVENIENT POINTS FOR THE DELIVERY AND RECEIPT OF CARLOAD TRAFFIC MOVING TO AND FROM THESE PLANTS.

As has been previously stated, the evidence of the witnesses for the Commission was confined to a superficial record of car numbers and car movements. None of the witnesses were able to tell why the car movements were made, none of them could testify as to the commodities carried. The supervisor of the investigation also did not know why such movements were made, and in addition had no knowledge of the relationship between cars in the various trains.

This fundamental information is needed to distinguish those movements which are intraplant from those movements which are a part of the line haul, and to separate all of these movements from those made for the convenience of the railroad.

In addition to a lack of the required intensive study of traffic conditions, the testimony of Mr. MacDonald, the supervisor of the investigation, is diametrically opposed to the findings of the Commission when he terms the "plant yard" at Garfield a railroad interchange yard, and states that the switch movements in the yard are orderly and that the intraplant moves which he had noticed did not interrupt interstate traffic.

This evidence is supported by the testimony of K. L. Moriarty, the operating witness for the Rio Grande. (R 877-908). He stated that three railroads deliver trains to the

"plant yard"; that these trains are classified and delivered in a straight movement and with few exceptions to unloading bins or docks and other points inside the plant (R. 893); that the principal use of the plant yard at Garfield is for the delivery of road haul trains and for the classification of those trains. (R. 898)

He further stated that the orders for delivery of cars made by the smelter employees were only given after the trains had been classified, the cars weighed and placed on hold tracks. He stated that this is true of any railroad yard handling trains for any industry and that this "plant yard" is the only facility available for such terminal work by the carriers. (R. 899-900)

Similar testimony by Mr. Moriarty developed the facts that trains are made up in the "plant yard" for outbound movements and that switching at Garfield is just like industrial switching at any large city where it is necessary to classify a train prior to the arrival of the spotting engine. He stated that the operation was efficient and compares favorably with the switching at the Salt Lake terminal. (R. 901-903)

With respect to the operation at Leadville Mr. Moriarty testified (R. 1081-1095) that the "flat yard" is used by the railroad as a terminal yard for the benefit of several shippers. These included truckers that bring in ore of independent shippers for outbound movement by rail, the Ore & Chemical Company, the Resurrection Company and the American Smelting and Refining Company.

Contrary to this evidence of Mr. Moriarty and without supporting evidence by its own investigators, the Commission found that the "plant yard" and the "flat yard" are reasonably convenient points for the delivery and receipt of carload traffic in these plants.

Thus, by the record, the only evidence before the Commission is to the effect that the "plant yard" at Garfield and the "flat yard" at Leadville are railroad terminal yards. This was the evidence of an experienced railroad operating official who testified in detail with regard to these operations. His qualifications were not objected to by the Commission. His testimony was accepted by the Commission. It stands in the record unrefuted, and is in direct contradiction to the Commission's findings and this was so held by the Statutory Court.

CONCLUSION

For the reasons stated, the decree of the Statutory Court should be affirmed.

Respectfully submitted,

OTIS J. GIBSON.

FEB 6 1950

CHARLES ELMORE CROMBIE

IN THE

Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

**BRIEF FOR INTERVENOR, THE COLORADO
MINING ASSOCIATION**

HENRY S. SHERMAN

514 Equitable Building
Denver 2, Colorado

Of Counsel

STANLEY T. WALLBANK

514 Equitable Building
Denver 2, Colorado

Attorney for Intervenor,
The Colorado Mining
Association

INDEX.

	Page
Introductory Statement	1
Questions Presented	4
Argument.	
I. Shipping Public Disregarded by Commission ...	4
II. Commission Order Cannot Operate Intrastate ...	9
III. Findings 8 and 9 of Commission Void	10
IV. Findings 1 to 7 of Commission Void	15
Conclusion	19

IN THE
Supreme Court of the United States

NO. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY.

Appellees,

CONSOLIDATED CAUSES

**BRIEF FOR INTERVENOR, THE COLORADO
MINING ASSOCIATION**

INTRODUCTORY STATEMENT.

This Intervenor, The Colorado Mining Association, filed its Motion for Leave to Intervene and its Petition in Intervention (R. 401-407) as a party Plaintiff before the statutory Court in Case No. 1324 on June 18, 1947. Such Leave was granted by the Court by oral Order on the same date (R. 296) under and pursuant to Section 45a of Title 28 of the United States Code. Inasmuch as Cases 1324 and 1325 involved similar issues and like arguments, by Stipulation and with the approval of the Court, they

were consolidated for argument (R. 297 and 493-494). Upon the Court's holding that the Orders of the Interstate Commerce Commission were unlawful and void in these cases and remanding the cases to the Commission for further action, the Commission entered its Second Report on Reconsideration and Order based thereon, on May 18, 1948, which was attacked in Cases No. 1524 and 1525 before the same three-judge statutory Court, in which cases Intervenor again intervened (R. 431-437) with the approval of the Court (R. 445), which Court held the Second Order of the Commission to be unlawful and void. It is this Second Report on Reconsideration and Order based thereon which is before this Court at the present time.

The Findings of Fact and Conclusions of Law in consolidated Cases No. 1525 and No. 1524 (R. 455) provided

“On hearing of these proceedings the parties hereto, with the approval of this Court, stipulated that the entire records in the respective proceedings before the prior statutory Court in Civil Actions, Nos. 1324 and 1325 should be considered incorporated by reference in the record of these proceedings as fully as if physically incorporated herein.”

In its Petition in Intervention, The Colorado Mining Association adopted by reference all the allegations of the Plaintiffs' Complaint. Inasmuch as the position of the Intervenor in these cases is the same as that of the Plaintiffs, it would be imposing upon the Court to repeat the statements of issues involved and the arguments relied upon, which are ably set forth by counsel for the Plaintiffs in their Briefs. We adopt their statements of issues involved, their arguments and citations of authority in behalf of our position, and urge them most earnestly upon the Court. Did we not feel that such arguments in our behalf are being adequately presented to the Court by Plaintiffs' counsel, we would be most remiss in our duty if we did not state them, even at the risk of tiresome repetition,

for this Intervenor and those it represents are most vitally affected by these proceedings.

We will limit ourselves to those aspects of the case we believe to be especially applicable to our position, and emphasize only such arguments as we believe should be repeated from our own particular viewpoint.

Stated simply, the crux of the controversy so far as this Intervenor is concerned is this: The tariff of the railroad carrier for the transportation of ores and concentrates to the Leadville, Colorado, smelter of the Refining Company provided for ~~years~~ and now provides that *line-haul rates* to the smelter *include* certain terminal switching operations in the smelter area. The Commission in an endeavor to compel the railroads to charge for those switching operations *in addition to* the line-haul rates first made an Order based upon a Finding that the line-haul rates *do not* include switching operations. The statutory Court held that Order void on the specific ground that such Finding was in error, in that the evidence showed that the line-haul rates *do* include the switching operations referred to. Had the Finding been proper, the Order would have had a proper basis and would have been valid. The Commission then entered a second Order achieving the same results as the first Order, but boldly abandoning and expressly repudiating its Finding that line-haul rates *do not* include such switching operations, and apparently hoping by some permissive legerdemain to obtain approval of that Second Order, without the benefit of any relevant finding to sustain it, thus effecting a legal version of the Hindu rope trick. This second Order came before the same statutory Court, and was held by it to be void for the same politely reiterated reasons, in addition to a most persuasive new reason: that the Commission had foreclosed itself because the Findings of the Court with respect to the absence of a necessary basis for the Order desired by the Commission had become *res adjudicata*. From there the matter came to this Court.

ARGUMENT

- I. SHIPPING PUBLIC, VITALLY AND ADVERSELY AFFECTED, WAS AFFORDED NO OPPORTUNITY TO BE HEARD. THUS ORDER IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND VOID.
- II. ORDER OF THE COMMISSION UNLAWFULLY AFFECTS INTRASTATE MOVEMENTS, OR IT HAS NO SUBSTANTIAL PURPOSE.
- III. FINDING THAT LINE-HAUL RATES DO NOT INCLUDE SWITCHING CHARGES IS ESSENTIAL TO VALIDITY OF ORDER OF COMMISSION. SUCH FINDING IS EXPRESSLY DISAVOWED BY COMMISSION, IS AGAINST THE EVIDENCE, AND WOULD BE BARRED AS RES ADJUDICATA, IF MADE. THUS FINDINGS 8 AND 9 OF THE COMMISSION (R. 320), VOID.
- IV. CARRIERS MUST PERFORM SWITCHING SERVICES TO ASCERTAIN VALUES OF ORES, IN ORDER TO ASSESS FREIGHT CHARGES. THUS FINDINGS 1 TO 7 INCL. OF COMMISSION (R. 319-320), VOID.

I.

SHIPPING PUBLIC, VITALLY AND ADVERSELY AFFECTED, WAS AFFORDED NO OPPORTUNITY TO BE HEARD. THUS ORDER IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND VOID.

This Intervenor is a composite of approximately 3,000 miners, producers of ore, and other persons interested in mining, most of them small, who are caught in the wheels of this controversy. They should not be lost from sight, for of all the parties to this litigation, they are the ones who will be most hurt in relation to their capacity to bear it, if the decision of the statutory three-judge Court should be

overruled and the Order of the Commission should be sustained.

Whether the Plaintiff smelting companies themselves could absorb the impact of a double freight rate attempted to be imposed by the questioned Order of the Commission is immaterial, as it is not theirs to absorb. That burden falls upon the members of this Intervenor Association and other producers and shippers of ore, and to many of them it is a matter of life or death. (Witness Carey: R. 1099 Ex. H-2) The plight of the producer is of course important to the smelting companies, for if through excessive freight charges the marginal mines of the West cannot operate, there is that less need for smelters. Likewise, the producers' status is of extreme importance to the railroads, for the destruction of marginal mining would deprive the rails of tonnage so derived.

The Colorado Mining Association is a non-profit Colorado corporation, composed of miners, mine owners, mining lessees, shippers of mineral products and other parties interested in the development of mining and production of minerals chiefly in Colorado, and in lesser degree, in all neighboring western states. Intervenor's purposes, stated broadly, include the protection and promotion of the mining industry in Colorado and in the West.

Most of the mines in Colorado are now so-called marginal in character. Many of them depended upon subsidies of the Federal Government in order to operate. (R. 1099 Ex. H-2) These subsidies, as this Court is well aware, have now been withdrawn. The picture is best presented by the Witness Carey (Freight Traffic Manager of the Denver & Rio Grande Western Railroad Company) (R. 1097-1099 Ex. H-2):

"The Leadville Smelter is dependent entirely on Colorado ores, and because of the complex nature thereof and the fact that the smelter at Leadville cannot treat zinc and copper ores, it is extremely difficult

for them to secure a sufficient volume to keep in operation. . . . At one time some twenty-five smelters were located on the line of the Denver & Rio Grande Western in Colorado, at Silverton, Ouray, Rico, Durango, Gunnison, Leadville, Denver, Pueblo, Florence, Salida, Minnequa, Grand Junction, and Buena Vista. Today there is but one. That is the Leadville smelter. Inability to secure proper assortment of ores, and the dwindling supply thereof, were mainly responsible for this situation.

"The Denver & Rio Grande Western Railroad was primarily constructed for the purpose of serving the mining districts in Colorado and Utah; and in normal times the movement of products of mines has constituted the preponderance of tonnage handled by them. In the year 1922, products of mines constituted 75 percent of the total tonnage, and this has gradually dwindled until in 1940 this tonnage amounted to but 51 percent of the total.

"The Durango, Colorado, plant of the American Smelting & Refining Company closed, in 1930 because of the inability to secure proper supply and assortment of ores. This forced the movement of ores from mines operating in Southwestern Colorado to other smelting points, much of it to the Leadville plant. By reason of the longer haul to Leadville, it, of course, was not possible to maintain the same freight rate structure as these mines formerly enjoyed into Durango, . . . and this condition placed many of the mines in the position of becoming so-called marginal operations, from what might have been termed profitable operations.

"The situation at Leadville is precarious, and the imposition of the additional charges on the ore they now receive, most of which is marginal, is apt to result in the closing of the mines and resultant loss of this important industry to us." (Italics ours.)

At this point Examiner Way remarked (R. 1099 Ex. H-2) that the testimony of Witness Carey was

" . . . wholly immaterial in this case. We are not here dealing with rates. The only subject that appears to be

before us is whether or not it is the duty of the carriers to switch these cars in the plant under the line-haul rates."

This remark of the Examiner is typical of the lack of interest shown in the plight of the producer from the beginning to the end of the proceedings before the Commission.

Certainly it would be far-fetched reasoning to say that the Order of the Commission which requires switching charges additional to those of the line-haul rates does not concern the matter of rates, when the only evidence in the case was to the effect that such switching charges *were included* in the line-haul rates.

These so-called marginal mines still in existence in Colorado cannot survive any appreciable increase in freight rates, and, as clearly appears, the arbitrary, unreasonable and capricious Order of the Commission does impose an appreciable increase in rates. This increase will be borne definitely and ultimately by the producers and shippers of minerals to the smelter at Leadville, and will not be absorbed by the Smelting Company nor by the public. Metal prices, the Court knows judicially, are fixed in the world markets and not by any combination of local costs of production, inclusive of freight rates. Thus the burden of any increase in rates is borne by the producing shipper.

As was pointed out in our Petition in Intervention, neither Intervenor nor any member in whose behalf it appeared, nor any producers or shippers of ore, nor the mining industry of Colorado in whole or in part were made parties to the investigation by the Interstate Commerce Commission, were notified or made cognizant of the hearing upon which the Order of the Commission was based, nor were extended the opportunity to be present and be heard at such hearing, *nor was there one single witness* called by

the Commission to testify in behalf of such producers or shippers.

When objection was made to the Court that no notice was given to any representative of the mining industry of the proceedings before the Commission, Mr. Dumbauld of counsel for the United States (R. 513) stated:

"... as to notice, (to the mining public) there is no legal requirement of such notice, and certainly this Intervenor has access to the Traffic World and other trade publications and would have participated in the proceeding before the Commission if it had been thought that it had any interest in the matter why it should do so."

Such an impractical supposition that the marginal miner had access to, saw, or even knew of the existence of the Traffic World or any similar trade publication, is typical of the treatment accorded the producer throughout the proceedings before the Commission. The small miner is in no position to defend himself; he must and should rely upon the Commission to investigate his position and protect his interests. In these proceedings he was utterly ignored.

The mining industry of Colorado as a whole is interested seriously and perhaps vitally in the outcome of this proceeding. The Commission made no effort whatsoever to discover what effect, no matter how damaging, the proposed order would have upon that industry.

We cannot believe that the Commission itself actually feels that an Order should be sustained which compels a segment of the public so little able to bear it (the marginal producers of low-grade ore) to pay a doubled transportation charge (actually twice for the same service) without producing of its own motion, and having the benefit of, all relevant testimony the staff of the Commission could muster in behalf of that public. Surely an Order, achieving such a result, issued by a Commission whose very existence is de-

dedicated to the protection of the public, without any effort whatsoever to ascertain the effect of that Order upon the shipping public, cannot be said to be other than arbitrary, unreasonable, capricious and void. It invades unlawfully the rights of the producers and shippers of ore and of the mining public, and should remain set aside.

II.

ORDER OF THE COMMISSION UNLAWFULLY AFFECTS INTRASTATE MOVEMENTS, OR IT HAS NO SUBSTANTIAL PURPOSE.

Practically all the traffic handled at the Leadville Smelter is intrastate. This conclusive statement of fact comes from one of the Commission's own witnesses, F. C. McDonald (R. 1107 Ex. H-2). Witness Carey for the railroad testified that during the years 1936 to 1941, inclusive, 95 percent of the movement was intrastate traffic; in 1942, 99 percent was intrastate, and in 1943 98.5 percent was intrastate. (R. 1096-1097 Ex. H-2)

Witness Hennebach (R. 1115 Ex. H-2), Superintendent of the Leadville Smelter, testified that for the 12 months ending March 31, 1944, 93 percent were intrastate movements, and 5 percent out of the remaining 7 percent of the movements originated in Colorado, becoming only technically interstate, leaving only 2 percent of the whole constituting movements originating out of Colorado. The 5 percent became technically interstate commerce because, although originating in Colorado, they could not move expeditiously by rail without traversing a small portion of New Mexico by way of in and out movement, enroute from origin points in Colorado to the smelter at Leadville, Colorado.

The movements involved are thus almost entirely intrastate and the Order of the Commission is either substantially without purpose, or it operates upon purely intrastate business. It would be arbitrary and unreasonable to main-

tain that the Order should become effective on 5 percent of the ores and concentrates moving from Colorado through New Mexico back to Colorado, while ineffective as to 93 percent of such ores and concentrates moving solely intrastate in Colorado, thus imposing discriminatory rates upon the shippers of the 5 percent of the ores and concentrates originating in Colorado. Based on 1944 movements, the Order would thus be left effective only as to 2 percent of the traffic, which is strictly interstate, and thus it becomes without practical efficacy or purpose. There was no semblance of a finding by the Commission, nor any attempt to arrive at a finding, that the rate situation with respect to the overwhelming intrastate character of the Colorado movements constituted a burden upon interstate commerce, or affected interstate commerce in any way or in any degree, adversely or otherwise. Surely admittedly the Order of the Commission cannot affect purely intra-Colorado movements unless it is found they constitute a burden upon interstate commerce, or affect interstate commerce, and no such findings were made. Hence the Order becomes purposeless, meaningless and void.

III.

FINDING THAT LINE-HAUL RATES DO NOT INCLUDE SWITCHING CHARGES IS ESSENTIAL TO VALIDITY OF ORDER OF COMMISSION. SUCH FINDING IS EXPRESSLY DISAVOWED BY COMMISSION, IS AGAINST THE EVIDENCE, AND WOULD BE BARRED AS RES ADJUDICATA, IF MADE. THUS FINDINGS 8 AND 9 OF THE COMMISSION (R. 320), VOID.

Insofar as this Intervenor is concerned, we deem it sufficient to discuss this aspect of the case upon the basis of the facts pertaining only to the Leadville, Colorado, smelter, the situation at that smelter being the one in which this Intervenor is most directly interested. Although this argu-

ment is applicable to the other smelters as well, the Leadville situation shows the fallacy of the Commission's action as simply, directly and unerringly as it can be shown. Therefore we shall confine our observations to this one situation.

Stripped of verbiage, the essence of the controversy insofar as the smelter of the American Smelting & Refining Company at Leadville is concerned, is as follows:

The uncontradicted testimony before the Commission showed that the line-haul charges to destination Leadville for approximately 40 years has included switching movements within the plant.

O. W. Tuckwood, General Traffic Manager of the Smelting company, testified that between 1908 and 1920 all the applicable tariffs provided under the line-haul rate not only switching in connection with road hauls such as weighing, thaw house, sampler, and final spotting, but also switching without charge between tracks in the plant itself—purely intra-plant switching (R. 946 Ex. H-2).

W. M. Carey, Freight Traffic Manager of the Denver & Rio Grande Western Railroad Company, testified that after 1920, and until the publication of the tariffs applicable to the Utah smelters in 1938, the tariffs all specifically covered a provision that the line-haul rate included movement to the thaw house, weighing, sampling and one spotting.

This testimony of these two witnesses stood alone and unquestioned. In the words of the Court:

"The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates, and that the presently effective tariffs at Leadville continue so to provide."

(Finding 16 of Findings of Fact and Conclusions of Law. R. 456)

It is important to note that the tariff provisions effective at Leadville differ from those effective at Garfield and Murray, in that since November 27, 1920 and *now* the effective tariffs at Leadville expressly provide that *line-haul carload shipments*

"will include movements of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company." (Item No. 15-A R. 1293)

The first Order of the Commission on Reconsideration entered October 14, 1946, attacked by Plaintiffs and Interveners in Case No. 1324 as being unlawful, unreasonable, arbitrary and void, stated, in spite of the above uncontradicted testimony:

"We conclude that the services performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent is not obligated to perform, and *for which it is not* compensated under its line-haul rates; and that performance of said services by respondent, without reasonable charge therefor, results in the industry receiving a preferential service not accorded to shippers generally." (R. 50 Ex. C-2) (Report of Commission on Reconsideration) (Italics ours)

In enjoining the above Order of the Commission as unlawful the Findings and Order of the statutory Court entered November 14, 1947, states in substance (R. 299):

That the Commission based its Order on the premise that the line-haul rates *do not* cover transportation services rendered by the railroad company within the

respective plants; that such premise by the Commission is contrary to law, had no evidence to support it and that the sole evidence which would justify any finding upon that point is to the contrary.

After the holding of the statutory Court as aforesaid, the Commission then attempted, after vacating this invalid Order of October 14, 1946, through the Second Report on Reconsideration and Order based thereon, dated May 18, 1948, to avoid the findings of the Court that the previous findings of the Commission were without evidence to support them, by expressly disowning and disavowing its previous position and specific findings of fact made by it, in the following language (R. 368 Ex. N-2):

"It is our purpose to make it entirely clear here that our order herein is based solely upon the findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in Ex Parte No. 104, Part II, and that *said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas.* We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein." (Italics ours)

This Second Report on Reconsideration and Order based thereon is the basis of Plaintiffs' Complaints and Interveners' Interventions in Cases Nos. 1525 and 1524.

It seems astounding to note the above disclaimers on the part of the Commission.

In one breath it expressly disavows the findings of its First Report and Order that line-haul rates *do not* include transportation services within the smelter areas, and then

in a second breath it immediately and doggedly falls back upon the basis of these same findings, in both Findings No. 8 and 9 of the Second Report, in an attempt to sustain its Second Order. Finding No. 8 of its Second Report and Order reads as follows (R. 375):

That the common carrier transportation which respondents are obligated to perform begins and ends at the convenient points and that all services beyond those points in the plant areas are industrial or plant services *for which respondents should make reasonably compensatory charges.*" (Italics ours)

The very basis of the Order of the Commission presupposes a finding that the line-haul rates do not include compensatory charges, in spite of virtuous denials on the part of the Commission that such a finding is intended. That supposition was held to be against the evidence by the first statutory Court, and not being appealed from, that holding became *res adjudicata*. The Second Order falls of its own weight, without the semblance of even a void or unlawful finding to support it. The trial Court so held.

A finding that the line-haul rates *do not* include switching charges is a finding necessary and basic to a finding by the Commission of a violation of Section 6(7) of the Act. As said by the Court in Conclusion No. 4 of the Findings of Fact and Conclusions of Law in Cases Nos. 1525 and 1524 (R. 460):

"The Commission by expressly disclaiming in its respective reports of May 18, 1948, any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating in its report in the American Smelting & Refining Company case its previous finding that the line-haul rates do not include such compensation, thereby deprived its respective findings of violations of Section 6(7) of the Act and its respective orders to cease and

desist from such alleged violations, of basic findings of fact essential to support such findings of violations of Section 6(7) and its orders to cease and desist from such alleged violations."

In its First Report and Order the Commission made the requisite Finding. When the Court told it there was no basis in fact for such a Finding, it attempted ostensibly to withdraw that Finding, still predicated its determination of a violation, upon the assumed existence of the same non-existent facts as were contained in the void Findings. This alternate affirmance, denial, and again affirmance of an alleged state of facts which has been held by the Court to be non-existent seems almost incredible.

To say the least, in view of the finding of the Court in the first cases that the line-haul rates *do* include the intra-plant switching involved, the Second Order of the Commission of May 18, 1949, requiring "reasonably compensatory charges in addition to the line-haul rates" certainly compels the producing and shipping public to pay twice for the same transportation services, and is thus unlawful and void.

IV.

CARRIERS MUST PERFORM SWITCHING SERVICES TO ASCERTAIN VALUES OF ORES, IN ORDER TO ASSESS FREIGHT CHARGES. THUS FINDINGS 1 TO 7 INCL., OF COMMISSION, VOID (R. 319-320).

There are 9 Findings in the Second Report of the Commission on Reconsideration, upon which the Order therein is based. Findings Nos. 8 and 9 have just been discussed. Findings Nos. 1 to 7, inclusive, relate to so-called excess service within the plant and are all predicated upon the correctness of Finding No. 1, which reads as follows (R. 374 Ex. N-2):

"That it is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values."

This Finding is specifically contrary to the evidence.

As herein noted, the exact wording of the tariff now in effect at Leadville includes switching operations within the smelter area for purposes which would be utterly useless were they not for ascertaining values. And the ascertainment of values is absolutely essential in the case of ores and concentrates for the assessment of freight charges (R. 912).

The Report of the Commission itself upon which the first Order was based, states (R. 33):

" . . . for the purpose of determining the freight charges, the value of the ore and concentrates, based on the dry weight, is converted to a wet weight basis and applied to the shipping weight."

Contrary to the Finding of the Commission with respect to the duty of the carrier to ascertain values, is the following testimony: Witness Carey for the railroad (R. 912).

" . . . it will be noted that in addition to having the weights, the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers, and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the smelters did not."

Again Witness Carey testified (R. 913):

"... it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. . . . Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, . . . "

Witness Carey (R. 914):

"Q. Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

"A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

"Q. So it would have to build them and maintain them for those purposes?

"A. Yes.

"Exam. Way: Is there any other way to make the rates so that the rates will cover the service?

"A. No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that there wouldn't be any movement of the low grade ore, and the same thing would result.

Exam. Way: Why?

"The Witness: Because the ore couldn't afford to pay the higher freight charges, the low grade ore.

"Mr. Finerty: In other words, the small miner and the small mine producing a fairly low grade ore could

not afford to produce that ore if you had your rates on a single-rate basis?

"The Witness: That is correct.

"Mr. Finerty: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

"The Witness: That is right."

Witness Tuckwood, for the Smelter (R. 950):

"As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course. The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built."

Again (R. 951):

"Q. Then it (Smelting company) also furnished the carrier with a translation of that dry weight basis into a wet rate basis of values?

"A. Yes, we do that for the carriers.

"Q. And the carriers then assess their charge on a translation of that wet weight basis?

"A. Yes, it always assesses bills on the basis of that wet weight value."

The testimony of the above two witnesses is the only testimony in the proceeding with respect to the Leadville smelter as to the duty to provide the intra-plant switching services necessary for the assessment of freight charges, and this testimony stands uncontradicted. How the Commission could arrive at the conclusion, from the testimony of these witnesses for both the railroad and the smelter, that "it is the duty and obligation of the smelters to certify to the carriers the values of ores...", passes our under-

standing. Thus the Findings of the Commission, Nos. 1 to 7, inclusive, are against the evidence and void. In the words of the Court (Finding of Fact No. 12. R. 455):

"... the only evidence of record before the Commission was contrary to such findings and each of them."

Again, in Finding No. 16 (R. 456):

"The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided *that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates*, and that the presently effective tariffs at Leadville continue so to provide." (Italics ours)

CONCLUSION.

We submit for the above reasons, among the others set forth by Plaintiffs, that the decision of the trial court is correct and should be sustained, and that this Court should affirm the permanent injunction restraining the enforcement of the Order of the Interstate Commerce Commission under date of May 18, 1948.

Respectfully submitted,

HENRY S. SHERMAN
514 Equitable Building
Denver 2, Colorado
Of Counsel

STANLEY T. WALLBANK
514 Equitable Building
Denver 2, Colorado
Attorney for Intervenor,
The Colorado Mining
Association

FEB 6 1950

CHARLES ELMORE CROFT
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellants,*

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY,
AMERICAN SMELTING & REFINING COMPANY, THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Brief For Intervener—Utah Mining Association

MITCHELL MELICH

S. J. QUINNEY

Attorneys for Intervener

INDEX

Page

INTRODUCTORY STATEMENT 2

ARGUMENT:

I. DUE TO INCREASED COSTS AND OTHER
FACTORS THE METAL MINING INDUS-
TRY TODAY FINDS ITSELF IN A SERI-
OUS ECONOMIC CONDITION 3

II. THE ORDERS OF THE INTERSTATE COM-
MERCE COMMISSION IF SUSTAINED
WILL RESULT IN A DOUBLE CHARGE
FOR THE SAME SERVICES BEING IM-
POSED UPON THE METAL MINING IN-
DUSTRY 6

CONCLUSION 11

CITATIONS

Anaconda Copper Mining Company, 266 I.C.C. 387
(1946) 7

Interstate Commerce Commission v. Chicago, B. & Q.
R. Co., 186 U. S. 321 (1902) 10

Northern Securities Co. v. United States, 193 U. S. 197
(1904) 11

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellants*,

VS.

UNITED STATES SMELTING REFINING AND MINING COMPANY,
AMERICAN SMELTING & REFINING COMPANY, THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

OPINIONS BELOW

Neither the findings of fact and conclusions of law (R. 449-463) nor the opinion (R. 474-477) of the District Court have been reported. The District Court opinion refers to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported. The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission reported at 270 I.C.C. 385 (R. 315-321) (and one at 270 I.C.C. 359 (R. 364-375)). The previous decision of the District Court reviewed an order of the Interstate Commerce Commission reported at 266 I.C.C. 476 (R. 271-279) and 263 I.C.C. 749

(R. 330-341) (and those at 266 I.C.C. 349 (R. 29-52) and 263 I.C.C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Interstate Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949. Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U.S.C. Sections 1253, 2101 (b).

INTRODUCTORY STATEMENT

The Utah Mining Association, hereinafter called the "Association," was allowed to intervene in these actions pursuant to Section 45a, Title 28, U.S.C.A. (now Section 2323 of new Title 28, U.S.C.A.) (R. 297, 445.).

The Association was formed for the purpose of advancing metal mining and its related industries within the State of Utah, and in general to support activities in behalf of metal mining and metallurgy. The membership of the Association represents more than ninety per cent of the non-ferrous ore production of Utah.

Due to the effect on the economy of the mining industry, the Association finds itself compelled to join with the plaintiff industries in asking that the final decree of the United States District Court for the District of Utah, entered on January 10, 1949, be sustained by this Court. The additional transportation cost which must necessarily result from the orders of the Interstate Commerce Commission will become an additional freight charge to the ore producers. If this decree be reversed and the original orders of the Interstate Commerce Commission, hereinafter referred to as the "Commission," entered on May

18, 1948, entitled "United States Smelting Refining and Mining Company," and as "American Smelting & Refining Company" under a general proceeding before the Commission entitled "Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services," are permitted to stand, an increase will result in transportation charges which the mining industry of Utah cannot at this time absorb.

ARGUMENT

I.

DUE TO INCREASED COSTS AND OTHER FACTORS THE METAL MINING INDUSTRY TODAY FINDS ITSELF IN A SERIOUS ECONOMIC CONDITION.

The mining industry in the West and particularly in Utah now finds itself in a rather unfortunate position. During the twelve year period from 1935 to 1946, there has been a decrease in the number of producing lode mines in the State of Utah from 203 to 89.¹ We also find that the number of lead and zinc producing mines in our western states decreased from 1401 in 1939 to 690 in 1944, although 1939 was a comparatively poor year for the western lead and zinc industry. Over 700 of the casualties were small or what are called marginal operators. These marginal mines are mines which produce a low grade type of ore and upon which a profit can only be made if the price for metals is sufficiently high and operating costs held at a minimum. The reason for the closing of so many of our mines is due to the tremendous increase in operating costs. Operating costs in 1948 per ton mined have at least doubled and in some cases tripled since 1939. Average labor costs per ton mined for the lead-zinc mining industry alone have increased 135 per cent over the average costs in 1939. Supply costs per ton mined show an average increase of 113 per cent in 1948 over 1939. For example, in 1939 an outlay in tools and equipment valued at \$550.00 was re-

¹ See Minerals Year Books, Published by U. S. Bureau of Mines, Department of the Interior.

quired to advance a drift heading in a mine operation, whereas in 1948 a drift crew required a total of \$8900.00 in tools and equipment.

In addition to the tremendous increases in labor and supply costs, the mine operator today is faced with such additional costs consisting of increasing demands for pensions and welfare plans.

The reports of the Utah State Tax Commission show that there were forty mines paying the Mine Occupation Tax in Utah in 1940 and in 1949 the number had decreased to twenty-one (a decrease of 47.5% over 1940).

The records in the office of the Secretary of the State of Utah show that in 1915 there were 159 new mining companies organized in Utah as against only 29 in 1948.

The downward trend in the number of operating mines is attributable to the higher operating costs, which include increases in wages, supplies, taxes and transportation charges, coupled with an unstable metal market due to large imports of foreign metals.

During World War II the Federal Government inaugurated what was called the "Premium Price Plan." This plan was created originally in 1942 under the first War Powers Act to make possible the control of the prices of metals, and was later amended and extended under O.P.A. to June 30, 1947, when it expired. Many mines were dependent upon the subsidy paid by the Government under the Plan for their continued existence, and upon the expiration of the Plan a number of mines closed and still remain closed. For these mines to reopen there must be a substantial reduction in mine operating costs, including a revision in the present tax structure applicable to mine operations.

In 1947 the Legislature of the State of Utah recognized the critical condition of the mining industry and to give it some aid and encouragement amended the Mine Occupation Tax Law by increasing the exemption from

\$20,000.00 to \$50,000.00.² This tax is an imposition of one per cent on the gross amount received from all metalliferous ores sold during any one year by any mine operating in Utah.

As further evidence of the serious condition of the metal mining industry, we refer to the survey of business conditions made by Secretary of Commerce Charles Sawyer and which was submitted by him to John R. Steelman, Assistant to the President, on December 23, 1949.

We quote from that survey:

"By far the most serious problem raised in the Salt Lake City and Denver meetings was in connection with mining of nonferrous metals. During the summer there had been layoffs of over a thousand non-ferrous miners at Park City and in the Tintic District of Utah. It was reported that a very large number of mines throughout the mountain area had closed during the year; and figures were advanced to show that this was a secular condition dating back many years before the war. As for the immediate problem, it was stated that wartime premium prices did not provide profits adequate to permit new explorations and development, and that, in the meantime, higher grade ores had been depleted. Again, imports and price declines earlier this year were said to have further demoralized the domestic industry, though a reimposition of the lead tariff effective during the summer had improved that market somewhat.

"It was the unanimous view of both labor and business representatives that the problem described in general terms above was one meriting extremely earnest consideration on the part of the federal government. It was feared that unless very vigorous action were taken the nation might jeopardize a basic security factor by becoming too largely de-

² Section 80-5-66, Utah Code Annotated 1943, as amended by Laws of Utah 1947, Ch. 108, and Laws of Utah 1949, Ch. 80.

pendent upon foreign sources for non-ferrous metals. There were suggestions that higher tariffs be imposed on imports. Great interest was expressed by a number of business and labor representatives in the mine subsidy and incentive arrangements suggested in the first session of the present Congress. However, it was the view of some businessmen that direct subsidies and incentives would prove to be only temporary correctives, and that more basic good would come from special tax arrangements under which the industry would be able to retain a larger share of its earnings for the financing of exploration and developmental costs and the installation of cost-reducing equipment."

The Department of Commerce also reports that business mortalities during the past year have been the heaviest in mining and manufacturing.

Another factor to consider is that with the closing of our marginal mines there results a loss in the total tonnage hauled by plaintiff carriers. The tonnage of ore hauled by plaintiff carriers from mines to smelters is substantial. Not only will this loss in tonnage occur within the state of origin but will be reflected in loss in interstate freight, as much of the metal produced in the western states is shipped by rail to the eastern sea coast for refining.

II.

THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION IF SUSTAINED WILL RESULT IN A DOUBLE CHARGE FOR THE SAME SERVICES BEING IMPOSED UPON THE METAL MINING INDUSTRY.

The present practice in the entire non-ferrous metal industry has been in effect for over fifty years and terminal services which have been furnished by the carriers have during all of this time been considered to have been included in the line-haul rates. The moving of cars to samplers with-

in the smelters and to thaw houses during the winter months are part of the terminal services which plaintiff carriers have furnished the metal mining industry, and are necessary in order to determine the rate to be charged by the plaintiff carriers of the ores. The only manner in which the plaintiff carriers can determine the rate to be charged is to determine the value of the ore moved, and such value can only be determined by having the ore sampled.

In the dissenting opinion of Commissioner Alldredge in the case of *Anaconda Copper Mining Company*, 266 I. C. C. 387 (1946), an accurate statement is made of the practice prevailing in such cases.

Commissioner Alldredge said:

"In my opinion, the evidence here clearly establishes that the services incident to the delivery of shipments within the industry plant area are both customary and reasonable. Throughout the entire non-ferrous metal industry of the West such a practice has been uniform for more than 50 years. It has not been shown by any evidence of record that the performance by respondents of such terminal services without compensation, in addition to that which is included in the line-haul rates, is preferential of this industry or prejudicial to any other industry or shipper." (R. 54)

This dissent was incorporated by reference in the report of the Interstate Commerce Commission in the *American Smelting & Refining Company* and the *United States Smelting Refining and Mining Company* cases herein involved (R. 51-79, 329).

There is nothing in the record in these cases to sustain the Commission in finding that the terminal services furnished by the plaintiff carriers are not included in the line-haul rates.

The Statutory Three-Judge Court in temporarily enjoining the Commissioner's respective orders of October 14, 1946, found that:

"(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

"(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary." (R. 299-300)

In its findings dated January 7, 1949, the Statutory Three-Judge Court also found:

"(13) There was no evidence to support the Commission's findings that the 'plant yard' at Garfield, the 'hold tracks' at Murray, the 'flat yard' at Leadville, and the 'assembly yard' at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the plaintiff carriers. On the contrary, the only evidence before the Commission was that such carriers, under the express provisions of their duly published tariffs, have for approximately fifty years delivered and received carload freight at actual points of unloading and loading at the respective smelters beyond such designated points, and have never delivered or received such freight at such designated points.

"(14) That there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective plaintiff industries. On the contrary, the only evidence before the Commission was that the tracks at such designated points constitute the only available railroad terminal facilities of the plaintiff carriers for their ordinary railroad terminal handling of carload freight to and

from the respective smelters of the plaintiff industries, and, as such, are used in the same manner as any railroad terminal facilities are used by carriers generally, in bringing cars into their terminals for further disposition to consignees of inbound shipments, and for the assembling of outbound shipments into the carriers' road-haul trains.

“(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. On the contrary, the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called 'interrupted movements' incident to determining the value of inbound shipments of non-ferrous ores and concentrates.”
(R. 455-456)

And further in this connection reference is particularly made to the concurring opinion of Judge Phillips in enjoining the Commission's orders of October 4, 1946, wherein he states that if the orders of the Commission are permitted to stand that:

“This would result in two charges for the same services.”

Based upon the evidence in the record in these two cases and the finding of the Statutory Three-Judge Court it cannot be said that plaintiff industries have been receiving a preferential service or a refund of any rates collected.

If the orders of the Commission of May 28, 1948, should become effective requiring the plaintiff carriers to collect and the plaintiff industries to pay charges in addition to the line-haul rates for the terminal switching services, which have been customarily furnished by the carriers to the metal mining industry for the past fifty years,

the carriers will be required to collect and the industry to pay twice for the same service. This condition if brought about by the Commission will be in direct violation of Section 1 (5) (a) of the *Interstate Commerce Act* (Title 49, U.S.C.A.) which provides that:

“All charges made for any service rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.”

In the absence of proof it cannot be presumed that the plaintiff carriers have been performing the terminal services in these cases gratuitously.

The case of *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U.S. 321 (1902), was one in which the line-haul railroads transported cattle from various points in the United States to points in the Chicago stock yards from 1865 to 1894, and had used the tracks of the Union Stock Yards & Transit Company for delivery of the cattle without charge in addition to the line-haul rates from points of origin to Chicago. The tariff of the railroads provided for a charge of \$2.00 per car for delivery services within the stock yards area, without any charge in-line-haul rates.

The Court at page 336 said:

“Under these circumstances in the absence of proof, can it be assumed that the carriers were, for the many years in question, gratuitously performing the terminal services? That such assumption may not be indulged in results from the ruling in *Covington Stock Yards v. Keith*, 139 U.S. 128, where it was decided that, as for a through rate to a given point, the carrier contracted to deliver at that point,

the presumption was that the through rate included adequate compensation for the services rendered at point of delivery. Applying this principle, it results that the through rate existing prior to June the 1st, 1894, certainly in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stockyards."

In deciding the issues in these cases this Court can well consider the words of Justice Holmes in the case of *Northern Securities Co. v. United States*, 193 U.S. 197, (1904) where he said:

"... at times judges need for their work, the training of economists or statesmen, but must act in view of their foresight of consequences, . . ."

This Court should in its determination of these cases give careful consideration to the economic repercussions resulting from the final decision in the case. If transportation rates are to be increased by the imposition of a double charge for services furnished to the metal mining industry the result will be a further downward trend in mine operations in the West with a resultant decrease in ore supplies, which are so necessary toward the welfare of this great nation, both in times of peace and war.

CONCLUSION

It is submitted that the record in these cases conclusively establishes that there is no just reason in law or fact for the Interstate Commerce Commission to have its orders of May 18, 1948, enforced against the plaintiff industries or plaintiff carriers. It is submitted also that this Court should give careful consideration to the effect of the Commission's orders, if enforced, upon the metal min-

ing industry, which is ill and in need of some cure to continue to produce under our system of free enterprise.

Accordingly, the decision of the Statutory Three-Judge Court should be sustained and the orders of the Interstate Commerce Commission of May 18, 1948, permanently enjoined.

Respectfully submitted,

MITCHELL MELICH

S. J. QUINNEY

Attorneys for Intervener

January, 1950.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED

FEB 6 1950

CHARLES ELMORE CROLEY

IN THE

Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

**BRIEF FOR INTERVENOR, THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF COLORADO**

THE PUBLIC UTILITIES COMMIS-
SION OF THE STATE OF COLORADO

RALPH C. HORTON
JOHN R. BARRY
JOSEPH W. HAWLEY
Commissioners

By: JOSEPH W. HAWLEY
Commissioner

INDEX.

	Page
Introductory Statement	1
Questions Presented	2
Argument	
I. Effect of Order upon Mining Industry Not Con- sidered by Commission	3
II. Order Affects Intrastate Commerce and is Ar- bitrary and Unreasonable.....	4
Conclusion	5

IN THE
Supreme Court of the United States

NO. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

**BRIEF FOR INTERVENOR, THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF COLORADO**

INTRODUCTION

This Intervenor, The Public Utilities Commission of the State of Colorado intervened in the proceedings before the Interstate Commerce Commission which are now before this Court (R. 873), on behalf of the mining industry and the producers of ore in Colorado. It intervened in their behalf in Cases 1324 and 1325 (R. 297) and again in Cases 1525 and 1524 (R. 445), in all of which cases, this Intervenor has taken, and now takes the position that the Orders of the

Interstate Commerce Commission complained of are unlawful and void.

We have no disposition to burden the Court with a repetition of the arguments supporting that position. We believe it sufficient to state that we hereby adopt and join in the brief being filed with this Court by the Intervenor, The Colorado Mining Association, commend it to the attention of the Court, and urge that the Court sustain the decision of the trial Court and enjoin permanently the questioned Order of the Interstate Commerce Commission as unlawful and void.

This Commission does not propose to do more in this brief than to attempt to focus the attention of the Court upon two arguments appearing in the brief of The Colorado Mining Association, in the hope that they will receive the consideration we believe they deserve. Arguments covering other facets of the case are set forth fully and amply in the briefs of Appellees and other Intervenor. We hope we will be pardoned for indulging a normal fear that so much intensified argument has been directed to the other aspects of the case, that the two arguments above referred to may be partially lost from view. They are not the grounds of the trial Court's decision in these cases, and while we concur wholeheartedly with those grounds, we feel that the Order of the Commission could have been properly enjoined on these two grounds alone.

We shall discuss these two grounds briefly and in order:

ARGUMENT

- I. THE ADVERSE ECONOMIC EFFECTS OF THE PROPOSED ORDER UPON THE MINING INDUSTRY OF COLORADO WERE NOT CONSIDERED BY THE COMMISSION, HENCE THE ORDER IS ARBITRARY AND CAPRICIOUS.

II. THE PROPOSED ORDER AFFECTS COMMERCE ALMOST WHOLLY INTRASTATE IN CHARACTER, HENCE IS ARBITRARY AND UNREASONABLE.

I.

THE ADVERSE ECONOMIC EFFECTS OF THE PROPOSED ORDER UPON THE MINING INDUSTRY OF COLORADO WERE NOT CONSIDERED BY THE COMMISSION, HENCE THE ORDER IS ARBITRARY AND CAPRICIOUS.

The marginal mining industry of Colorado is far from what could be called a cohesive industry. It retains about as much of "rugged individualism" as it possessed at its birth during the last century. The marginal miner of today is still the pioneer of the 80's, and he lacks the power of any united expression in his own behalf about as much as did his predecessors.

When this Commission intervened in these cases it intervened largely because it felt that the marginal mines of Colorado constituted a very necessary and important section of the industry of Colorado, and that they needed this Commission as one of their spokesmen in this litigation.

With respect to this first argument we do not believe we should do more than to refer to the evidence and adopt the arguments contained in the brief of Intervenor, The Colorado Mining Association, and call attention to the fact that the mining industry was afforded no opportunity to be heard. We will pass on to the second point with just this observation: We believe that when a fact finding, policy making, regulatory body such as the Interstate Commerce Commission or our own Commission embarks on a factual investigation of its own motion, it should be more than care-

ful to elicit and develop all the facts favorable to all the parties to the controversy. From the record of these proceedings it would not appear that this has been done—the interests of the mining producers were not even casually considered by the Commission.

II.

THE PROPOSED ORDER AFFECTS COMMERCE ALMOST WHOLLY INTRASTATE IN CHARACTER, HENCE IS ARBITRARY AND UNREASONABLE.

As calculated from the figures set forth in the brief of Intervenor, The Colorado Mining Association, an average of approximately 96% of all inbound movements to the Leadville, Colorado, smelter from 1936 to 1944, inclusive, were intrastate movements and not interstate movements. In view of such a preponderance we desire to affirm most earnestly the position taken by The Colorado Mining Association, that the Order of the Commission is arbitrary and unreasonable in its attempt to affect what is overwhelmingly of intrastate concern. If the jurisdiction of federal regulatory bodies is allowed to expand itself into such extensive coverage of matters which are so thoroughly intrastate in character, there is little need of the existence of state regulation at all.

We assure this Court that we are not ambitious for our jurisdiction in the sense that we have any desire to reach out into federal fields, but we do hold it our duty to maintain the jurisdiction that has been intrusted to our keeping. We feel there has been an overreaching on the part of the Interstate Commerce Commission in these proceedings, unconscious though it has undoubtedly been, and we trust that the Court will establish some guide posts to boundary lines for future guidance.

CONCLUSION

We submit in conclusion that the decision of the trial Court should be sustained and that the Order of the Commission dated May 18, 1948 should be permanently enjoined.

Respectfully submitted,

THE PUBLIC UTILITIES COM-
MISSION OF THE STATE OF
COLORADO

RALPH C. HORTON
JOHN R. BARRY
JOSEPH W. HAWLEY
Commissioners

By: JOSEPH W. HAWLEY
Commissioner

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 9 1950

CHARLES ELMORE GARDNER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellants,*

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY,
AMERICAN SMELTING & REFINING COMPANY, THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR PUBLIC SERVICE COMMISSION OF UTAH AND
STATE OF UTAH

CLINTON D. VERNON,
Attorney for the State of Utah

CHARLES A. ROOT,
*Attorney for the Public Service
Commission of Utah*

INDEX

	Page
INTRODUCTORY STATEMENT	2
SUMMARY OF ARGUMENT	2
ARGUMENT:	
I. LONG ESTABLISHED PRACTICES SHOULD NOT BE DISTURBED WITH- OUT DEFINITE AND SUFFICIENT REASONS	3
II. THE SO-CALLED SWITCHING SERVICE IS INCLUDED IN THE SAMPLING IN TRANSIT TARIFF	5
III. A SEPARATE CHARGE FOR SWITCHING ON A FREIGHT RATE PER CAR DE- STROYS THE ELEMENT OF VALUE IN FIXING THE FREIGHT RATE	6
IV. THE FINDING OF THE COMMISSION THAT THE PRESENT PRACTICE RE- SULTS IN A PREFERENTIAL SERVICE TO THE INDUSTRIES IS UNSUPPORT- ED BY EVIDENCE. (SEE FINDINGS NUMBERED 9 BY THE COMMISSION IN EACH CASE (R. 320, 375))	7
CONCLUSION	8

CITATIONS

<i>Nashville Railway v. Tennessee</i> , 262 U. S. 318	8
---	---

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, *Appellants*,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY,
AMERICAN SMELTING & REFINING COMPANY, THE DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR PUBLIC SERVICE COMMISSION OF UTAH AND
STATE OF UTAH

OPINIONS BELOW

Neither the findings of fact, and conclusions of law (R. 449-463) nor the opinion (R. 474-477) of the District Court have been reported. The District Court opinion refers to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported. The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission reported at 270 I.C.C. 385 (R. 315-321) (and one at 270 I.C.C. 359 (R. 364-375)). The previous decision of the District Court reviewed an order of the Interstate Commerce Commission reported at 266 I.C.C. 476 (R. 271-279) and 263 I.C.C. 749 (R. 330-341) (and those at 266 I.C.C. 349 (R. 29-52) and 263 I.C.C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Interstate Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949. Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U.S.C. Sections 1253, 2101 (b).

INTRODUCTORY STATEMENT

The State of Utah, by its Attorney General, and the Public Service Commission of Utah, by its Commerce Attorney, were allowed to intervene in these consolidated causes in the United States District Court pursuant to Section 45a, Title 28, U.S.C.A. (now Section 223 of new Title 28, U.S.C.A.). The trial court made its orders permitting the State of Utah and the Public Service Commission of Utah to intervene in the Trial of the consolidated causes (R. 297, 444, 445).

SUMMARY OF ARGUMENT

The Public Service Commission of Utah has jurisdiction of the regulation of intrastate commerce. It and the State of Utah are interested in this case because of their interest in the economic welfare of the railroads, the non-ferrous metal mining industry and smelting interests of Utah and because of the effect on intrastate commerce and the intrastate tariffs and practices.

We agree with the smelters and the carriers that the present tariff rates compensate for all services rendered, and the effect of the order of the Interstate Commerce Commission, enjoined by the District Court, is to require the railroads to charge twice for the same service. We also agree that what has been designated by the Commission as

switching service is part of the line-haul under Ex Parte 104, Part II, and is not switching service. But in addition to these matters, which should be conclusive in this case, there are other reasons for not interfering with the present arrangement at the smelters even though there were no double charge and even though the end of line-haul does terminate at the points found by the Interstate Commerce Commission. *Long established practices of the carriers and industries should not be disturbed without definite and sufficient reasons.* Furthermore, the so-called switching service is included in the sampling in transit tariff, and there should, therefore, be no additional charge for so-called switching involved in the sampling of ore.

Should there be a separate tariff for switching on the basis of a freight charge per car, the rate structure which is based upon values will be destroyed so far as this part of the service is concerned.

The Interstate Commerce Commission has based its orders upon a finding that the performance of the described services within the plant without reasonably compensatory charges in addition to the line-haul rates results in the smelting companies receiving a preferential service not accorded shippers generally (Finding No. 9 (R. 320-321, 375)). There is no evidence to support a finding of such preference, and in any event a preference is not unlawful unless it results in an undue prejudice or disadvantage to another person, locality, commodity, or class of traffic which has not been shown. See *Nashville Railway Company vs. Tennessee*, 262 U. S. 318.

ARGUMENT

I.

LONG ESTABLISHED PRACTICES SHOULD NOT BE DISTURBED WITHOUT DEFINITE AND SUFFICIENT REASONS.

The State of Utah and the Public Service Commission of Utah are both particularly interested in the economic

welfare of the railroads, and the non-ferrous mining and smelting interests of Utah and the intermountain west. The Public Service Commission of Utah is also interested because of the effect of the orders on intrastate practices and tariffs. It is respectfully submitted that any systems or methods worked out by the experience of fifty years so as to subserve the best interests of all parties should not be upset or overthrown without a full understanding and realization of the economic consequences of such an act.

In the first place, it is important to know that the mining, transportation, and smelting of non-ferrous ores in Utah are carried on under the terms of railroad tariffs that apply alike to interstate and intrastate commerce. No one in Utah obtains any different or better advantages under the tariffs insofar as the litigated provisions are concerned, although the tonnage is about 90 percent intrastate in character. (R. 335,615).

In addition to this we think the Court can take judicial notice of the fact that ordinarily Utah smelters produce nearly one-third of all the copper produced in the United States. For example, during World War No. II, Utah produced in 1943, 647,978,000 pounds of copper, while the entire production in the U.S. was 2,181,636,000 pounds, and every pound of Utah copper moving by common carriers was mined, shipped, and smelted *under the very provision of the tariffs that the Interstate Commerce Commission has condemned as unlawful.*

There must be some compelling reason why these railroads, the smelters and the miners, mine owners and their association resist to the utmost the order of the Interstate Commerce Commission declaring the practices of the carriers herein to be unlawful. It would appear to us that if these practices were unlawful or harmful some of the appellees would "rise up and complain". The fact that none of these appellees have previously complained about the practices which the Commission now condemns as unlawful, appears to negative the idea that the practices are unlawful and harmful.

II.

THE SO-CALLED SWITCHING SERVICE IS INCLUDED IN THE SAMPLING IN TRANSIT TARIFF.

One important point appears to be the desire of the Interstate Commerce Commission that the rates for line-haul service of the ores from the mines to the smelter should not also include compensation for the intermediate switching at the samplers. A "sampler" is a plant usually maintained and operated by the Smelter for the purpose of taking "samples" of the ore in each car for the purpose of not only ascertaining the value of the ore, but also for determining which smelter, i.e., a copper smelter, or lead smelter or other type of smelter can best smelt the car to get the biggest return from its ore. (R. 275-276) There is also an independent sampler in Utah and this sampler is given transit rates and services identical with those of the smelting companies involved herein. We think the necessity of having the switching at the samplers included in the line-haul rates justifies an explanation of the facts. In the first place, The Almighty has placed these non-ferrous ores at various points and places throughout the western mountain states. These deposits vary greatly in richness, in composition, and in volume. A prospector locates what to him appears to be a copper mine. Upon development this mine produces ores of varying richness in copper. In addition there may also be lead, or zinc, or silver, or gold in varying amounts to such a degree that no two carloads of ore from this mine are alike or any where near alike. Some may be poor, some medium, some rich in mineral content. These circumstances make it necessary to *sample each and every car* at the "sampler".

The sampling in transit tariff (R. 263) permits the sampling as in transit service, and the service is included under the tariff. This practice is not disapproved where, after sampling, the ore is sent to another smelter (R. 276). The order of the Commission requiring an additional tariff for all services beyond the assembly yard nullifies the sampling in transit tariff, which tariff has in no way been disapproved or considered invalid.

III.

A SEPARATE CHARGE FOR SWITCHING ON A FREIGHT RATE PER CAR DESTROYS THE ELEMENT OF VALUE IN FIXING THE FREIGHT RATE.

The railroads for many years have published their rate for transportation of non-ferrous ores on the basis of the value of the mineral in the ore. On low value ores the rates for line-haul and so-called switching (combined) are relatively low. *These rates progressively increase as the value of the ores increase.* This plan makes it possible for the mine owner to ship his poor ores at low rates and his good ores at progressively higher rates. And the freight rate includes the *total charge* for line-haul and switching. The railroad is satisfied because in the aggregate its revenues for the total services are sufficient and adequate. The smelters are satisfied because they have provided the "samplers" and, except for switching, they operate the samplers and furnish to the railroad and the miner its certificate of the value of each carload, upon receipt of which the railroad makes out its freight bill and the smelter settles its bill with the miner or mine owner, less the freight paid. There are, of course, many ramifications of this system but in essence they all embody the same idea, i.e., the compensation for line-haul and for so-called switching are covered by one freight bill based upon the value of the ore in each car.

Assuming that the Commission's order requires the carrier to render a separate charge for line-haul and for switching (the order in fact requiring an additional charge for so-called switching), the switching charge would necessarily be on a per car basis, that is, a fixed charge for each car. Thus the low grade ores would pay the same price for so-called switching as the high grade ores. This would destroy in part the present system of tariffs under which freight charges are graduated according to the value of ore shipped.

Utah also has large deposits of iron ore and furnaces and mills to use this ore. No such plan as that now in

effect for non-ferrous ores is used in transporting iron ore, because primarily *there is no demand for such a plan.*

It is our contention and position that the railroad being a *public utility* or *servant* should provide services and systems of charges as *demanded and needed* by the different types of commerce and industry. Ordinarily they are permitted and required to do that very thing. Why should they be *forced* to refuse the non-ferrous mining industry, a really essential service, and system of rates which this very investigation discloses has been in effect for approximately fifty years without change or challenge.

Indeed, if it is proper and lawful to provide by tariff the line-haul rates according to the value of the shipment transported, why is it not *legal to also provide for switching charges on the same basis?* And if that is legal why separate these charges at all?

IV.

THE FINDING OF THE COMMISSION THAT THE PRESENT PRACTICE RESULTS IN A PREFERENTIAL SERVICE TO THE INDUSTRIES IS UNSUPPORTED BY EVIDENCE. (SEE FINDINGS NUMBERED 9 BY THE COMMISSION IN EACH CASE (R. 320, 375)).

We submit that there is no evidence in the record from which finding No. 9 in these cases can be sustained and suggest that the Interstate Commerce Commission point to such evidence if there be any in the record.

There is nothing in the competitive situation which calls for a change in the present practices regarding carrier service at the smelters. There are comparatively few smelters in this or any other area, and they are generally of comparative size and require substantially the same carrier service. There are no small competitive industries to be eliminated or to be burdened by reason of a preference. Even when a preference exists, it is not necessarily unreasonable, undue or unjust if it does not in fact result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. As stated by this Court in

the case of *Nashville Railway Company vs. Tennessee*, 262 U. S. 318:

"Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co. vs. Interstate Commerce Commission*, 162 U.S. 197, 219, 220; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic." *Nashville Railway v. Tennessee*, 262 U.S. 318.

V.

CONCLUSION

Inasmuch as the mining industry has demonstrated to the railroads the absolute necessity of maintaining the present provisions of the tariff for the full and free development of the non-ferrous mines in this State and surrounding states, we humbly submit that to order these provisions to be changed would deprive the railroads of much needed revenues and cripple the smelting companies and miners and mine owners by making it impossible to ship large quantities of their low grade ores.

We have read and considered the briefs of the other Appellees and we consider them well taken. We will, however, leave to those parties the particular defenses necessary in each case. Our only endeavor here is to persuade the Court that the copper and non-ferrous mining industry is entirely unique in the particular that the ores mined, treated, and transported are entirely different from any other ores in the world because these non-ferrous ores are mixed one with the other in varying amounts also in varying degrees of richness or value, making each car thereof carry a different value.

Respectfully submitted,

Clinton D. Vernon, Attorney for the
State of Utah

State Capitol

Salt Lake City, Utah

Charles A. Root, Attorney for Public
Service Commission of Utah

State Capitol

Salt Lake City, Utah

Dated at Salt Lake City, Utah,
this 2nd day of February, 1950.

LIBRARY
SUPREME COURT, U. S.

No. 173

Office - Supreme Court, U. S.

FILED

FEB 9 1950

CHARLES ELMORE CROPLEY

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellees.

and

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY and AMERICAN
SMELTING AND REFINING COMPANY, *Appellees*.

CONSOLIDATED CAUSES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLER, UNITED STATES SMELTING
REFINING AND MINING COMPANY

CHARLES A. HORSKY

PAUL B. CANNON

HERBERT R. SILVERS

Attorneys for Appellee.

Of Counsel:

COVINGTON, BURLING, RUBLEE,

O'BRIAN & SHORB,

Washington, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement	3
Questions Presented	8
Summary of Argument	9
Argument	11
I. The Decision Below should Be Affirmed Because the Law of the Case Permitted no Other Result	12
A. The Commission Failed to Follow the District Court Mandate and Order of November 14, 1947	13
B. The Commission May Not Now Challenge, or Appeal From, the First Mandate	15
II. The Court Below was Correct in Rejecting the Commission's Theory Which Would Require Double Payment for the Same Service	19
A. There Can Be No Denial, on This Record That the Line-Haul Rates are Fully Compensatory	21
B. Section 6(7) Does Not Require Payment Twice for the Same Services	23
III. The Commission's Finding That the Line Haul Ended at the "Assembly Yard" Is Wholly Unsupported by the Record	31
A. The Nature of the Carriers' Service at Appellee's Midvale Smelter	31
B. The Court Below Properly Found That on the Record Before the Commission Its Finding That the Line Haul Ended at the Assembly Yard Cannot be Supported	36
IV. In Any Event, the Decision Below Should Be Affirmed Because the Commission's Order Fails to Give Proper Effect to Valid Sampling-in-Transit Provisions of Applicable Tariffs	46
A. The Tariff Cannot Be Discriminatorily Construed to Apply to the Operations of Other Samplers, But Not Those of Appellees	49
B. Nor May the Sampling-in-Transit Tariff Be Nullified Without Any Consideration of the Usefulness and Necessity of its Provisions	50
Conclusion	54

CITATIONS

Cases:

<i>Atchison T. & S. F. Ry. v. United States</i> , 284 U. S. 248	53
<i>Baltimore & Ohio R. R. v. United States</i> , 305 U. S. 507	27, 51, 52
<i>Central R. R. of New Jersey v. United States and Interstate Commerce Commission</i> , 257 U. S. 247	49
<i>Chesapeake & Ohio R. R. v. Westinghouse Co.</i> , 270 U. S. 260	51
<i>Clark v. Keith</i> , 106 U. S. 464	12
<i>Coffee Roasted in the Southeast</i> , 225 I. C. C. 271 (1937)	52
<i>Corn Products Refining Co. v. United States</i> , 331 U. S. 790	28, 29, 30

	Page
Ex parte 104, <i>Corn Products Refining Co.</i> , 266 I. C. C. 181 (1946)	29
Ex parte 104, <i>Practices of Carriers Affecting Operating Revenues or Expenses</i> , Part II, Terminal Services, 209 I. C. C. 11 (1935)	3, 25, 26, 27, 28, 35, 36, 37, 38, 40, 42, 45, 48, 51
<i>Federal Power Commission v. Pacific Power & Light Co.</i> , 307 U. S. 156	16
<i>Fowler v. Hunter</i> , 164 F. 2d 668 (10th Cir. 1947)	22
<i>Grand Rapids & I. Ry. v. United States</i> , 212 Fed. 577 (6th Cir. 1914)	52
<i>Great Western Telegraph Co. v. Burnham</i> , 162 U. S. 339	12
<i>Grubb v. Public Utilities Commission of Ohio</i> , 281 U. S. 470	22
<i>Himels v. Rose</i> , 5 Cranch 313	9, 12
<i>Inland Steel Co. v. United States</i> , 306 U. S. 153	16
<i>Interstate Commerce Commission v. Chicago, B. & Q. R. R.</i> , 186 U. S. 320	39
<i>Interstate Commerce Commission v. Hoboken Mfgs. R. R.</i> , 320 U. S. 368	23, 27
<i>Louisville & Nashville R. R. v. United States</i> , 242 U. S. 60	16, 17
<i>Lowden v. Simonds-Shields-Lonsdale Grain Co.</i> , 306 U. S. 516	50
<i>Mantle Lamp Co. of America v. Knapp-Monarch Co.</i> , 81 F. 2d 428 (7th Cir. 1936)	18
<i>Messenger v. Anderson</i> , 225 U. S. 436	18
<i>Northern Pacific R. R. v. Ellis</i> , 144 U. S. 458	12
<i>Nonferrous Metals</i> , 204 I. C. C. 319 (1934)	46, 52
<i>Otis Gin & Warehouse Co. v. Atchison, T. & S. F. Ry.</i> , 219 I. C. C. 749 (1937)	52
<i>Panama R. R. v. Napier Shipping Co.</i> , 166 U. S. 280	18
<i>Pic Bakeries, Inc. v. Railway Express Agency, Inc.</i> , 225 I. C. C. 171 (1937)	46
<i>Roberts v. Cooper</i> , 20 How. 467	12
<i>In re Sanford Fork & Tool Co.</i> , 160 U. S. 247	17
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 318 U. S. 80	13
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 332 U. S. 194	13
<i>Sewerage Commission of Milwaukee v. Activated Sludge, Inc.</i> , 81 F. 2d 22 (7th Cir. 1936)	22
<i>Sibbald v. United States</i> , 12 Pet. 488	17
<i>Southern Ry. v. Clift</i> , 260 U. S. 316	17, 18
<i>Sprague v. Ticonic National Bank</i> , 307 U. S. 161	17
<i>Swift & Co. v. United States</i> , 316 U. S. 216	38
<i>Thornton v. Carter</i> , 199 F. 2d 316 (8th Cir. 1940)	17
<i>Transit on Cottonseed at Quanah, Texas</i> , 232 I. C. C. 183 (1939)	49, 52, 53
<i>United Dredging Co. v. Industrial Accident Commission</i> , 208 Cal. 705, 284 Pac. 922 (1930)	16
<i>United States v. American Sheet & Tin Plate Co.</i> , 301 U. S. 402	27
<i>United States v. Baltimore & Ohio R. R.</i> , 333 U. S. 169	49
<i>United States v. Denver & Rio Grande R. R.</i> , 191 U. S. 84	17
<i>United States v. Pan American Petroleum Corp.</i> , 304 U. S. 156	27
<i>United States v. Wabash R. R.</i> , 321 U. S. 403	10, 23, 28, 50
<i>White v. Higgins</i> , 116 F. 2d 312 (1st Cir. 1940)	18

Constitution and Statutes:

Section 1(5) (a) of the Interstate Commerce Act, 49 U. S. C. § ^(C) 165(a)	7, 20
Section 6(1), Interstate Commerce Act, 49 U. S. C. § 6(1)	8, 13, 14, 15
Section 6(7), Interstate Commerce Act, 49 U. S. C. § 6(7)	2, 8, 9, 10, 11, 13, 20, 23, 24, 26, 47, 50, 51
Section 15a(2), Interstate Commerce Act, 49 U. S. C. § 15a(2)	53
Section 55, Interstate Commerce Act, 49 U. S. C. § 55	53
Act of October 22, 1912, c. 32, 38 Stat. 220	16, 19
Act of June 25, 1948, 28 U. S. C. §§ 1253, 2101 (b)	2, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellees.

and

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY and AMERICAN
SMELTING AND REFINING COMPANY, *Appellees*.

CONSOLIDATED CAUSES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLEE, UNITED STATES SMELTING
REFINING AND MINING COMPANY

OPINIONS BELOW

Neither the findings of fact and conclusions of law
(R. 449-463) nor the opinion (R. 474-477) of the District
Court has been reported. The District Court opinion refers

to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported.

The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission directed against present appellee, the report relating to which is at 270 I. C. C. 385 (R. 315-321) (and one directed against American Smelting and Refining Company, the report relating to which is at 270 I. C. C. 359 (R. 364-375)). The previous decision of the District Court (R. 299-302) reversed an order of the Interstate Commerce Commission, the reports relating to which are at 266 I. C. C. 476 (R. 271-279) and 263 I. C. C. 749 (R. 330-341) (and an order the reports relating to which are at 266 I. C. C. 349 (R. 29-52) and 263 I. C. C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Interstate Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949 (R. 1403). Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U. S. C. §§ 1253, 2101(b).

STATUTE INVOLVED

This case involves primarily Section 6(7) of the Interstate Commerce Act, 49 U. S. C. § 6(7), which reads as follows:

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

STATEMENT

A number of years ago the Interstate Commerce Commission instituted a proceeding known as *Ex parte 104, Practices of Carriers Affecting Operating Revenues or Expenses*. The Commission's general and original report on the aspect here involved—*Part II, Terminal Services*—is set out at 209 I. C. C. 11.

Subsequent thereto, particular investigations were had of a large number of individual industrial enterprises, and supplemental reports made on each. This consolidated cause concerns two separate, but related, investigations that were made of certain western non-ferrous metal smelters. One investigation related to the terminal practice at the Midvale smelter of the United States Smelting Refining and Mining Company. The second related to the terminal practices at

three smelters of the American Smelting and Refining Company. The present appellee is concerned, of course, only with the first of these two matters; this brief will deal only with it.¹

Not only is there a long history of Commission investigations of and orders in terminal services in general, but also there is a very considerable history in the proceeding with which this appellee is here concerned—the lawfulness and propriety of the terminal service charges and practices of the Union Pacific and Denver and Rio Grande Western Railroads in the receipt and delivery of carload freight at the plant of the United States Smelting Refining and Mining Company at Midvale, Utah. The early procedures in this Midvale proceeding, which began in 1944, need not be detailed; suffice it to say that following a hearing, and arguments and rearguments before the Commission, the Commission issued an order dated October 14, 1946 (R. 283-284) directing the carriers (Union Pacific and Denver and Rio Grande Western) to cease and desist from giving appellee certain terminal services “beyond the assembly yard, as described, without reasonable and compensatory charges in addition to the line-haul rates” (R. 283-284, 278).²

¹It is unfortunate that appellants undertook to docket these two proceedings here as one appeal, with but one record. The minor duplications in printing thus avoided scarcely compensate for the intrinsic difficulties of segregating in a consolidated record the proceedings in each case.

²In the interests of clarity, we shall not in this Statement recite, or even summarize, the details of the operations at Midvale; the services performed at that plant by the carriers, the nature and history of the tariff charges there, and the like. They are set out in Point III of the Argument, *infra*, to which the Court is respectfully referred.

Appellee herein, and the carriers named in the order, filed a petition on June 13, 1947 to review this order in the United States District Court for the District of Utah (R. 256-270). A statutory three-judge court was convened, and on November 14, 1947, that court made findings of fact and conclusions of law, and on the basis thereof remanded the case to the Commission; meanwhile temporarily enjoining the Commission from enforcing its order (R. 302).

Although we deal with the matter in more detail in Point I of the Argument, *infra*, it is important here to point out both what this decision was, and what it directed the Commission to do on remand. As to the first, the court found that the Commission had based its order on the premise that the existing line-haul rates "do not cover transportation services rendered by the [transportation] Companies" within the plant, and held, specifically, that there was "no evidence" to justify such a finding, and indeed that the only evidence was to the contrary (R. 299-300). The court stated, however, that the Commission had, under *Ex parte 104* as approved by this Court, authority, nonetheless, to direct the carriers to segregate the charges—for line-haul service and otherwise (R. 300). Accordingly, its conclusions of law, in remanding the case to the Commission, stated (R. 300):

"* * * that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service. * * * and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed * * *"

The order accordingly stated that the cases "be remanded to the Interstate Commerce Commission for such action as it may find justifiable in the premises * * *" (R. 302).

No appeal was taken from this order by either the Commission or the United States (R. 453). On December 5, 1947, the Commission entered an order vacating its prior order of October 14, 1946, and reopening the proceeding "upon the present and existing record" (see R. 308). The Commission did not take any additional evidence. Instead, stating that "a further hearing would serve no purpose" (R. 318) it issued a new order repeating without modification the prohibitions to the carriers contained in the former one (R. 321-322).

In major part, this report and order of the Commission incorporated the previous order (R. 318). However, it specifically disclaimed *any* finding on the issue of whether the line-haul rate already compensated the carriers for all the transportation services, stating that its new order (R. 318):

"* * * is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the proposed rates are reasonable or do or do not include compensation for switching within the plant area."³

Again appellee and the two carriers sought review of the Commission's order by a complaint filed in the District

³Because of the specificity of its prior opinion in the American Smelting and Refining Company proceeding, the Commission felt required to make a specific repudiation, stating, in its new order in that proceeding (R. 454): "We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

Court in Utah, on October 6, 1948 (R. 303-314). Again a statutory three-judge District Court (the same three judges) was convened. This time, however, after making findings of fact and conclusions of law (R. 449-463) the court issued a permanent injunction (R. 464). It is from this second order that the present appeals have been taken.

The findings of the District Court are in considerable detail. Among other things, they repeat the earlier findings that there is no evidence before the Commission that the existing rates are not compensatory for the terminal services which appellee receives from the carriers (R. 455). In addition, the District Court concluded, as a matter of law, that "it is *res judicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services here involved" (R. 459). That fact being established both as a matter of the record and as a matter of law, the District Court concluded that the findings actually made by the Commission were legally irrelevant (R. 460). It noted, further, that the Commission's order, being one which thus required the carriers to charge twice for the same services, would violate Section 1(5)(a) of the Interstate Commerce Act, prohibiting unjust and unreasonable charges (R. 460). In addition, as discussed in Point III of the Argument, *infra*, the court specifically found that each of the findings upon which the Commission based its order was unsupported by evidence and contrary to the evidence before the Commission (R. 455-457).

The opinion of the District Court (R. 475) again explains the prior remand. The court stated that on the prior proceeding, it was argued that the effect of the Commission's order was only to require segregation of line-haul and

terminal charges. For that reason "the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission, for reasons best known to itself, thought not advisable to do" (R. 475).

This time, both the Commission and the United States appealed, and the appeals were allowed by the court below on March 7, 1949 (R. 465). On October 10, 1949, this Court noted probable jurisdiction (R. 1403).

QUESTIONS PRESENTED

We cannot fully agree with appellants' statement of the questions. A more accurate statement of them, so far as they apply to this appellee, is as follows:

1. Appellants failed to appeal from a judgment and mandate entered in this proceeding in 1947. Did not the Commission's procedure and order subsequent to the mandate violate its terms, and has not that mandate become the law of the case?

2. Is the Interstate Commerce Commission empowered by Section 6(7) of the Interstate Commerce Act to require additional compensation to be paid to a carrier for terminal transportation services notwithstanding the fact that the carrier has already been fully compensated for those terminal services by existing tariffs?

3. Did the court below correctly hold that several of the essential findings of the Commission were not supported by substantial evidence?

4. Does the Commission order fail to give required effect to a valid and important sampling-in-transit tariff?

SUMMARY OF ARGUMENT

There are four independent bases upon which we believe that this Court should affirm the decision below. They may be summarized as follows:

I

In 1947 the court below heard and decided this case against the appellants. They did not appeal. The mandate of the court at that time, however, did leave the Commission two possible courses of action. The Commission chose not to follow either. The attempt by appellants in this present appeal, two years later, to review the earlier mandate must be rejected since that mandate has become the law of the case. *Himely v. Rose*, 5 Cranch 313.

II

Appellants are forced here to contend that the Commission is empowered by Section 6(7) of the Interstate Commerce Act to require additional compensation to be paid to the carriers for terminal transportation services at appellee's smelter, notwithstanding the fact that the carriers have already been fully compensated for those terminal services by existing tariffs.

That the existing rates fully compensate for the terminal service is established on this record not only because it is res judicata as a result of the 1947 decision of the court below, but also because the Commission has stated that its order is valid whether or not the existing rates already compensate for the terminal services, and has explicitly repudiated the finding it had made in a prior decision that the carriers are not now compensated. On that basis we believe the court below was clearly correct in holding that

the Commission is not empowered under Section 6(7) of the Act or otherwise to enforce a requirement that the carriers be compensated twice for these terminal services. Every prior decision of this Court, and indeed the prior decisions of the Commission itself, make it clear that an order requiring additional compensation for terminal services can be justified only if the services are being rendered without adequate compensation. E.g., *United States v. Wabash R. R.*, 321 U. S. 403.

III

The Court below was also correct in concluding that there was no substantial evidence before the Commission to justify its conclusion that the "assembly yard" is the termination point of the line haul. The Commission has simply adopted a wholly mechanical, arbitrary, approach to a question which must depend upon the particular circumstances of the particular industry. Here, without reference to the distinctive character of this industry—that the line-haul tariffs are not only fully compensatory for, but have been made in contemplation of terminal transportation movements—the Commission has none the less applied the same rule which it would apply in a situation where the tariffs have not been so fixed.

Moreover, several of the essential subsidiary findings of the Commission, upon which its ultimate determination of the end point of the line haul is based, are unsupported by substantial evidence, as the court below found.

IV

Finally the Commission order summarily and without discussion jettisons a sampling-in-transit provision of the

carriers' tariffs which has been in effect for half a century, which has never been challenged as illegal or improper, which has been specifically approved by the Commission, and which is of extreme importance to the nonferrous mines of the West. An order so sweeping as incidentally to cancel this tariff provision as it applies to appellees, but not elsewhere, creates an illegal discrimination and is invalid unless the tariff provision itself is challenged, which it appears not to be. Moreover, if the order intends to challenge the sampling-in-transit tariff, it is equally invalid because it compels a violation of Section 6(7) of the Act, which requires a carrier to comply with its published tariffs. This proceeding is not only inappropriate to set the tariff aside, but the record is wholly deficient in the data on which any decision as important as that must rest.

ARGUMENT

We believe that the District Court was correct in permanently enjoining the Commission's order for four separate reasons. Each reason, we believe, independently warrants a judgment by this Court affirming the judgment below.

Because the four reasons are thus independent, we take them up in what might be deemed their order of simplicity. First we point out that the decision below is correct because the law of the case permitted no other conclusion. Second we show that, even if the law of the case be deemed not thus established, the unique "double compensation" theory of the Commission is wholly unsound. Third and fourth, and with more detail because of the necessity for dealing with the operating procedures at Midvale, we show that even if the first two arguments be ignored, nevertheless the

Commission's order was properly enjoined because there is no substantial evidence that the line haul ended at the "assembly yard", as found by the Commission, and because valid sampling-in-transit provisions of applicable tariffs are improperly nullified by the Commission's order.

I

THE DECISION BELOW SHOULD BE AFFIRMED BECAUSE THE LAW OF THE CASE PERMITTED NO OTHER RESULT

The principle upon which we rely can scarcely be in dispute. When a cause is remanded to, *e.g.*, the Commission, by a mandate of this Court, then the Commission is of course required to act in accordance with that remand in subsequent proceedings. On a later appeal, this Court would feel bound, as between the Commission and appellee, to consider in the second appeal only errors alleged to have occurred subsequent to the original remand. The mandate itself, and all that was decided by the first case, could not be questioned on the second appeal. This has been the rule of this Court throughout its history. *Himely v. Rose*, 5 Cranch 312; *Roberts v. Cooper*, 20 How. 467; *Clark v. Keith*, 106 U. S. 464; *see, Northern Pacific R. R. v. Ellis*, 144 U. S. 458, 464; *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343-344.

We believe there is no doubt but that the Commission failed to follow the first mandate of the District Court. Nor do we believe that it can avoid the consequences of that failure by reason of the fact that the mandate in question is that of the District Court, rather than of this Court itself.

A. THE COMMISSION FAILED TO FOLLOW THE DISTRICT COURT MANDATE AND ORDER OF NOVEMBER 14, 1947

The District Court in the first proceeding squarely held that the finding of the Commission that the line-haul rate was not compensatory for the terminal services, was unsupported by the record, and that absent such a finding, the Commission's finding of violation of Section 6(7) of the Act could not stand. The court also, however, stated that the Commission could, under proper circumstances, order the carriers to segregate this compensatory rate into the line-haul and terminal segments (under Section 6(1)), but had not done so. Under those circumstances, the court, citing the *Chenery* case,⁴ concluded that it was proper to give the Commission a second opportunity to enter a proper order (Phillips, J., *dubitante*). Accordingly, it stated (R. 300):

"* * * that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service * * * and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed * * *".

The Order, which was simply the final paragraph of the same document, accordingly remanded the cases to the Commission "for such action as it may find justifiable in the premises" (R. 302). The Commission took no appeal.

⁴Securities and Exchange Commission v. *Chenery* Corp., 318 U. S. 80. The Brief for the United States mistakenly cites (pp. 9-10) the second *Chenery* case, 332 U. S. 194.

Perhaps it could be argued that under that mandate the Commission might properly have reopened the case and attempted, by the introduction of further evidence, to create substantial support for its findings which the court had held to be unsupported—that the existing rates were not compensatory. That would be an extreme example of “two bites at the cherry” in administrative proceedings, but it might have been justified under the mandate by the specific reference of the court to “evidence to be taken”. Whether that construction of the mandate be correct, however, is now irrelevant, since in fact the Commission made no attempt to follow that course. It took no further testimony whatever.

It is clear, however, that the Commission, consistently with the court's order, could have issued an order under Section 6(1) of the Act, requiring a segregation of the line-haul, and terminal charges.⁸ Probably this was the *only* proper action it could have taken. That, at any rate, is the construction which the District Court put upon its own mandate. In the second proceeding, the court stated (R. 475):

“The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul and

⁸Appellee would have urged before the Commission that a valid Section 6(1) order would have required a further hearing and further evidence addressed to the segregation of charges issue. Judge Phillips, in his concurrence, so implies (R. 300-302). Since the Commission chose to ignore the opportunity accorded it by the court, the question of its proper procedure thereon is no longer important.

a separate specific charge for switching services beyond the end of the line haul *and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.*" (italics supplied)

This construction of the mandate by the same court (and indeed by the same judges) which had issued it, would seem to be substantially conclusive. There can be no real doubt that the Commission, when it had no further hearing, took no further evidence, and made no order requiring segregation of charges under Section 6(1), has "for reasons best known to itself" (R. 475) flouted the mandate.

B. THE COMMISSION MAY NOT NOW CHALLENGE, OR APPEAL FROM, THE FIRST MANDATE

What, then, is the consequence of this decision by the Commission to ignore the District Court's instructions? We think the answer is clear. Were it the mandate of this Court—i.e., had the Commission appealed and the first District Court decision been affirmed *in haec verba*—there can be no doubt that the Commission could not now challenge that mandate, and would be required to accept the consequences of its failure to follow it. We think the same answer follows from the fact that it chose *not* to appeal the order. That mandate and judgment have become the law of the case. The District Court which heard the first case was acting under specific statutory authority. If its decision, when not appealed, is not given the same effect which would be granted to a decision of this Court if the appeal had been taken, then the authority of the District

Court is undercut and the statutory scheme of review is rendered ineffective.

Although the precise issue has not, so far as we are aware, been squarely presented to this Court, it has strongly intimated that it would apply the law of the case as determined by a District Court in just this situation. In *Inland Steel Co. v. United States*, 306 U. S. 153, 160, this Court stated:

"* * * since the [statutory three-judge District] court had exercised jurisdiction to review and suspend the [Interstate Commerce] Commission's report and order, the administrative body was without power to act inconsistently with the court's jurisdiction, had it attempted to do so."

See also *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156, 160. See also, to the same effect in a state court hierarchy, *United Dredging Co. v. Industrial Accident Commission*, 208 Cal. 705, 284 Pac. 922 (1930). Moreover, an examination of other cases, particularly with respect to the bases upon which the rule of the law of the case has been rejected, leaves little doubt that here it should be applied.

There are a series of instances in which this Court has refused to apply the doctrine of the law of the case when the original mandate is that of an inferior court. All of these instances have differed in two determinative aspects from the present case. First, these instances all involved situations in which the original mandate could not have been appealed as a matter of right to this Court. Here, the order was appealable. Act of October 22, 1912, c. 32, 38 Stat. 220; see *Louisville & Nashville R. R. v. United States*, 242 U. S. 60. The judicial code as amended in 1948 also

permits appeal of such orders. 28 U. S. C. § 1253. In addition, these instances, unlike the present case, all involved situations in which there had been conformance to the mandate below and in which the only question was whether this Court should be completely bound by the instructions of the inferior court.

A typical example of these instances is *United States v. Denver & Rio Grande R. R.*, 191 U. S. 84. A lower state court had been required by mandate from the state supreme court to accept the sufficiency of defendant's plea. The lower court, conforming to the mandate, directed a verdict for the defendant. In reversing the decision, this Court noted (191 U. S. at 93) that the judgment embodying the original mandate not being final, "could not be made the subject of a writ of error from this court". Again, in *Southern Ry. v. Clift*, 260 U. S. 316, the state court judgment including the original mandate was not final and could not have been reviewed by the Supreme Court.

It is clearly proper for this Court to refuse to apply the law of the case as determined by a lower court when the party seeking to escape the effect of the original mandate could not bring the original decision before this Court, at least when there is no need for the exercise of the discipline needed to penalize a departure from instructions on the part of the court or agency directed by the original mandate.⁶

⁶Binding as the law of the case is upon an appellate tribunal, it has always been thought even more binding upon the court or agency instructed by the mandate. The latter can have no discretion and no right to reconsider what is determined by the mandate. *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Sibbald v. United States*, 12 Pet. 488; *Thornton v. Carter*, 109 F. 2d 316 (8th Cir. 1940). See *Sprague v. Ticonic National*

If it were otherwise, important federal questions decided in non-final proceedings would escape any effective review by this Court. For similar reasons, this Court will not consider itself bound by the law of the case found by a lower federal court when the Supreme Court's discretionary review by certiorari is granted only after the second appeal, at least when there has been conformance below to the mandate. *Panama R. R. v. Napier Shipping Co.*, 166 U. S. 280; *Messenger v. Anderson*, 225 U. S. 436. See *White v. Higgins*, 116 F. 2d 312 (1st Cir. 1940).

In the present case, both these determinative factors are absent. The wise tolerance of this Court toward the exercise of the discretion of administrative agencies in performing their fact finding functions and the extent to which they may be permitted to depart from merely formal rules of evidence and procedure only emphasize the necessity of

Bank, 307 U. S. 161, 168; *Mantle Lamp Co. of America v. Knapp-Monarch Co.*, 81 F. 2d 428, 430 (7th Cir. 1936). Thus the reviewing court faces a different problem when the mandate has been followed than when it has been disobeyed. In the latter case it would seem that the discipline requisite to any orderly appellate procedure requires the mandate to be given effect by the court of final review.

Other factors that, in conjunction with the two major ones, have been persuasive in inducing this Court in particular situations not to follow the law of the case as determined below are also absent from the present case. Thus *Messenger v. Anderson*, in the text *supra*, involved a situation in which the remanding federal tribunal decided on the first appeal a matter of state law which was definitively announced to be otherwise by a final decision between the same two parties made by the highest state court while the federal appeal was pending. Again, in *Southern Ry. v. Clift*, in the text *supra*, the remanding court was a state tribunal passing upon a federal question. Clearly such cases involve questions which are not present when a matter of federal law is being determined by the very court assigned by Congress to hear the case.

requiring such agencies to conform to the basic rules of procedure, among which obedience to the directions of a court reviewing under explicit statutory authority ranks high.

The brief for the Commission seeks to avoid this result by suggesting (pp. 127-128) that the present appeal is "in effect" "an appeal from both the first and last decisions of the lower court". It should be sufficient to point out that the appeal from the *first* decision, which should have been taken within 30 days (see Act of October 22, 1912, *supra*, p. 16), is about two years late.

We submit, therefore, that the present appeal may be decided, and the decision below affirmed, without more. We can see no escape from the conclusion that the Commission ignored—violated—the original mandate. If it believed itself aggrieved by that mandate, its proper course was not to flout it, but to appeal it to this Court. Not having done so, it cannot now be heard to complain.

II

THE COURT BELOW WAS CORRECT IN REJECTING THE COMMISSION'S THEORY WHICH WOULD REQUIRE DOUBLE PAYMENT FOR THE SAME SERVICE

In addition to the fact that the Commission has ignored the mandate of the court below, there is a further basic difficulty with appellants' position. This point, too, can be adequately discussed without the detailed facts, since it goes to the foundation of the entire case.

Reduced to its essence, the theory of the Commission in this proceeding may be stated as follows: if the carriers performed services beyond the point found by the Commission to be the proper one for the termination of the line

haul, then they violate Section 6(7) *even though these terminal transportation services, and what the Commission finds to be "line-haul" transportation services, are fully compensated for by tariff charges.* Stated in another way, the Commission asserts that a violation of Section 6(7) can be avoided only by requiring a *double* charge by the carrier, and a *double* payment by the shipper, for the same services. It scarcely needs to be pointed out that this would be a plain violation of Section 1(5)(a) of the Act, which prohibits excessive or unreasonable charges.

Appellants are understandably reluctant to reveal this as their theory quite so baldly as we have stated it above. The Argument in the brief for the United States begins (pp. 15-16) by italicizing the sentence in Section 6(7) which prohibits rebates—which would suggest that the terminal transportation services were rendered *without* full compensation to the carriers. Two pages later (p. 17) the Argument refers to the principle of *Ex parte 104* as prohibiting the "illegal rebates involved in the gratuitous furnishing of services". Finally, however, the brief (pp. 19-20) accepts the fact that the Commission had made no finding that any gratuitous service—and hence no rebate—was involved, but then urges that the Commission is simply advising "segregation" of rates. That, of course, is precisely what the Commission, "for reasons best known to itself" (R. 475) *refused* to do.

The brief for the Commission is even more contradictory. It repeats, at one point, the explicit concession in the Commission's report that it had made *no* finding on the issue of the compensability of the present tariff rates (p. 53). Then, however, in disregard of what the Commission itself has done, the brief speaks of "service without any charge" (p. 85) and of "free" service (p. 91).

We suggest that the safest course is to rely on what the Commission itself did. It *expressly* made no finding on the issue whether the existing line-haul rates fully compensated the carriers for both the line-haul and terminal transportation services (R. 318). And its order requires that the carriers cease furnishing services beyond the point at which it has deemed that the line haul ends "without reasonable compensation in addition to the line-haul rates" (R. 321-322).

A. THERE CAN BE NO DENIAL, ON THIS RECORD, THAT THE LINE-HAUL RATES ARE FULLY COMPENSATORY

In its first order in this proceeding, the Commission made a finding that the line-haul rates were not compensatory, and that, in consequence, appellee was receiving discriminatorily favorable treatment which was, in effect, a rebate (R. 271). That finding was challenged in the first proceeding in the District Court, as being wholly unsupported by the evidence, and, in its first decision, that court found that it was unsupported, and that in fact the only evidence in the record was precisely to the contrary (R. 299-300).

That finding was not appealed. More than that, when the case was again before the Commission, it made no effort to adduce evidence which *would* support its finding. Instead, as pointed out in detail in the Statement (pp. 5-6), it attempted simply to avoid the issue by *withdrawing* its prior finding that the rates were *not* compensatory for all services, and making *no finding at all* on the issue.

When the case again came before the District Court, however, it correctly refused to accept that solution. It made a finding of its own on the record—that the only

evidence was that the rates were compensatory (R. 455-456). In addition, as its first conclusion of law, it stated that it was now *res judicata*, so far as this proceeding was concerned, that the existing rates were compensatory (R. 459).

Not only do we think that the court below was correct on both counts,* but, if more be needed, this Court will recognize that the Commission has in effect conceded that to be true. The only possible meaning of its strenuous attempt to eliminate any trace of its prior finding on that issue (R. 318, 454) is that it believes that the case can properly be decided in its favor *either way*.

That, we challenge. When the line-haul rates are fully compensatory for both the line-haul and terminal transportation services, as we must assume that they are in this case,⁹ the Commission *cannot* find that there is violation

*There is abundant and uncontroverted evidence in the record that the services here in question are actually compensated for by the existing tariff (R. 629, 646, 648, 650, 663-669). There is no evidence to the contrary.

Moreover it is clear that when in 1947 the District Court, which had explicit statutory jurisdiction, made a decision on this precise issue, in an appealable, but unappealed decision, the holding was *res judicata* in the later case. *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470; *Sewerage Commission of Milwaukee v. Activated Sludge, Inc.*, 81 F. 2d 22 (7th Cir. 1936); reversed per stipulation, 102 F. 2d 972 (7th Cir. 1938); *Fowler v. Hunter*, 164 F. 2d 668 (10th Cir. 1947), cert. denied 333 U. S. 868.

⁹The Commission's present brief recognizes (p. 53) that it is bound by its own explicit concession: " * * * the Commission has not here decided that tariff charges for plant spotting are or are not sufficient or reasonable." The occasional instances in which that brief overlooks this fact (*e. g.*, pp. 85, 91—particularly in arguing that the present tariffs are not compensatory (*e. g.*, pp. 93-102)—may be disregarded.

of Section 6(7) when carriers are fully compensated for the performance of the transportation services specified in their tariffs.

*B. SECTION 6(7) DOES NOT REQUIRE PAYMENT TWICE
FOR THE SAME SERVICES*

This Court has enunciated the basic rationale of *Ex parte 104* a sufficient number of times that it is surprising to find the Commission now attempting to disregard it. As applied to the performance of terminal transportation services by carriers that basic rationale is that such performance violates Section 6(7) *if and only if such services are rendered without adequate compensation*. There is no possible logical basis for claiming that, when such services are fully paid for, the carriers' performance of them violates the Act.

A complete statement of this inherent basis of an *Ex parte 104* proceeding was given by this Court in the case of *United States v. Wabash R.R.*, 321 U. S. 403. The Court there related the history of *Ex parte 104* proceedings and noted that (p. 406):

"* * * the Commission found that the freight rates had not been so fixed as to compensate the carriers for such [spotting] service and that the railroads by assuming to perform it * * * had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, * * * is in violation of § 6(7) of the Act."

The spotting services now in question *are* "compensated by the filed tariffs". And they are *not* performed "free". See also the similar statement in *Interstate Commerce Commission v. Hoboken Mfgs. R.R.*, 320 U. S. 368, 378.

The most charitable explanation which can be made for the Commission's position is that it has confused an evidentiary matter with the ultimate fact in issue. The ultimate fact is whether the carrier is according a shipper a rebate by performing a service free. In some instances, that issue will be determined by this one evidentiary fact. For example, where the line-haul tariff provides generally for "delivery", then a determination of where the line haul ends will ordinarily also determine whether services performed by the carriers subsequent to that termination point and without extra charge are free. Even there, the determination of where the line haul ends is important, not for its own sake, but because of its relation to the basic question of whether or not the spotting services are paid for. If the rates paid under the tariff do in fact compensate for all the services which are rendered by the carriers, then the finding as to where the line haul ends loses all relevance in a Section 6(7) proceeding. The Commission's half mystic, half hysterical adherence to the "assembly yard" formula has no logical connection with any issue of *this Ex parte 104* proceeding.¹⁰

The lengths to which the Commission is driven in attempting to explain its position here is exemplified by the opening paragraph of the Argument in its brief (pp. 41-42). It states:

"The chief purpose of this application [cf. *Ex parte 104*] is to require the carriers serving these plants

¹⁰Even where the rates are fully compensatory, the Commission might have determined in a proper proceeding where the line haul ended in order to require, under Section 6(1), that the tariffs segregate the respective rates. This, however, the Commission refused to do even when invited to do so by the District Court in the first proceedings (R. 475).

to render to them no more in delivery and receipt of freight than is rendered to other industrial plants throughout the country."

Let us hope not. If so, the Commission's present order is not drastic enough because the Commission is saying now in its brief that the carriers must be *forbidden* to render such services even if fully compensated by separate terminal charges. Then the brief continues:

"Equality in service as between shippers, and removal of preferential service accorded a particular shipper as compared to services rendered shippers generally, is a main objective of the Interstate Commerce Act, and was one of the important results expected from the proceedings in *Ex parte 104*."

We can agree. But in what way it is "preferential" to give shippers in this industry one set of services which they fully pay for under the present tariff, and to give other shippers different services under different (and also presumably compensatory) tariffs? And in what way would this "preferential" treatment be eliminated if an extra charge is imposed for services for which the carriers are already fully paid? We do not take issue with the objective that preferential treatment be eliminated. We *do* take issue with the conceptualism which leads the Commission to the position that the label "line haul" has some magic significance of its own.

Perhaps it is not unfair to suggest that even the Commission, until its last orders in these cases, seems not to have been in doubt as to what it was seeking to achieve. The very title of its investigation in *Ex parte 104* is "Practices of Carriers Affecting Operating Revenues or Expenses". In the original *Ex parte 104* decision, in 1935, the

Commission fully agreed with the later decisions of this Court on the proper rationale to justify a finding of a violation of Section 6(7). There was no indication in that report that the finding of where the line haul ended was to be made determinative of the ultimate issue in those cases in which applicable tariffs covered services beyond the end of the line haul. Indeed, the Commission made it perfectly clear that the whole reason for *Ex parte*, 104 proceedings was the necessity of conforming terminal transportation services to compensation for them. It stated (209 I. C. C., at 29):

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes."

And in its conclusion to the original report, the Commission emphasized that the heart of its determination was whether or not the services were actually compensated for (209 I. C. C., at 45):

"Generally the payment of allowances for service, or the performance of such service *without charge* to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally" (*italics ours*).

In sum, every element in the original report was geared to the determination of the very fact which the Commission now claims to be irrelevant.¹¹

Moreover, this Court has premised its affirmance of *Ex parte 104* and similar Commission orders on its approval, in each such case, of a Commission finding that the line-haul rates were not sufficient to compensate for the questioned terminal services.

In the first such case, *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402, this Court noted (pp. 406-407) that the Commission found "no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates".

Likewise, in *United States v. Pan American Petroleum Corp.*, 304 U. S. 156, this Court pointed out (p. 157) that the Commission had found that "moving and spotting of cars in the industries' plants formed no part of the service covered by the line-haul rates".

In *Baltimore & Ohio R. R. v. United States*, 305 U. S. 507, which affirmed a Commission finding that the carrier performance of certain warehousing service violated Section 6(7), this Court pivoted its holding on the Commission finding that the warehouse services were performed "at rates and charges which failed to compensate the carriers for the cost" (see 305 U. S. 507, at 518).

Interstate Commerce Commission v. Hoboken Mfgs. R. R., 320 U. S. 368, involved the question of whether a terminal switching rail carrier was entitled to an increase in the divisions which it received out of joint freight rates

¹¹The Commission's citations in its own brief in this Court likewise emphasize that adequate compensation is the heart of *Ex parte 104*. See pp. 105, 106, 117-118.

maintained by it and various trunk carriers. Upholding the Commission's negative conclusion, this Court relied on the Commission finding that "Hoboken is adequately compensated for its part in that service without including the payment to Seatrain in its divisions" (see 320 U. S. 368, at 375).

Again in *United States v. Wabash R. R.*, 321 U. S. 403, the most recent case in which the Court has dealt at any length with an *Ex parte* 104 proceeding, the Court based its holding on the Commission finding that what was rendered by the carrier was "free spotting service" (see 321 U. S. 403, at 405).

Both appellants rely on the recent *per curiam* decision in *Corn Products Refining Co. v. United States*, 331 U. S. 790, in attempting to support the Commission's novel theory. They are not in agreement, however, on what the case holds. The brief for the United States (p. 21) states that in that case "the Commission made no finding as to whether the line-haul rates did or did not include compensation for switching and spotting services." The Commission, however, now states (pp. 123-124) that one of the "major" issues in the case was—

"whether, in the face of uncontradicted evidence that line-haul rates do include compensation for the [spotting] service, without contrary testimony, the Commission could lawfully find to the contrary."

There can be no doubt that the Commission is correct in asserting that it made a finding in the *Corn Products* case that the rates were *not* compensatory for the terminal services. In one of its reports in the case the Commission found "that the interstate line-haul rates of respondents

cover the delivery and receipt of carload shipments" at the "plant yard described in the report" and that it was therefore illegal for the carrier to perform services beyond that point "without charge in addition to the line-haul rates" (266 I. C. C. 181, 182). This, if words mean what they usually do, is a holding that the line-haul rates were not sufficient to compensate for the extra services.¹²

Again, we should point out that it was not even argued before this Court in the *Corn Products* case that it involved the additional issue which the United States now purports to find in it. Appellant industry in that case told this Court in its Brief in opposition to Motion to Affirm that (p. 3) the case was one in which the Commission had found that "railroads were not compensated by their line-haul rates for spotting cars." And in its Statement as to Jurisdiction, appellant said (p. 8):

"Thus there was affirmative * * * evidence by a competent traffic officer that the line-haul rates of the railroads included compensation to them for the switching of cars to and from points of loading and

¹²That the Commission itself regards such a statement as a holding to this effect is indicated by the predecessor proceedings before the Commission in the present case. In the United States Smelting report, 263 I. C. C. 749 (1945) (R. 330), the Commission held in virtually the same words as in the *Corn Products Refining* report that the "interstate line-haul rates * * * cover the delivery and receipt of carload shipments" at the "assembly yard" and that the violation of Section 6(7) consisted of "the performance of service beyond the yards as described at the line-haul rates" (263 I. C. C. 749 at 758-759) (R. 341). This statement was described in the subsequent report of the Commission (266 I. C. C. 476) (R. 271) as a finding "in substance, that respondents' line-haul rates do not include compensation for such services beyond certain tracks described of record" (266 I. C. C. at 476) (R. 271).

unloading in appellant's plant. The Commission reached a contrary conclusion and based its order thereon."

Nor did the appellees in that case argue that it involved the radical holding which the Commission now tells this Court was latent in it. In the "Motion of the United States to Affirm" in that case it was stated (p. 2) that the "issues are the same as have been presented in several of the so-called terminal services cases in which the Commission's orders have been uniformly sustained by this Court".

Finally, if more be needed, we point out that the *per curiam* opinion of this Court cites the *American Sheet & Tin Plate* case, *supra*, and the *Wabash R. R.* case, *supra*, in both of which, as we have already shown, the Court relied on the Commission's finding of "free" services. Nothing either apparent or "lurking in the record" of the *Corn Products* case requires this Court to adopt a rule which would impose an added charge for services already paid for once.

We should perhaps advert to a final suggestion of the United States (p. 19) that a requirement that the Commission find whether the line-haul rates are compensatory would convert these supplemental hearings into rate hearings. No similar fear is voiced in the brief for the Commission, possibly because it recognizes that it has been able, without undue burden, to make that finding in supplemental proceedings up until the present one, and indeed made it specifically and as a matter of course in this one in its first report (R. 40, 271) (pp. 27-29, *supra*). Moreover, we have already indicated (p. 24, *supra*) that in every case in which the line-haul tariff by its terms covers only "delivery", the determination of when the line haul ends will in fact settle whether there are additional services performed by the

carrier which must be paid for at a rate in addition to the line-haul tariff.

We respectfully submit that the Commission's new theory should be rejected, as it was by the court below, and that on this ground, too, the decision below should be affirmed.

III

THE COMMISSION'S FINDING THAT THE LINE HAUL ENDED AT THE "ASSEMBLY YARD" IS WHOLLY UNSUPPORTED BY THE RECORD

For reasons already stated in Points I and II, we believe that the Court need not concern itself with the details of appellee's operations at Midvale. Nonetheless, we do not rest there. The judgment of the District Court enjoining the Commission's order is also fully supported on two other bases: first, that the court was correct in finding that there was no evidence to support the Commission's finding that the line haul ended at the "assembly yard", and, second, that such a finding sets at naught, and without valid reason, a sampling-in-transit provision of the tariffs which has been long in effect.

These two additional bases for affirmance constitute Points III and IV of this brief. However, in order to make them intelligible, it is necessary to review, to some extent, the findings as to the operations of the Midvale smelter, and as to the carriers' activities and facilities there. We will be as concise as the facts permit, and refer to details in connection with the several arguments.

A. THE NATURE OF THE CARRIERS' SERVICE AT APPELLEE'S MIDVALE SMELTER

The plant layout. Appellee's smelter, as the Commission found, is served by two carriers, the Union Pacific

and the Rio Grande. They haul ore, coal, coke, limestone, smelter products and miscellaneous supplies to and from the smelter at Midvale, Utah (R. 272). An undisputed Commission finding is that about 10 percent of the inbound, and 66 percent of the outbound movement is interstate (R. 272, 615).

The smelter yard area, as the Commission found, contains 14 miles of standard-gauge trackage, comprising 48 separate tracks serving about 16 locations for the loading and unloading of cars (R. 331). The switching and spotting of cars within the plant is performed by two Rio Grande switch engines operated by four Union Pacific crews (R. 334). The switching operations under discussion here are distinct from the intra-plant transportation of commodities handled by appellee's own employees on electrified narrow-gauge tracks; the Commission concedes that there is no interference with the carriers from such operations (R. 331).

The "assembly yard".—As the Commission found, cars are usually brought into the "south" or "assembly" yard when they arrive at the plant (R. 272, 595). The uncontested evidence shows that these incoming cars are placed here—or on other possible tracks—at the carriers' own convenience (R. 595, 597-599). In like manner, outgoing empty and loaded cars before departure from the plant are sometimes held in this yard for the convenience of the carriers (R. 609-610).

This "convenience of the carrier" requires a bit more explanation. Neither carrier has adequate—or anything like adequate—terminal facilities at Midvale. The Rio Grande, for example, has one receiving track of its own at Midvale which holds only 13 cars. Consequently, as the

Commission admitted (R. 333), the appellee's tracks, inside appellee's plant are "used by both [carriers] as assembly and classification tracks for general switching and passing and storage tracks."

General spotting procedure.—Of the total inbound traffic, about 80 per cent is spotted directly to the point of unloading (R. 623). All spotting is done, of course, on instructions of appellee, but the orders are general, and may be given even before the car reaches the plant (R. 623). Evidence further indicates that the particular switching movements in carrying out the orders are within the sole control of the carriers and for their convenience; the appellee may not even know where a car is, even though it is in the plant, when orders for it are given (R. 587-588, 594-595).

The sampling-in-transit procedure we detail below. Apart from that, as the Commission found, there are, in the plant, tracks for the final reception of ore, tracks serving facilities for stockpiling coke and other commodities, and tracks serving facilities for loading lead bullion and matte (R. 332).

The Commission found that the outbound traffic, which consists of smelter products and ore which by reason of sampling-in-transit procedures is reshipped to other smelters, constitutes about 20 percent of the total carload movement (R. 335). The Commission made no finding of interference by appellee with this traffic, yet since it, too, is assembled by the carriers for their own convenience in the assembly yard, it too may be assessed additional charges by the Commission's order. —

Sampling-in-transit.—A further characteristic of the movement of ore is occasioned by the fact that weighing

and sampling of ore is necessary to determine both the freight *rate* and the freight *destination*. The several non-ferrous smelters in the region have varying facilities, with the result that greater recovery of metal values can be obtained at Midvale for some ores, at Garfield for others, and at other smelters for still other ores, as their assays may indicate. The shipper wants the highest possible recovery (R. 647). So, too, does the carrier, because the freight rate on these ores is a valuation rate (R. 646, 652). If, therefore, a carload of ore arrives at Midvale, and upon sampling is found to be such that it can be more efficiently treated at a different smelter, it is taken on to the other smelter on a through rate, as described more in detail below.

Consequently, there are in the plant track scales on which full and empty cars may be weighed. The weighing is necessary in order for the carriers to determine the rates to be charged, and the carriers have no scales of their own (R. 652, 591). It should be added that the evidence shows that the scales are also occasionally used for the carriers' convenience in weighing traffic not belonging to the appellee (R. 591-592, 652, 671-672). In addition, as the Commission found, there is in the plant a combination sampler and concentrator, and a thaw house where frozen ore may be thawed in the winter months to make accurate weighing and sampling possible (R. 333).

We should also point out here that in addition to the sampler (and the related facilities) at Midvale and the other smelters involved in the companion case, there is a sampler at Murray, Utah. It is not in dispute that this sampler performs the same service, for the same reasons, and under the same tariff provisions, as appellee's sampler at the Midvale plant (R. 587, 607, 646-647).

The tariff provisions.—The undisputed testimony of appellee's General Traffic Manager shows that almost a half century ago, when appellee's smelter was first built (R. 647-648)—

"an agreement was made with the carriers in consideration of the smelting company providing yard trackage, scales, etc., to furnish at the smelter all terminal services necessary in handling of ores and concentrates, compensation for which was to be included in the line haul rates."

In November 1920, as the result of an order of the Director General of the United States Railroad Administration (see R. 649) the tariff was modified to include an extra charge for certain extra intra-plant movements. That provision of the tariffs of the two appellee carriers read (R. 649):

"Delivery of a line haul carload shipment destined to smelters at Midvale, Utah, will include one movement of commodity within the smelter plant over track scales to and from smelter samples, or to and from combination sampler and concentrator, to a designated unloading point indicated by the smelting company. Also from track to track within smelter plant for each additional movement not provided for, \$2.50 per car."

In July 1938, there was a further change in the tariffs, believed by the carriers to be required by the original *Ex parte 104* order. Under this new tariff, all movements in the plant under the line-haul rate were eliminated except the movement over the scales and subsequent delivery to any designated track within the plant which could be accomplished by an uninterrupted movement (R. 628-629, 650,

663-669). Appellee has not acquiesced in the validity of this change, believing that the 1920 provision was in all respects in conformity with *Ex parte 104* (R. 650).

The sampling-in-transit provisions of the tariffs, which are as old as the smelters themselves, allow the ore to be sampled at Midvale (or other smelters) or at the independent sampler at Murray, Utah, and then forwarded to destinations with no extra charge (see, e. g., R. 309).

B. THE COURT BELOW PROPERLY FOUND THAT ON THE RECORD BEFORE THE COMMISSION ITS FINDING THAT THE LINE HAUL ENDED AT THE ASSEMBLY YARD CANNOT BE SUPPORTED

With this summary introduction to the general factual picture, on which there is no substantial dispute, we come to the issue whether the Commission's findings can be supported. The Commission's report concluded (R. 320):

"(8) That common-carrier transportation which respondents [carriers] are obliged to perform begins and ends at the assembly yard and that all services beyond that point in the plant area are industrial or plant services for which respondent should make reasonably compensatory charges."

The District Court, in a series of findings (Findings 13-17, R. 455-457) held this finding to be not only unsupported, but directly contrary to the evidence. It found that there was no evidence that the "assembly yard" at Midvale constituted a reasonably convenient point of delivery or receipt; on the contrary, it found that the only evidence was that the carriers had for 50 years delivered and received freight at points of unloading or loading beyond the "assembly yard" and never had received or delivered it there. The

District Court found that there was no evidence that the "assembly yard" tracks were industrial tracks of appellee; on the contrary, the only evidence was that the "assembly yard" was the only available terminal facilities of the carriers, and was used by them as they would use their own terminal facilities anywhere else. The District Court found that there was no evidence that the carriers' transportation services began and ended at the "assembly yard"; on the contrary, the only evidence was that the line-haul rates of the carriers included compensation for additional movements incident to determining the value of inbound ores and concentrates.

We believe the District Court was correct, for two reasons. First, the subsidiary findings of the Commission, even taken at face value, do not support its basic finding that the line haul ends at the "assembly yard". Second, the court below was correct in stating that there was no evidence to support the subsidiary findings on which the Commission relies.

1. The basic difficulty with the Commission's ultimate finding, taking its subsidiary ones at face value, is that it ignores the difference between a tariff which does *not* include terminal movements, and one which does. A brief review of the nature of its *Ex parte 104* decision will make our position clear. We must keep in mind that the issue, in this branch of the argument, is where the "line haul" ends.

The Commission's basic report in 1935 indicated its awareness that similar subsidiary findings would not lead to the identical conclusion as to the ending place of the line haul in every case. Indeed, that report purported to deal only with the "general situations" presented (209 I. C. C. 11, at 15), and recognized that "in the nature of things, no

inflexible formula can furnish a solution" for the problem as to when delivery at the plant is made (209 I. C. C. 11, at 17). This Court has noted that the Commission determination of where carrier duty ends is not to be decided "by mechanical operation of a fixed rule of law". *Swift & Co. v. United States*, 316 U. S. 216, 225.¹³

The premise of the original *Ex parte 104* report was that the line-haul tariffs were not fixed in contemplation of the spotting services questioned by the Commission. The Commission finding is particularly clear, and particularly significant here (209 I. C. C. 11, at 44):

"It is likewise urged that the line haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving it from the carriers, and at the time the change was made, the line haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."

¹³The necessity for avoiding "mechanical" rules is particularly evident when the case, like the present one, is a carrier-performance one rather than an allowance one. The Commission noted that the evidence before it was largely confined to the allowance type of case (209 I. C. C. 11, at 16). Most of the conclusions of the report were directed to allowance situations (209 I. C. C. 11, at 29-39), and the report quoted with approval a previous Commission statement to the effect that an allowance case must have different standards applied to its determination than a carrier-performance case (209 I. C. C. 11, at 30). See also the statement at 209 I. C. C. 37.

It is clear, in other words, that the Commission may not automatically apply the same standards as to the ending place of the line haul in those situations in which the original tariffs were not based in part upon services rendered beyond that point, and in cases where they were. Cf. *Interstate Commerce Commission v. Chicago, Burlington and Quincy R. R.*, 186 U. S. 320. That would be "mechanical operation" with a vengeance.

In the present case, unlike those upon which the original standards of the Commission were based, the tariffs have *always* been fixed to compensate the carriers for their performance of the terminal services to which the Commission now objects. As we have stated in more detail above—and we should emphasize again that these facts are not disputed—near the beginning of the 20th century at the Midvale Plant, "an agreement was made with the carriers in consideration of the smelting company providing yard trackage, scales, etc., to furnish at the smelter all terminal services necessary in handling of ores and concentrates, compensation for which to be included in the line haul rates" (R. 647-648). Various changes have since been made in the applicable tariffs, but it is wholly clear that every tariff has been made with explicit consideration of the services now in question, and the rates have been carefully designed to meet the problem which the Commission would solve by an arbitrary decision unrelated to, and in complete disregard and defiance of, this long history (R. 262, 663-672, 756, 757-761).

In this situation, we think the court below, which *did* give consideration to the facts as to the tariffs and what they meant (R. 456-457) was correct in concluding that the evidence could not support a finding that the line haul

ended elsewhere than at the actual and customary points of loading and unloading at the smelter. That is what line haul has meant at *Midvale* for half a century. This is what the line-haul tariff covers, and what the railroads receive compensation for in the line-haul rate. To pick out the "assembly yard" and assign it as the end of the service is no less arbitrary than stating that it ends as the car crosses the plant boundary. Nothing in *Ex parte 104*, nor in the cases in which this Court has approved supplemental findings of the Commission under it, lends support to the conclusion that the Commission can thus disregard the services which the line-haul rate was fixed to cover.

2. Moreover, as the court below correctly found, there is no evidence to support several of the essential subsidiary findings upon which the Commission rested its ultimate finding that the line haul ended at the "assembly yard".

a. One such subsidiary finding is that the "assembly yard" was a reasonably convenient point for interchange (R. 320). On the basis of the evidence before the Commission, that is simply not the fact, and no evidence suggests that it is. Rather, as the court below found, the "assembly yard" is "the only available railroad terminal facilities" of the carriers for the "ordinary railroad terminal handling" of the carload freight to and from appellee's smelter (R. 456).

The tracks designated by the Commission as the "assembly yard" have all the characteristics of railroad terminal facilities. The railroads would have great difficulty in handling traffic to and from the smelter except for these tracks (R. 589-591). As in other terminal facilities, the manner of switching was completely under the carriers'

control (R. 587-588, 601, 614). As in other terminal facilities, the cars are placed in the yard at the carriers' own convenience (R. 595-599). The tracks are maintained so as to secure efficient locomotive switching (R. 611). Again, let us emphasize, this evidence was undisputed; the statements to this effect by an industry representative were corroborated by carrier representatives (R. 625-626) and were not contested by the Commission.

Indeed, the inherent weakness of this subsidiary finding is demonstrated by the manner in which appellants now attack the holding of the Court below that that finding was unsupported by evidence. The total argument in appellants' two briefs in support of this finding of the Commission is the following sentence (Brief for the Commission, p. 67):

"The record of the Midvale and Leadville plants contain little or no direct opinion that the designated yards there are railroad yards."

Apart from the inaccuracy of the statement (see R. 587-591), this is a rather extraordinary argument—that the alleged absence of substantial evidence *against* an administrative finding is equivalent to the presence of substantial evidence for it.

In view of the entire evidence as to the nature of the "assembly yard" tracks, there simply cannot be a basis for an ultimate finding that the line haul ends at that point. Not even the Commission, presumably, would deny that a railroad terminal yard must *precede* any reasonably convenient interchange point.

b. Another unsupported subsidiary finding which is essential to the Commission's decision that the line haul ends at the assembly yard is that relating to "interference" by

appellee. The Commission's original report has pointed out that spotting service is service beyond a convenient interchange point (209 I. C. C. 11, at 16, Note 3). But the line haul may nevertheless extend *past* such an interchange point unless such an extension involves the rendering of service solely for a shipper's convenience (209 I. C. C. 11, at 30) beyond the point of interruption or interference by the shipper (209 I. C. C. 11, at 44-45). Here, there is no substantial evidence to support any finding of such interruption or interference by appellee in the "assembly yard".

The contention by the Commission that such interference exists is singularly vague. Finding (6) of the Commission, the only finding bearing on this issue, states merely (R. 320) that

"the services to and from the 'assembly yard' and between points within the plant area are not and cannot be performed in a continuous movement without interruption or interference at respondents' operating convenience because of the disabilities of the plant, including the manner in which industrial operations are conducted, all as explained in the prior supplemental reports herein."

"Prior supplemental reports" provide little amplification of this general statement of a conclusion that must be crucial to the Commission's attempt to uphold its switching order. The October 14, 1946 report of the Commission apparently contains the statement upon which the Commission most relies to uphold its finding (R. 277):

"It is manifest that when, as here, cars are held in the assembly yard awaiting instructions from the plant with respect to further movement, respondents are prevented from performing an uninterrupted

service at their ordinary operating convenience in a continuous movement."

The Commission does not refer to any evidence supporting its general charge that cars are delayed in the "assembly yard" on orders of appellee. Such a conclusion could not be supported on the record. Sometimes, for example, orders for the spotting of cars are issued by appellee even before the arrival of cars at the plant (R. 623). Appellee does not or may not even know where a particular car is at any given time (R. 594-595). The evidence is conclusive that incoming cars are not, in fact, held or delayed in the "assembly yard" by orders of appellee. Orders for the spotting of cars are given promptly. Any delay that occurs in the yard results from the operating convenience of the carriers, or, on outgoing cars, is attributable to the nature of sampling-in-transit tariff provisions. The sweeping generalization of the Commission, upon which it has apparently based this crucial conclusion, is not supported by any evidence given by the industry, the carriers, or the Commission observers (R. 614, 621-623, 625-626).

In the Commission's most recent report it makes no mention of delays alleged to have occurred in the "assembly yard" other than those attributable to appellee's orders. But in the earlier reports, there is also indication of alleged switching delays found by Commission observers to occur. It may be helpful to this Court, therefore, if such delays are also examined in the light of the burden upon the Commission to show actual interference by the industry within the "assembly yard" in order to justify the order which was enjoined below. The Commission statement of these delays is found in its report of October 1, 1945 (R. 334). It is significant that the statement of these delays as found in this

report differs materially from the statement of the same delays given by the Commission representative at the hearing. The report, for example, in addition to listing alleged delays occurring subsequent to the "assembly yard" and therefore obviously irrelevant to the Commission order, states that on March 28 a delay occurred from 10:30 A. M. to 11:10 A. M. "waiting for engine to clear scale and blocked from south yard" (R. 334). The statement by the Commission representative at the hearing in regard to the same delay was more specific and more modest: "Engine 62 was delayed by engine 58 at the scale track. However, that particular delay may have been due to the fact that the brake rigging on the tender of engine 58 had become in some way disconnected or broken down" (R. 637). In the Commission report there is mention of a delay on March 29 from 10:50 A. M. to 11:05 A. M., "blocked from entering south yard" (R. 334). In the hearing the same delay was reported, "On March 29, engine 62 was delayed from 10:50 A. M. to 11:05 A. M. by engine 58 working on the scales" (R. 637). Apparently, therefore, these few observed delays actually occurred not as part of the switching operations, but as incidents of later unloading, spotting or weighing. In addition, it should be noted that none of these delays can be attributed, on the basis of the evidence before the Commission, to the appellee. The Commission representative who discussed these delays was asked: "Do you know whether or not these delays are a result of the industry, or whether they are just the result of normal switching in the plant between the two locomotives?" He replied, "Of course, I could not tell that. It was a delay. That is all I know." He was then asked, "That could happen in any switch yard?" The reply was that it could so happen and does so happen (R. 640-641).

Weighing and sampling delays might conceivably be relevant to a Commission order establishing the end of the line haul at some point *beyond* the assembly yard. See 209 I. C. C. 11, at 40. They are clearly not relevant to the present Commission order. It should also be noted that, in any event, these delays are not of the type significant in measuring the end of the line haul. Industrial weighing is discussed in the original *Ex parte 104* report at 209 I. C. C. 39-40. The Commission concluded that weighing for the account of the industry constituted an interference by the industry with carrier operations. This conclusion was based upon the fact that in the situations examined by the Commission, "in practically all cases the unwillingness of the industries to accept the weights of the carriers and the consequent use of the industries' scales involves extra switching within the plants * * *" (209 I. C. C. 11, at 39). On the contrary, in the present situation there is every indication that weights taken by the carriers would be accepted by the appellee although, of course, such weighing would involve great extra work for the carriers (R. 656). In a case relied upon by the Commission for the determination of its standard in the basic *Ex parte 104* report, the carriers "have their own track scales and are able and willing to perform for all other shippers" (209 I. C. C. 11, at 40). In the present situation, on the other hand, "if the weighing were not permitted within the plants, then it would be necessary for the carriers to either provide costly facilities for weighing or to transport the tonnages considerably greater distances to ascertain the weights" (R. 652).

The necessity of affirming the decision below in order to give needed affirmative support to the sampling-in-transit

provisions of applicable tariffs is discussed in the final section of this brief. Here it should only be noted that any delay incident to sampling is in the same category, or in one even more favorable from the industry standpoint, as delays incident to weighing. Sampling, like weighing, must be done for carrier as well as industry purposes. The ultimate destination of most ore shipped into Midvale cannot be determined until sampling is completed. Often, therefore, sampling, as between appellee and the carriers, is of benefit only to the latter. Moreover, sampling, even more than weighing, can be performed only by the industry. The carriers have no facilities which would enable them to perform the necessary sampling operations carried out at Midvale (R. 592, 646). Where services are useful both to carrier and to shipper, they cannot be classified as performed for shipper convenience unless the shipper elects to do them itself despite the availability of carrier performance. Cf. *Pie Bakeries, Inc. v. Railway Express Agency, Inc.*, 225 I. C. C. 171, 172 (1937).

IV

IN ANY EVENT, THE DECISION BELOW SHOULD BE AFFIRMED BECAUSE THE COMMISSION'S ORDER FAILS TO GIVE PROPER EFFECT TO VALID SAMPLING-IN-TRANSIT PROVISIONS OF APPLICABLE TARIFFS

We have already referred, in part A of Point III, to the sampling-in-transit provisions of the carriers' tariffs. We know of no challenge to their validity, nor do we know of any basis for such a challenge.¹⁴ Yet the order of the Com-

¹⁴The present sampling-in-transit tariff has actually been approved by the Commission in a proceeding not since reversed or questioned. *Nonferrous Metals*, 204 I. C. C. 319, 387-389, 404-405 (1934).

mission which has been enjoined by the court below would effectively nullify these provisions. Most of the terminal movements to which the Commission objects take place under the provisions of the tariff. Moreover, to the extent that the services provided for in this tariff constitute either "transportation" or "any service in connection therewith" within the meaning of Section 6(7), the Commission may not require deviation from the filed tariffs without formal disapproval of them.

The sampling-in-transit tariff provisions, as we have already stated, have been in effect since the turn of the century (R. 646). These provisions, as described by the General Traffic Manager of appellee, "allow shipments of ores and concentrates to be sampled in transit at one or more of the public samplers at the Utah smelters or the independent sampler at Murray, Utah, and then reforwarded to the smelter that would be most advantageous" (See, *e. g.*, R. 309). Sampling, of course, involves weighing, thawing (if the ore is frozen) and usually unloading and loading (R. 604-605, 607). The ultimate destination of the ore is not known until the sampling is completed. The provision insures maximum recovery from the ore and is clearly for the benefit of everyone concerned—the shipper, the carrier and the smelter.

Although the Commission's order does not mention the sampling-in-transit provisions of the tariff as such, there is no doubt that its order would effectively abolish it. The order requires the carriers to make an extra charge to appellee for all movements subsequent to the "assembly yard". No sampling in transit is possible without such movements.

This tariff is of vital importance, not only to appellee, but to the whole nonferrous mining industry in Utah. Yet nothing in the Commission's order or report explains or supports its summary abolition. The report accompanying the most recent order does not even mention the sampling-in-transit provisions. The previous reports referred to these provisions briefly and non-committally, *e.g.* (R. 276):

"It is not known at the time of sampling at Midvale whether the destination of the ore is to be the Midvale or some other smelter. Nor is the final unloading of it at Midvale known until after sampling. Under the transit arrangement, no switching charge is made if the ore is forwarded to other smelters after sampling at Midvale."¹⁵

The Commission reports give no further indication of awareness of the drastic nature of its order in this request. Perhaps even more surprisingly, the brief for the Commission in this Court is similarly silent.

One can only speculate, therefore, on what the Commission means to do. On the one hand, the Commission may intend to penalize only the appellees' smelters by wholly eliminating the application of the sampling-in-transit provisions to Midvale (and the smelters of appellee American Smelting and Refining Company) while permitting the sampler at Murray to retain the full benefits of the tariff. On the other hand, the Commission may intend to eliminate the sampling-in-transit provisions of applicable tariffs alto-

¹⁵The final sentence of Commission's statement refers to the 1938 change made, over appellee's objection, by the carriers in purported reliance upon the basic *Ex parte 104* report of the Commission. Appellee has never agreed to this change which, although less in extent, is objectionable for the same reasons which apply to the present Commission report.

gether, striking at appellees' smelters first. This Court should reject either alternative.

A. THE TARIFF CANNOT BE DISCRIMINATORILY CONSTRUED TO APPLY TO THE OPERATIONS OF OTHER SAMPLERS, BUT NOT THOSE OF APPELLEES

The sampling-in-transit operations are carried out by the same carriers at all the samplers. To allow the discrimination against appellees' smelters, which would be the necessary consequence of the Commission orders, would be to violate the Interstate Commerce Act in a vital respect. This Court has noted that the prevention of discrimination between localities by the same carriers was one of the major objects of Congress in passing the Interstate Commerce Act. *Central R. R. of New Jersey v. United States and Interstate Commerce Commission*, 257 U. S. 247, 260. The prevention of this kind of discrimination between shippers takes precedence even over the assertion of traditional property rights. *United States v. Baltimore & Ohio R. R.*, 333 U. S. 169. In carrying out this policy, the Commission has noted that in-transit provisions must be condemned when their allowance results in the "preference of one individual or locality over another". *Transit on Cottonseed at Quanah, Texas*, 232 I. C. C. 183 (1939). Entirely apart from all other questions—whether switching services are adequately compensated for, whether these services constitute transportation, and where the line haul ends—an order of the Commission cannot be sustained which creates, by its terms, a plain discrimination between appellees and the sampler at Murray, Utah.

We do not mean to say that the Commission could not, as the first step in a general attack on the sampling-in-transit provisions, move against appellees' smelters above;

the Commission when dealing with evils is not required "to suppress all simultaneously or none". *United States v. Wabash R. R.*, 321 U. S. 403, 414. We do say that there is no evidence that the Commission is attacking sampling in transit as such. Its order is not directed at it by name; rather, it almost casually abolishes it as a consequence of the sweeping nature of the order. Nothing indicates that the next step is the abolition of the tariff provision at the other samplers.

That, we believe, is discrimination, and condemned by the Interstate Commerce Act itself.

B. NOR MAY THE SAMPLING-IN-TRANSIT TARIFF BE NULLIFIED WITHOUT ANY CONSIDERATION OF THE USEFULNESS AND NECESSITY OF ITS PROVISIONS

If, however, the Commission chooses to say that it is dealing with an evil in the sampling-in-transit tariff, and that this is no more than the first step in the campaign, we think nevertheless the present order must fall. First, the Commission may not attack a tariff provision except in a proceeding in which it considers the nature of that provision, its usefulness to the carriers and the shippers, and the social function which it serves. Second, the result of any such proceeding, had the Commission held it, would have been to indicate that the present sampling-in-transit tariffs are valid and useful, and should be continued.

1. There can be no doubt that under the Interstate Commerce Act published tariffs for transportation or services in connection therewith must be complied with. Section 6(7); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520. Indeed, as apposite to the present situation, this Court has explicitly held that when a carrier

makes an extra charge for a spotting service which is actually covered by the line-haul tariff, it violates Section 6(7) of the Act. *Chesapeake & Ohio R.R. v. Westinghouse Co.*, 270 U. S. 260.

The tariff, of course, must be for "transportation * * * or for any services in connection therewith" to fall within the mandate of Section 6(7). *Baltimore & Ohio R.R. v. United States*, 305 U. S. 507, 526. The "tariff" in the *Baltimore & Ohio* case applied to warehousing which may be taken as an indication of the type of "tariffs" which are not made mandatory by Section 6(7).¹⁶ By the same token, the spotting services involved in the *Chesapeake & Ohio* case; *supra*, indicate the type of tariff to which Section 6(7) applies. Here, the car movement involved in sampling in transit appears to be clearly within the scope of the Section; the weighing is necessary to determine the values and rates, the sampling is necessary to determine both the rates and the destination, and the carriers have facilities for neither operation.

Nor may the Commission successfully assert that it, at least, is not bound, and may set aside in an *Ex parte 104* supplementary proceeding a sampling-in-transit tariff, whether or not it falls within the mandate of Section 6(7). Both this court and the Commission have been careful to note that in-transit privileges often serve important functions and are not to be generally or casually condemned.

¹⁶The cases cited in appellants' briefs in which the Court has refused to allow published tariffs to justify improper allowances in *Ex parte 104* proceedings suggest that a "tariff" providing for an allowance—payment by the carrier instead of to it—may also escape the mandatory effect of Section 6(7). Brief for the United States, p. 22; Brief for the Commission, pp. 102, 107-112, 114-117.

See *Baltimore & Ohio RR. v. United States*, 305 U. S. 507, 524. Particular in-transit privileges have often been specifically approved by the Commission, even when they involved considerable processing to the shipped goods and even though they did not, as in the present case, determine the destination point of the shipment or serve any other function vital from the carrier's point of view.¹⁷ *E.g.* *Coffee Roasted in the Southeast*, 225 I. C. C. 271, 275 (1937); *Otis Gin & Warehouse Co. v. Atchison, Topeka & Santa Fe Ry.*, 219 I. C. C. 749 (1937). Of course transit privileges can be abused. See *Grand Rapids & I. Ry. v. United States*, 212 Fed. 577 (6th Cir. 1914). But when such a privilege is questioned, the decision as to its allowance or continuance is a complex one, involving the study of the carrier, shipper and public interests which are bound to be affected by any sweeping change. The Commission has made such studies and in approving or condemning particular transit privileges has pointed out the difficult decisions involved. In *Transit on Cottonseed at Quanah, Texas*, *supra*, for example, the Commission noted, in denying the privilege there sought which would have involved a complete change of the form of the commodity in transit that to "express the ideal, the identical commodity, in its original or other closely identical form, should move from the transit point" (232 I. C. C. 183 at 188). In the same case the Commission noted as a general principle that as "most of the industries that now have transit grew up under that system, its denial would be detrimental to them and to the commerce of the nation * * *" (*id.* at 189).

¹⁷As we have noted, the Commission has given formal approval to the present tariff. *Nonferrous Metals*, 204 I. C. C. 319, 387-389, 404-405 (1934).

Neither the pronouncements of this Court nor the statements of the Commission itself in other cases would allow the casual, arbitrary destruction of an established transit privilege which would result from the approval of the Commission's order in this case. Cf. 49 U. S. C. §§ 15a(2), 55; *Atchison T. & S. F. Ry. v. United States*, 284 U. S. 248 (1932).

Although it is perhaps not strictly necessary to the argument, it should be added that, had the Commission made a detailed study to determine whether the in-transit arrangements here involved should be approved, it could scarcely have reached any conclusion other than that the present sampling-in-transit provisions continue to be wholly desirable. They conform, of course, to the two criteria mentioned by the Commission itself in *Transit on Cottonseed at Quanah, Texas*; *supra*. No change takes place in the form of the ore at the transit point. And the present in-transit provisions have been in effect as long as the industry itself (R. 646). They have a real value to all concerned, including the carrier. Indeed, they are vital to the whole nonferrous mining industry; sampling and subsequent routing of the sampled ore to the most appropriate smelter are integral parts of mining operations in Utah, especially the operations of the small operators who do not have facilities to do their own sampling. The present provisions make possible the processing of the ore at the plant most adapted to the particular grade or type shipped (R. 646).

Moreover, this Court should consider this importance of the present tariff arrangements to the industry in the context of what the Court may well judicially note—the depressed conditions existing in nonferrous mining. The brief in this case of the intervenor, Utah Mining Association, shows that the increased costs and the depletion of high-grade ore have resulted, not only in the closing of

many marginal mines, but in lowered profit opportunities even for those remaining. This Court should not permit the present difficulties of the industry to be increased and intensified by the removal of the sampling-in-transit provisions which have become increasingly important to the industry as the depletion of high-grade ore continues.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below is correct and should be affirmed.

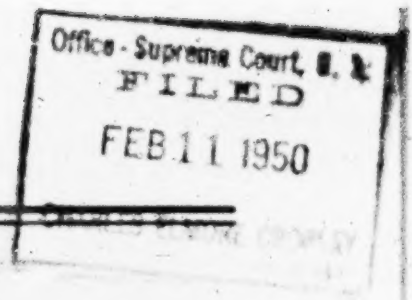
CHARLES A. HORSKY
PAUL B. CANNON
HERBERT R. SILVERS

February 1950.

Of Counsel:

COVINGTON, BURLING, RUBLEE,
O'BRIAN & SHORB,
Washington, D. C.

LIBRARY
SUPREME COURT, U. S.



IN THE
Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION;

Appellants,

v.
UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COM-
PANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.
DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellee

CONSOLIDATED CAUSES

**BRIEF FOR APPELLEES IN UNITED STATES v. DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION
PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING
AND REFINING COMPANY**

OTIS J. GIBSON,
ELMER B. COLLINS,
JOHN F. FINERTY,

Counsel for Appellees.

INDEX

PAGE

I. Preliminary Statement 1

The following facts of record are decisive against this appeal:

1. It is *res adjudicata* on the record before this Court on this appeal that the line-haul rates of the appellee carriers include compensation for all the terminal services here involved.

2. Even if this issue were not *res adjudicata* on this record, the Commission itself in its report and findings, 270 I. C. C. 359 (R. 364-375), on which are based its order which the Statutory Court has permanently enjoined, *has expressly repudiated a finding* previously made by it in these proceedings, that such line-haul rates *do not include compensation* for the terminal switching services here involved, *and has expressly undertaken to make its enjoined order without any finding whatever in this respect.*

II. Statement of the Case Showing the Manner in Which It Appears on This Record:

A. That It Is *Res Adjudicata* That the Line-Haul Rates of the Appellee Carriers Include Compensation for All Terminal Switching Services of the Appellee Carriers Here in Question.

B. That the Commission Has Expressly Repudiated Its Former Finding to the Contrary, and Has Expressly Undertaken to Make Its Enjoined Order without Any Finding Whatever in This Respect 7

III. The Commission, in Its Efforts Both to Impeach the Statutory Court's Conclusion of *Res Adjudicata*, and to Justify the Making of Its Enjoined Order of May 18, 1948, without Further Hearing or Evidence, Has the Naivete to Attempt to Support Such Efforts by Invoking the Grounds on Which the Statutory Court Made Its Order of Remand in Connection with Its Prior Temporary Injunction, *Although the Commission in Its Order Here Enjoined, and in the Procedure on Which That Order Is Based, Has Totally Disregarded the Grounds Stated by the Statutory Court for Such Remand*

30

IV. The Commission in Its Basic Report in These Proceedings, *Ex Parte 104, Part II, 209 I. C. C. 11*, in Laying Down a General Formula for Determining What Terminal Switching Services on Industrial Tracks Are Included in a Carrier's Line-Haul Rates, Has Itself Expressly Recognized in Such Basic Report That the Legal Application of Such General Formula Is Necessarily Limited to the Line-Haul Rates Which *Do Not Include Compensation* for Terminal Switching Services in Excess of Uninterrupted "Simple Switching or Team-Track Delivery", and That Such Formula Can Have No Legal Application to Line-Haul Rates Which *Do Include Compensation* for Additional Terminal Switching Services

42

V. In Every Case in Which This Court Has Sustained Prior Orders of the Commission, Based on the Applications of the General Formula in its Basic Report to the Terminal Switching Services of Other Carriers at Other Industries,

the Record Before This Court Has Expressly Shown That Such General Formula Was Applied by the Commission to Line-Haul Rates Which *Did Not Include Compensation* for the Terminal Switching Services There Involved, and This Court Has Expressly So Recognized.

In Every Such Case, Moreover, the Commission in Finding That the Carriers Violated Section 6(7) of the Act, by Rendering the Terminal Switching Services in Question Without Charges in Addition to the Line-Haul Rates, Based Such Finding Upon an Express Finding That the Line-Haul Rates *Did Not Include Compensation* for Terminal Switching Services in Excess of "Uninterrupted Simple Switching or Team-Track Delivery" 50

VI. Although Section 6(7) of the Act May Be Violated by the Performance of Terminal Switching Services without Compensation in Addition to the Line-Haul Rates, Even Where the Tariffs Specifically Provide That the Performance of Such Terminal Switching Services Is Included Under the Line-Haul Rates, There Can Be Such Violation Only if the Line-Haul Rates *Do Not Include Compensation* for Such Terminal Switching Services, and There Can Be No Violation if the Line-Haul Rates *Already Include Such Compensation* 66

VII. The Record Fully Sustains Findings of Fact 13 and 14 of the Statutory Court (R. 455-456), Which Are in Substance:

A. That There Was No Evidence to Support the Commission's Finding That the "Plant Yard" at Garfield or the "Flat Yard" at Leadville Constitute Reasonably Conveni-

ent Points for Delivery to and Receipt from the Respective Smelters of Carload Freight by the Appellee Carriers.

B. That on the Contrary, the Only Evidence Before the Commission Was That Such Carriers, in Accordance with Their Published Tariffs, Have for Approximately Fifty Years Delivered and Received Carload Freight at Actual Points of Loading and Unloading at the Respective Smelters, and Have Never Delivered or Received Carload Freight at the Points Designated by the Commission.

C. That There Was No Evidence Before the Commission to Support Its Findings That the Tracks at Such Designated Points Constitute the Industrial Tracks of the Appellee Industry.

D. That on the Contrary, the Only Evidence Before the Commission Was That the Tracks at Such Designated Points Constitute the Only Available Railroad Terminal Facilities of the Appellee Carriers for Their Ordinary Railroad Terminal Handling of Carload Freight to and from Such Smelters

70

VIII. The Suggestion in the Commission's Brief, pp. 77-79, That the Record Upon Which the Statutory Court Based Its Order of Injunction Appealed From, Is Insufficient Because It Does Not Contain the Record Underlying the Commission's Basic Report in *Ex Parte 104, Part I* Represents Either a Breach of Faith with the Statutory Court and the Appellees or, as Appellees Prefer to Believe, a Misunderstanding by the Commission of the Issues Involved on This Appeal

76

Conclusion 81

APPENDIX A—Verbatim Quotations of Pertinent Provisions of Interstate Commerce Act Referred to in This Brief a-1

APPENDIX B—Abstract of Testimony of Mr. Williams at Hearing of May 19, 1932, and of Mr. Carey and Mr. Tuckwood at Hearing of May 26 and 27, 1944 b-1

APPENDIX C—Findings and Orders of the Commission and of the Respective Statutory Courts Involved in Prior Decisions of this Court c-1

TABLE OF CASES

PAGE

<i>Allegheny Steel Company Terminal Allowance</i> , 209 I. C. C. 273	55
<i>American Sheet and Tin Plate Co. Terminal Allowance</i> , 209 I. C. C. 719	55
<i>Anaconda Copper Mining Co. Terminal Allowance</i> , 266 I. C. C. 387	18
<i>Baltimore & Ohio P. Co. v. United States</i> , 305 U. S. 507	68
<i>Celotex Company Terminal Allowance</i> , 209 I. C. C. 764	58
<i>Corn Products Refining Co. v. United States</i> , 331 U. S. 790	5, 10, 51, 52, 65
<i>Corn Products Refining Co. Terminal Services</i> , 262 I. C. C. 57	65
<i>Corn Products Refining Co. Terminal Services</i> , 266 I. C. C. 181	65
<i>Corn Products Refining Co. Terminal Services</i> , 69 F. Supp. 869	65
<i>Goodman Lumber Co. v. United States</i> , 301 U. S. 669	5, 51, 57
<i>Goodman Lumber Co. Terminal Allowance</i> , 214 I. C. C. 89	58
<i>Great Southern Lumber Co.—Bogalusa Paper Co. Terminal Allowance</i> , 209 I. C. C. 793	58
<i>Gulf Refining Co. Terminal Allowance</i> , 209 I. C. C. 756	59
<i>Humble Oil and Refining Co. Terminal Allowance</i> , 209 I. C. C. 727	58
<i>Interstate Commerce Commission v. C. B. & Q. Ry. Co.</i> , 186 U. S. 320	25

<i>Magnolia Petroleum Corp. Terminal Allowance</i> , 209	
I. C. C. 93	59
<i>Mexican Petroleum Corp. Terminal Allowance</i> , 209	
I. C. C. 394	58
<i>Oregon Short Line Ry. v. American Smelting and Refining Co.</i> , unreported, see Exhibit 14 (R. 1315-1318)	13, 20
<i>Pittsburgh Plate Glass Co. Terminal Allowance</i> , 209	
I. C. C. 467	55
<i>Pittsburgh Plate Glass Co. Terminal Allowance</i> , 210	
I. C. C. 527	55
<i>A. O. Smith Corp. v. United States</i> , 301 U. S. 609 ..	5, 51, 57
<i>A. O. Smith Corp. Terminal Allowance</i> , 215 I. C. C. 534	58
<i>A. E. Staley Manufacturing Co. Terminal Allowance</i> , 215 I. C. C. 656	60
<i>A. E. Staley Manufacturing Co. Terminal Allowance</i> , 245 I. C. C. 383	60
<i>Standard Oil Co. Terminal Allowance</i> , 209 I. C. C. 68	58
<i>Texas Company Terminal Allowance</i> , 209 I. C. C. 767	59
<i>Texas Company Terminal Allowance</i> , 213 I. C. C. 583	59
<i>United States v. American Sheet and Tin Plate Co.</i> , 301 U. S. 402	5, 51, 54, 57, 58
<i>United States v. Pan American Petroleum Corp.</i> , 304 U. S. 150	5, 51, 58
<i>United States v. Wabash R. Co. (Staley Case)</i> , 321 U. S. 403	5, 46, 51, 59
<i>Weirton Steel Co. Terminal Allowance</i> , 209 I. C. C. 445	55
<i>West Leechburg Steel Co. Terminal Allowance</i> , 210 I. C. C. 213	55

NOTE: Page citations to Commission's Basic Report, 209 I. C. C. 11, are to numerous to specify.

Likewise, page citations to the following reports of the Commission in these proceedings, *American Smelting and Refining Company, Terminal Services*, 75th Supplemental Report, October 1, 1945, 263 I. C. C. 719; Report on Reconsideration, October 14, 1946, 266 I. C. C. 349; Second Report on Reconsideration, May 18, 1948, 270 I. C. C. 359.

STATUTES INVOLVED

Interstate Commerce Act:

- Section 1(5)(a) Appendix A, p. a-1
- Section 6(1) Appendix A, p. a-1
- Section 6(7) Appendix A, p. a-1, a-2

IN THE
Supreme Court of the United States

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING
COMPANY, DENVER & RIO GRANDE WESTERN
RAILROAD COMPANY, AND UNION PACIFIC
RAILROAD COMPANY,

Appellees,

and—

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD
COMPANY, UNION PACIFIC RAILROAD COM-
PANY AND AMERICAN SMELTING AND REFIN-
ING COMPANY,

Appellee.

No. 173

CONSOLIDATED
CAUSES

**BRIEF FOR APPELLEES IN UNITED STATES v. DENVER
AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION
PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING
AND REFINING COMPANY***

I.

PRELIMINARY STATEMENT

Before proceeding to a general Statement of the Case,
appellees desire to call to the attention of the Court two

*While these so-called "consolidated causes" are embraced in
this single appeal from the single injunctive order of January 10,
1949 of the Statutory 3-Judge Court in the District Court of the
United States for the District of Utah, such injunctive order is
itself directed to two separate orders of the Interstate Commerce

(Continued p. 2)

facts shown on this record which, aside from all other grounds of invalidity of the Commission's enjoined order, are decisive against this appeal from the permanent injunction granted by the Statutory Court against that order. Both were ignored without the slightest mention by the appellants in their jurisdictional statement. Both are still ignored in the brief of the United States. Only the most cursory reference is made to either in the brief of the Interstate Commerce Commission.

Commission, brought before that Court by two separate complaints. Since the two complaints, however, involved substantially similar legal questions, they were heard and decided by the Statutory Court in a single proceeding, though separate records were made on each complaint.

This brief is directed specifically to the appeal from the injunctive order of that Court so far as that order enjoins the Commission's order of May 18, 1948, 270 I. C. C. 359 (R. 362), relating to terminal switching services of the appellee carriers at the smelters of the American Smelting and Refining Company located at Garfield and Murray, Utah, and Leadville, Colorado. The proceeding before the Statutory Court, in this respect was known as Civil Action No. 1525. (Since the operation of the Murray smelter has been permanently abandoned subsequent to the taking of this appeal, this brief will not discuss either the order of the Statutory Court or of the Commission so far as either relates to the Murray smelter.)

This brief will not be specifically directed to the appeal from the injunctive order of the Statutory Court so far as that order enjoins the Commission's separate order of May 18, 1948, 270 I. C. C. 385 (R. 321) relating to the terminal switching services of the same appellee carriers at the single smelter of the United States Smelting, Refining and Mining Company located at Midvale, Utah. The proceeding before the Statutory Court in that respect was known as Civil Action No. 1524. Because, however, both the American Smelting case and the United States Smelting case involve essentially the same legal questions, it is believed that the legal principles discussed in this brief will necessarily be applicable to the order appealed from as a whole.

These facts are the following:

1. As the Statutory Court has expressly found (R. 459) it is *res adjudicata* on the record before this Court on this appeal that the line-haul rates of the appellee carriers *include compensation* for all the terminal services here involved.

2. Even if this issue were not *res adjudicata* on this record, the Commission itself in its report and findings, 270 I. C. C. 359 (R. 364-375), on which are based its order which the Statutory Court has permanently enjoined, *has expressly repudiated* a finding previously made by it in these proceedings, that such line-haul rates *do not include compensation* for the terminal switching services here involved, and *has expressly undertaken to make its enjoined order without any finding whatever in this respect.*

These two facts it will be shown make wholly irrelevant on this appeal: first, any question of the sufficiency of the evidence before the Commission to prove that the line-haul rates do include compensation for such terminal switching services, or as to the competency of the witnesses who so testified; second, any question of the actual extent of such terminal switching services, or whether they do or do not exceed uninterrupted "simple switching or team track delivery"; third, any question whether the "plant yard" at Garfield, and the "flat yard" at Leadville, do or do not constitute convenient points for delivery and receipt of car-load freight by the appellee industry, to and from the appellee carriers.

4
This for the following reasons:

(1) The Commission's enjoined order is avowedly, it will be shown, the result of the application by the Commission to the terminal switching services, performed by the appellee carriers at the appellee industry, of a general formula set forth in the Commission's Basic Report in these proceedings. *Ex Parte 104, Part II*, 209 I. C. C. 11. Such formula in substance limits the terminal switching services which a carrier may perform on industrial tracks under line-haul rates of the character specified in such Basic Report, and without charge in addition to such line-haul rates, to such services as are the equivalent of "simple switching or team-track delivery", which can be performed at the carrier's ordinary operating convenience without interruption of movement by the industry.

(2) Under Point IV of this brief it will be shown that such Basic Report recognizes that the *legal application* of such formula is *necessarily limited* to line-haul rates which *do not include compensation* for terminal switching services on industrial tracks in excess of such "uninterrupted simple switching or team-track delivery", and that such formula *can have no legal application* to line-haul rates which *do include compensation* for additional terminal switching services.

(3) Under Point V of this brief it will be shown that in every decision of this Court in which it has sustained an order of the Commission made, as here, under Section 6(7) of the Interstate Commerce Act,* based on the application by the Commission of such general formula to the

*Section 6(7) of the Interstate Commerce Act is set out in Appendix A to this brief.

terminal switching services of other carriers at other industries, the record before this Court *has contained a finding by the Commission that the line-haul rates did not include compensation for the particular terminal switching services there in question, and that this Court has expressly* ~~so~~ ^{of} *recognized.**

(4) Under Point VI of this brief, it will be shown that although there may be a violation of Section 6(7) of the Act by the performance of terminal switching services without compensation in addition to the line-haul rates, even where the tariffs specifically provide that the performance of such terminal switching services is included under the line-haul rates, there can be such violation only if the line-haul rates *do not include compensation* for such terminal switching services, and there can be no violation if the line-haul rates *already include such compensation*.

Assuming that this brief establishes the validity of the foregoing legal propositions, appellees respectfully submit that the two cited facts of record, *ipso facto*, render invalid the Commission's findings that the appellee carriers violate Section 6(7) of the Act by performing the terminal switching services here in question without compensation in addi-

*The prior decisions of this Court here referred to are the following:

United States v. American Sheet & Tin Plate Co., 301 U. S. 402;

Goodman Lumber Company v. United States, 301 U. S. 669;

A. O. Smith Corporation v. United States, 301 U. S. 669;

United States v. Pan American Petroleum Corporation, 304 U. S. 150;

United States v. Wabash R. Co. (Staley case), 321 U. S. 403;

Corn Products Refining Company v. United States, 331 U. S. 790.

tion to the line-haul rates, and *ipso facto*, invalidate the Commission's enjoined order which would require the appellee carriers to make charges in addition to the line haul rates for such switching services, since thereby the enjoined order, as the Statutory Court has also expressly found (R. 460; Conclusion of Law No. 3) would require the appellee carriers to charge, and the appellee industry to pay, twice for the same services.

These facts of record, and the legal propositions applicable to them, have, however, an additional and important significance. They demonstrate that there is nothing in the order of the Statutory Court, or in the contentions of the appellees in support of it, which in any way challenges the validity of the Basic Report of the Commission, of the general formula there set forth, of any orders heretofore made by the Commission under that general formula, or of any decision of this Court which has sustained such prior orders of the Commission. On the contrary, it will be shown, that it is the appellants who, by this appeal and their contentions in support of it, seek to evade the Commission's own recognition in its Basic Report of the legal limitations on the application of such general formula, and seek to evade the fact that this Court, in its prior decisions, has sustained the application of such formula only when so limited.

Accordingly, this brief, before undertaking to establish the validity of the foregoing legal propositions, will undertake in its Statement of the Case under Point II, to show the manner in which the two facts, decisive against this appeal, appear on the record before this Court.

II.

STATEMENT OF THE CASE SHOWING THE MANNER IN WHICH IT APPEARS ON THIS RECORD:

A. THAT IT IS *RES ADJUDICATA* THAT THE LINE-HAUL RATES OF THE APPELLEE CARRIERS INCLUDE COMPENSATION FOR ALL TERMINAL SWITCHING SERVICES OF THE APPELLEE CARRIERS HERE IN QUESTION.

B. THAT THE COMMISSION HAS EXPRESSLY REPUDIATED ITS FORMER FINDING TO THE CONTRARY, AND HAS EXPRESSLY UNDERTAKEN TO MAKE ITS ENJOINED ORDER WITHOUT ANY FINDING WHATEVER IN THIS RESPECT.

This is an appeal by the Interstate Commerce Commission and the United States from an order of January 10, 1949 of a 3-Judge Statutory Court of the District Court of the United States for the District of Utah, permanently enjoining the order of the Commission of May 18, 1948 (R. 363).

The Commission's order required that the appellee carriers cease and desist from performing, in the delivery and receipt of carload freight at the smelters of the appellee industry, American Smelting and Refining Company at Garfield, Utah and Leadville, Colorado,* terminal switching

*The Commission's order also applied to such terminal switching services of the appellee carriers at the smelter of the appellee industry, American Smelting & Refining Company, at Murray, Utah. Since the Commission's order was made and permanently enjoined by the Statutory Court, the appellee industry has permanently abandoned the operation of its smelter at Murray. The order of the Commission has, therefore, to this extent become moot, and in this respect will not further be considered in this brief.

services beyond certain designated points at each smelter, without making compensatory switching charges *in addition* to the *line haul rates* for the terminal switching services beyond such designated points. The Commission's order was based on findings made by the Commission in a report, issued contemporaneously with its order, that the performance by the appellee carriers of such terminal switching services beyond points designated as the "plant yard" at Garfield and the "flat yard" at Leadville, without compensatory charges in addition to their line haul rates, violate Section 6(7) of the Interstate Commerce Act; *American Smelting and Refining Company, Terminal Services, Ex Parte 104, Part II*, 270 I. C. C. 359 (R. 364-375), already referred to under Point I of this brief.*

*While the Commission's findings and order apply to such terminal switching services in the receipt and delivery of *all* carload freight at the Garfield and Leadville smelters of the appellee industry, the terminal switching services which, in reality, are the actual occasion of the Commission's order, are those performed by the appellee carriers in the delivery at such smelters of inbound carloads of non-ferrous ores and concentrates. Such commodities move under rates based on *terminal* weights and graded according to the actual value of the metal content per ton of each carload. The industry is required by the tariffs of the appellee carriers to certify to the delivering carrier such actual values in order that such carrier may determine and assess the lawfully applicable freight charges (See Exhibit 4, R. 1145, 1146). The tariffs of the appellee carriers have, however, for over 40 years provided that such graded line-haul rates on non-ferrous ores and concentrates include the specified terminal switching services at each smelter, necessary to determine the actual value of each carload and to place such cars thereafter for unloading (See Appendix B, pp. b7-b10), except that, as will later be shown in more detail, the tariffs at Garfield have, since 1937, required the payment of certain switching charges in addition to the line-haul rates for so-called "interrupted movements" (See Appendix B to this brief).

The Commission's enjoined order was made in certain supplemental proceedings under a general investigation instituted by the Commission on its own motion by its order of July 6, 1931 (R. 124). On May 14, 1935, the Commission issued its so-called Basic Report in such proceedings, already referred to; *Ex Parte 104, Part II, 209 I. C. C. II.**

In such Basic Report, as already stated under Point I, and as will be shown in detail under Point IV of this brief, the Commission laid down as a general formula, that the terminal switching services which a carrier may lawfully perform under its line-haul rates without charge in addition to such line haul rates, are limited to the equivalent of "simple switching or team track delivery", which can be performed at the carrier's ordinary operating convenience without interruptions of movement by the industry.

As has already been stated under Point I, it will also be shown under Point IV that such Basic Report recognizes that the *legal application* of such formula is *necessarily limited* to line haul rates which *do not include compensation* for terminal switching services in excess of such uninterrupted "simple switching or team track delivery", and that such formula *can have no legal application* to line haul rates which *do include compensation* for additional terminal switching services.

What it is desired here to point out is that preceding such Basic Report, and as stated therein, the Commission had held hearings relating to the terminal switching services performed by rail carriers in the receipt and delivery of

*This Basic Report, while not incorporated in the record, is by stipulation to be considered part of the record (R. 503).

carload freight at some 200 industries throughout the country. Among these hearings, was one of May 19, 1932, relating to the terminal switching services of the appellee carriers at the Garfield Smelter of the appellee industry. Also among such hearings were hearings relating to the terminal switching services at the industries involved in the decisions of this Court cited in the footnote, *ante* p. 34, in which this Court has sustained prior orders of the Commission relating to the terminal services of the carriers at such industries.*

*The following facts are significant in this connection:

All of the orders of the Commission which this Court has sustained in prior decisions, with the exception of the order of the Commission involved in the *Corn Products* case, *supra*, were made within a few months after the issuance on May 14, 1935 of the Commission's Basic Report, and on the basis of evidence taken at hearings prior to such Report. The Commission, however, made no order on the basis of the evidence taken at the hearing on May 19, 1932, relating to the terminal switching services at the Garfield smelter of the appellee industry, until more than ten years later it issued its report and order of October 1, 1945, 263 I. C. C. 719 (R. 55-86). This order, moreover, was made only after the taking of further evidence at a hearing in 1944, involving terminal switching services both at the Garfield smelter and the Leadville smelter of the appellee industry.

These facts are significant in connection with the following statement in the Basic Report (p. 44) just preceding the statement in that report of the general formula, on the basis of which formula the Commission shortly thereafter made the orders subsequently sustained by this Court in its cited decisions. That statement reads as follows:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or as-

At the hearing of May 19, 1932, held before an Examiner of the Commission, it appears, as is shown by the transcript of such hearing (R. 535-565), that while the Commission itself and the appellee carriers were represented by counsel, the appellee industry was not represented and did not participate in such hearing.

At the hearing Mr. Williams, Freight Traffic Manager of the appellee Denver and Rio Grande Western Railroad Company, hereinafter referred to as the D. & R. G., testified as a witness not only for his company but for the appellee Union Pacific Railway Company, hereinafter referred to as the Union Pacific. On behalf of both carriers, he testified in substance that the terminal switching services rendered by them, particularly in the switching movements necessary to determine the value of inbound shipments of non-ferrous ores and concentrates at the Garfield smelter and to place such shipments for unloading, were included

sistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne."
(Italics supplied.)

Appendix C to this brief will show by quotation from the uncontradicted testimony of Mr. Williams and ~~Mr. Carey~~ for the appellee D. & R. G., and of Mr. Tuckwood for the appellee American Smelting and Refining Company, that starting with the inception of the service of the appellee carriers at the smelters of the appellee industry in the early nineteen hundreds, the line-haul rates of the appellee carriers have always included compensation for the terminal switching services here in question; that the appellee carriers have always performed such services under their line-haul rates; that the tariffs have always provided for the performance of such services under the line-haul rates; and that the appellee industry had never itself performed any such switching services either at its own expense or under allowance from the carriers.

in the line-haul rates. In addition, Mr. Williams testified that the published tariffs specifically so provided. Since even an abstract of Mr. Williams' testimony is, of necessity, extensive, such abstract has been postponed to Appendix II of this brief. It will suffice to say here that counsel for the Commission did not challenge Mr. Williams' testimony either by its cross-examination of Mr. Williams or any evidence in rebuttal. *On the contrary, by far the major part of Mr. Williams' testimony in this respect was developed by questions from the Commission's counsel or its Examiner.*

The Commission failed to make any order as a result of such hearing, and neither the appellee carriers or the appellee industry heard anything further of the matter until the Commission by its order of March 16, 1944 (R. 156), in which no reference was made to the 1932 hearing, assigned a hearing relating to the terminal switching services of the appellee carriers at the Garfield and Leadville smelters of the appellee industry.

Such hearing was held May 26th and May 27th, 1944. The transcript of such hearing appears of record (R. 873-1132) and with certain agreed omissions the exhibits filed at such hearing appear of record (R. 1132-1396).

At such hearing Mr. Carey, who had succeeded Mr. Williams as Freight Traffic Manager of the appellee D. & R. G., again appeared as the witness both for that carrier and for the Union Pacific (R. 908-918; 1095-1102). He expressly corroborated the testimony given by Mr. Williams as to the inclusion of the terminal switching services within the line-haul rates. In addition, Mr. Carey filed exhibits showing the tariff provisions under which, since 1908, the terminal switching services in question had always been

published as included in the line-haul rates. He specifically called attention to the fact that prior to 1920 the tariffs, in providing for the inclusion of such switching services in the line-haul rates, had provided that they should be performed "free" under the line-haul rates. Mr. Carey expressly testified (R. 916) that the tariffs in using the term "free" did not mean such services were performed without compensation under the line-haul rates, *but that the line-haul rates included compensation* for such terminal switching services. Mr. Carey also elaborated upon the reasons for the inclusion in the line-haul rates of the terminal switching services in question.*

Both Mr. Williams' prior testimony and Mr. Carey's testimony were corroborated in substance (R. 944-958; 1047-1051) by the testimony and exhibits of Mr. Tuckwood, the then General Traffic Manager and now Vice-President of the appellee American Smelting and Refining Company.*

In Mr. Tuckwood's testimony he, in addition, called attention to a case decided in 1918 by one of the members of the Statutory Court from whose order this appeal is taken, the Honorable Tillman D. Johnson, as corroborating Mr. Carey's foregoing construction of the word "free" as used in the tariffs of the appellee carriers prior to 1920. This decision was in a test case brought by the Oregon Short Line Railway, now part of the appellee the Union Pacific, entitled *Oregon Short Line Railway v. American Smelting & Refining Company*. The decision is unreported, but a copy of it was introduced by Mr. Tuckwood as his Exhibit 14 (R. 1315-1318).

*Abstracts of the testimony of Mr. Carey and Mr. Tuckwood likewise appear in Appendix R of this brief.

As there appears, the carrier was seeking to recover from the appellee industry \$60,378.71 for the terminal switching of inbound shipments of non-ferrous ores and concentrates at its Murray smelter on the ground that the word "free", which appeared in connection with such switching in the tariffs of both appellee carriers until their amendment in 1920 (R. 1243; see also R. 498), made the tariff provisions for the inclusion of such switching within the line-haul rates illegal. As appears from Judge Johnson's decision (R. 1316), the case was tried upon an agreed statement of facts.

In his decision, Judge Johnson after commenting (R. 1317) on the position of the industry that the word "free" used in the tariff did not mean a gratuitous service, but only meant that such switching services would be performed without any charge in addition to the line-haul rate, and that the value of such service was included in the line-haul rate, said, among other things, (R. 1318):

"Perhaps in a prosecution by the United States, or in a complaint made by a shipper, facts would be developed which would show that this service rendered by the plaintiff and its assignors was in fact a rebate allowed the defendant by the plaintiff and its assignors, and that it was and is an unjust, unfair and unreasonable discrimination against other shippers, but as the record now stands there is, as I view it, not only a failure of proof with respect to these matters, but the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate.

"The judgment will be that the action be dismissed." (Italics supplied)

Judge Johnson's decision, it may be noted, was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 269 U. S. 898.

Judge Johnson's decision is important not only as furnishing corroboration for Mr. Carey's testimony, but is even more important as a commentary on the record before this Court.

To paraphrase Judge Johnson's decision,

"Perhaps in this investigation by the Commission, facts could have been developed which would show that the terminal switching services in question were in fact a rebate, because the reasonable value of them was not included in the transportation rate."

The point here is that it is undeniable that neither at the Commission's 1932 hearing or its 1944 hearing did the Commission, though represented not only by its Examiner, but by its counsel, make any attempt to develop such facts, either by cross examination or by rebuttal evidence of the testimony of Mr. Williams, Mr. Carey or Mr. Tuckwood. Moreover, as will shortly be shown, the Commission made no attempt to develop any such facts, even when prior to the issuance by the Statutory Court of its permanent injunction were appealed from, that Court had issued a temporary injunction and remanded the proceeding to the Commission, with an express suggestion that the Commission might do this very thing (R. 300). Furthermore, it may be observed that neither at the 1932 hearing, nor at the 1944 hearing, did counsel for the Commission raise any question of the qualification of the witnesses to give such testimony.

In short, on the record before the Statutory Court, and now before this Court, the testimony of such witnesses is not only uncontradicted, but as the Statutory Court twice found, it is the sole testimony of record in this respect (R. 300, 455).

In January 1945 the Examiner who had presided at the 1944 hearing, and another Examiner of the Commission, issued their proposed report (R. 86-116). As there appears, the Examiners recommended (R. 99, 116) that the Commission should find in substance that the line-haul rates of the appellee carriers *did not include compensation* for terminal switching services beyond the "plant yard" at Garfield and the "flat yard" at Leadville, and that the performance of terminal switching services beyond such designated points, without charges in addition to the line-haul rates, violated Section 6(7) of the Act. The Examiners also recommended that an appropriate order be entered. *In such proposed report, the Examiners made no mention whatever of the foregoing uncontradicted testimony of Mr. Williams, Mr. Carey and Mr. Tuckwood.*

On March 27, 1945, the appellee industry filed exceptions with the Commission to such proposed report (R. 156-210). As will there appear, such exceptions pointed out to the Commission that the Examiners' proposed report had wholly ignored such testimony and its relevance to the validity of their recommended order under Section 6(7).

After argument upon such exceptions before Division 3 of the Commission, consisting of three members, that Division, on October 1, 1945, issued the original report of the Commission in these supplemental proceedings, 263 I. C. C. 719 (R. 55-86), Commissioner Miller dissenting. On the

basis of such proposed report, Division 3 made an order substantially similar to the order here enjoined (R. 85).

The report of Division 3 was substantially a repetition of the Examiners' proposed report, and made the findings recommended in the proposed report as to the terminal switching services at the Garfield and Leadville smelters (R. 67, 84). Moreover, like the proposed report, it *wholly ignored, without the slightest mention*, the uncontradicted testimony of Mr. Williams, Mr. Carey and Mr. Tuckwood. Moreover, Commissioner Miller's dissent (R. 84, 85) was specifically on the ground *that there was no contradiction in the record of the testimony of these witnesses that the line-haul rates "were made sufficiently high to compensate * * * for such services."*

Thereupon, the appellee industry filed with the Commission a petition for reconsideration by, and reargument before the entire Commission of the report and order of Division 3 (R. 212-246). This petition again pointed out the total ignoring, both in the Examiners' proposed report and in the report of Division 3, of the uncontradicted testimony of the foregoing witnesses and its relevance to the validity of the order of Division 3, of October 1, 1945. This petition was denied by the Commission's order of March 22, 1946 (R. 247).

Thereupon, on April 25, 1946, the appellee industry filed a second petition for reconsideration and reargument before the entire Commission based on substantially the same grounds (R. 248-255). While the printed record does not so show, the appellee carriers supported both petitions of the appellee industry. On June 3, 1946, the Commission made an order granting this second petition (R. 255), and

thereupon, reargument was had before the full Commission.

As a result of such reargument, the Commission issued its report and order of October 14, 1946, 266 I. C. C. 349 (R. 29-51), Commissioners Alldredge* and Mahaffie dissenting, and Chairman Barnard and Commissioner Aitchison not participating. Appellants concede (Jurisdictional Statement, footnote, p. 4), that the Commission's order of October 14, 1946 (R. 28) was substantially similar to the Commission's order of May 18, 1948 (R. 363, 364), here enjoined.

In the majority report, even the majority at long last finally took notice of the testimony of Mr. Williams and Mr. Carey, though not of Mr. Tuckwood. In so doing, the majority report stated, p. 358 (R. 40) :

"One of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the switching services. That is a question which is susceptible of proof by factual evidence. It is the function of witnesses to furnish such evidence and the province of the Commission to make the conclusion of fact." (Italics supplied.)

It is illuminating to observe the manner in which the majority thereupon undertook *not* to carry out this admirable statement of the proper functions of the Commission in this respect.

*The dissenting opinion of Commissioner Alldredge appears R. 51-52, and his dissenting opinion, there referred to, in *Anaconda Copper Mining Co. Terminal Allowance*, 266 I. C. C. 387, 394-396, appears R. 52-54.

On the same page of its report, the majority undertook wholly to reject the testimony of Mr. Williams and Mr. Carey on the ground that they were not qualified to give such testimony, stating in this connection:

"No showing was made that the witnesses had anything to do with the making of the rates, or were even in the carrier's service when the rates were first established. They are not shown to have had any information relative thereto, except such as is shown in the tariffs, and inferences they draw from the past practices of the carriers."

It has already been noted that although the Commission was represented by counsel at the 1932 hearing, when Mr. Williams testified, and at the 1944 hearing when Mr. Carey corroborated and elaborated Mr. Williams' testimony, counsel for the Commission raised no question of the qualification of either witness. Indeed, the record shows (R. 916) that when counsel for the appellee industry attempted at the 1944 hearing, preliminary to directing Mr. Carey's attention to Mr. Williams' testimony at the 1932 hearing, to elicit from Mr. Carey what experience his predecessor, Mr. Williams, had had in connection with the rates of the D. & R. G., the Commission's Examiner, on his own initiative, refused to permit Mr. Carey to answer. Furthermore, as already noted, and as the abstract of Mr. Williams' testimony contained in Appendix B to this brief will show, *it is here again to be emphasized, that most of Mr. Williams' testimony in this respect was in fact elicited by questions to him from the Commission's counsel or its Examiner.* It could not in any event, as the majority must well have known, be anything but the sheerest impudence to question

that the freight traffic manager of a carrier would have knowledge of the measure and structure of its freight rates since he then was *ex officio* responsible for such rates. It would further be equally impudent to assume that since he was *ex officio* responsible for the measure and structure of such rates at the time he testified, he nevertheless was wholly ignorant of their measure and structure in the past. However this may be, the question of the competence of Mr. Carey or Mr. Williams or the competence of their testimony is no longer open on this record, since, as already suggested and as shortly will be shown, that issue has become *res adjudicata*.

Nevertheless, it will be illuminating to this Court to refer briefly to another and equally important aspect of such majority report of October 14, 1946. This is the paradoxical use which the majority in that report attempt to make of the decision of Judge Johnson in 1918 in the case of *Oregon Short-Line Railroad Company v. American Smelting & Refining Company*, *supra*. It has been seen, *ante*, p. 13, that Mr. Tuckwood at the 1944 hearing had cited this decision of Judge Johnson and its affirmance by the Circuit Court of Appeals as corroborating Mr. Carey's testimony at that hearing that the use of the word "free" in the tariffs of the appellee carriers prior to 1920 in connection with the performance of the terminal switching services in question under the line-haul rates were without compensation, but that compensation for them was included in the line-haul rates. The majority report, instead of giving any weight to Judge Johnson's conclusion to the same effect in his cited decision, at the very outset of its reference to that decision, p. 358 (R. 40) treated the mere fact that the carrier had instituted the suit in question as conclusive proof of

"the fact that the carriers recognized that the line-haul rates did not include compensation for the switching services."

What, however, is of the utmost importance on this record is the fact that the majority report went further. It treated the mere fact that the carrier had brought the suit in question as conclusive proof of the substantive fact that the line-haul rates of the appellee carriers do not include such compensation as the terminal switching services. This is shown by the fact that following the discussion of Judge Johnson's decision in the majority report, pp. 358-359 (R. 41) and even in the face of Judge Johnson's conclusion as there quoted that,

*"as the record now stands there is not only a failure of proof with respect to these matters, but a fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rates."**
(Italics supplied)

*It is notable that while the majority report does quote this portion of Judge Johnson's conclusion, its purported paraphrases of Judge Johnson's decision immediately preceding the quoted portion of his conclusion omits any reference to those parts of such decision as are most significant with relation to the record, then before the Commission, and now before this Court. Judge Johnson's decision in this respect reads as follows (R. 1317):

"To give or take a rebate is a crime. Unfair and unreasonable discrimination is unlawful and illegal. This tariff, and others of similar import, were filed with the Interstate Commerce Commission more than ten years ago. During all this period the provisions of the tariffs were acquiesced in, at least, by the Interstate Commerce Commission. The railroad companies had performed this service for the defendant and made no demand for payment therefor until this action was commenced. Unfair dealing, fraud, or criminality cannot be presumed and ought not
(continued on p. 22)

the majority report immediately makes the following finding, p. 359 (R. 42):

"It is clear that the line-haul rates when first established did not include the expensive terminal switching performed at the smelter, and that they have not been increased since that time to include, and do not now include, compensation for such services." (Italics supplied)

This is the finding, which it will later be shown, the Statutory Court, both in connection with its temporary injunction of November 14, 1947 and its permanent injunction of January 10, 1949, here appealed from, found to be not only without any evidence to support it but contrary to the only evidence of record.

to be inferred from words or acts reasonably capable of innocent interpretation.

"It is possible that in making this tariff providing the rate of transportation that the reasonable value of the contemplated switching service was included, and when it is considered that it was publicly filed with the Interstate Commerce Commission, approved, or at least acquiesced in by the Commission for many years, and when it is further considered that men in their business dealings generally do not violate the law of the land but act honestly, and, I might add, in their own interest, the possibility above noted becomes a high probability. Such, of course, may not be the fact. Perhaps in a prosecution by the United States or in a complaint made by a shipper, facts would be developed which would show that this service rendered by the plaintiff and its assignors was in fact a rebate allowed the defendant by the plaintiff and its assignors, and that it was and is an unjust, unfair and unreasonable discrimination against other shippers, but as the record now stands there is, as I view it, not only a failure of proof with respect to these matters, but the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate.

"The judgment will be that the action be dismissed." (Italics supplied)

It is here desired to point out that this finding can have no other basis, even on the face of the majority report, than the indefensible assumption of the majority that the mere bringing of suit by the carrier in question before Judge Johnson, was not only proof that the appellee carriers recognized that the line-haul rates did not include compensation for the terminal switching services in question, *but was conclusive proof of the substantive fact that the line-haul rates did not include such compensation.*

As has been seen, the uncontradicted testimony of Mr. Williams and Mr. Carey was that the line-haul rates *did include compensation* for such terminal switching services. As has also been seen, Judge Johnson's finding, affirmed by the Court of Appeals, was to this same effect. Even assuming that the mere bringing of the suit before Judge Johnson was evidence to some degree that the appellee carriers did not consider that the line-haul rates included compensation for the terminal switching services, and as such served, in some degree, to impeach the testimony of Mr. Williams and Mr. Carey to the contrary, *the mere bringing of such suit still could not furnish affirmative proof of the substantive fact that the line-haul rates did not include such compensation.**

*It may be suggested that the majority report in making its finding that

"It is clear that the line-haul rates * * * do not now include, compensation for such services."

is based to some extent on the fact referred to, pp. 353, 354 of that report (R. 34) that in July, 1938 the tariffs at Garfield were changed to provide a charge in addition to the line-haul rate for so-called "interrupted" terminal switching services, on the theory that this change is evidence that the line-haul rates did not include compensation for such terminal switching services. It is notable, however, that the majority report on its face makes no reference

(Continued p. 24)

However this may be, it will now be shown that any such issue has become *res judicata*.

On June 13, 1947 the appellee carriers and the appellee industry filed their complaint in the District Court of the United States for the District of Utah (R. 1-28) asking that a three-Judge Statutory Court be convened and that, after hearing, the Commission's order be set aside and annulled, and its enforcement forever enjoined. Such Statutory Court having been convened and a hearing having been had before it, such Court, by its order of November 14, 1947, (R. 302) temporarily enjoined the Commission's order of October 14, 1946 and in so doing made, among others, the following Findings of Fact (R. 299, 300):

"FINDINGS OF FACT

"1. The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the companies within the respective plants.

"2. We find that upon such^o basis the order is contrary to law in that there is no evidence before

to such tariff change as being in any way the basis for its finding in this respect. This is for a very good reason. As shown in that report, p. 366 (R. 49) no such change was, or has been made in the tariffs at Leadville. The majority obviously recognized the danger of suggesting that such tariff change at Garfield, which, at most, affected so-called "interrupted" terminal switching services, was evidence that the line-haul rates did not include compensation for *such* terminal switching services, since, by a parity of reasoning, the fact that the carriers had made no similar tariff change at Leadville would thereby become evidence that the line-haul rates included compensation for *all* terminal switching services at that point.

In this connection see also Mr. Carey's testimony (R. 912) that the tariff change at Garfield was published under the misapprehension that the Commission's Basic Report required it.

the Commission which would justify the finding that such rates were not compensatory to the transportation companies for the service so rendered.

"3. *That the sole evidence in the record which would justify a finding upon that point is to the contrary.** (Italics supplied)

*In view of the subsequent conduct of the Commission, it is particularly to be noted that one member of the Statutory Court, the Honorable Orie Phillips, in concurring in the Findings of Fact and Conclusions of Law of the majority, expressed the opinion that certain additional findings, which he specified, should be made (R. 300-303). Among these findings were, in substance, the following:

a). That the "plant yard" at Garfield, and the "flat yard" at Leadville, have the physical characteristics of terminal facilities of the appellee carriers.

b). That the only evidence of record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the points where the Commission found the line-haul compensation begins and terminates, especially uninterrupted movements beyond such points.

c). That there is no evidence in the record to support a contrary factual conclusion.

d). That there is no evidence in the record to overcome the presumption that the railroads are not performing such services gratuitously, citing *Interstate Commerce Commission v. C. B. & Q. Ry. Co.*, 186 U. S. 320.

e). That the order of the Commission does not merely require a segregation between line-haul transportation and terminal switching services. On the contrary, it requires the railroads to file additional tariffs exacting separate and reasonable and compensatory charges for switching services. This would result in two charges for the same services.

f). That the question of whether the Commission might require the publication of new tariffs segregating line-haul transportation charges from terminal switching charges, is not presented and the Court should not express any opinion with respect thereto.

"4. That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

"5. We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

The Statutory Court also made the following Conclusions of Law (R. 300):

"CONCLUSIONS OF LAW

"(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, and that the cases should be returned to the Commission for *further proceedings upon the basis of evidence to be taken, or otherwise, upon a new theory of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in Securities & Exchange Commission vs. Chenery Corporation, . . . U. S. . . ., June 23, 1947 and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this Court.*" (Italics supplied)

The Commission took no appeal from this temporary injunction order of the Statutory Court (R. 302). Instead, the Commission by its order of December 5, 1947 (R. 377) vacated its temporarily enjoined order of October 14, 1946 and reopened the proceedings before it,

“* * * for reconsideration of the report and order entered October 14, 1946 *upon the present and existing record*”. (Italics supplied)

Thereupon, without any further hearings, briefs, or argument, or the taking of any additional evidence (R. 454), the Commission made its order of May 18, 1948, which, as will later appear, is the order here permanently enjoined (R. 363).

Moreover, in its contemporaneous report upon which such order was based, 270 I. C. C. 359 (R. 364-375), the Commission *expressly repudiated its prior findings* that the line-haul rates of the appellee carriers *did not include compensation* for the terminal switching services in question, *and expressly disclaimed any finding whatever in this respect*. In this respect the Commission's report reads as follows, p. 362 (R. 368):

“It is our purpose to make it entirely clear that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court of our original and supplemental reports in Ex Parte No. 104, Part II *and that said order is not based in whole or in part upon any conclusions or findings in connection with the tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas. We*

herby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."
(Italics supplied)

Thereupon, on October 11, 1948, the appellee carriers and the appellee industry filed a complaint in the same District Court (R. 342-352) asking that a 3-Judge Statutory Court be again convened and that, after hearing, the Commission's order of May 18, 1948 be set aside and annulled, and its enforcement forever enjoined.

Thereupon, after hearing before a Statutory Court consisting of the same three Judges who had constituted the prior Statutory Court, such Court granted the permanent injunction here appealed from (R. 463, 464).

In granting such permanent injunction, such Statutory Court made certain Findings of Fact, among which were its Findings (6) and (7) (R. 453, 454). These Findings were in substance: that neither the Commission nor the United States had taken any appeal from the Statutory Court's prior order of November 14, 1947 temporarily enjoining the Commission's order of October 14, 1946; that, instead, the Commission had reopened the proceedings before it for reconsideration of such temporarily enjoined order "upon the present and existing record"; that thereafter on May 18, 1948, it made its order on the same record on which

*It is characteristic of the conduct of the majority throughout the proceedings before the Commission that here they do not hesitate to stultify their own statement from their prior report of October 14, 1946, p. 358 (R. 40), already quoted herein that

"One of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the smelting services." (Italics supplied)

it had made its temporarily enjoined order of October 14, 1946 and without any further hearing, evidence, briefs, or arguments.

By its Finding (11) (R. 455) the Statutory Court reaffirmed its Findings of Fact numbers 1 to 5, inclusive, previously made in connection with its order of temporary injunction of November 14, 1947, and herein quoted *ante* pp. 24-26. It then made certain additional Findings of Fact, among which was its Finding of Fact number (15) (R. 456), reading as follows:

"(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. (i.e., The "plant yard" at Garfield and the "flat yard" at Leadville.) On the contrary, *the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called 'interrupted movements' incident to determining the value of inbound shipments of non-ferrous ores and concentrates.*" (Parenthetical matter and italics supplied)

After making other Findings of Fact, to which reference will later be made, the Statutory Court then entered as its first Conclusion of Law the following (R. 459):

"CONCLUSION OF LAW

"1. It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services

here involved at the respective smelters of plaintiff industries." (Italics supplied)

It has already been noted that neither the United States nor the Interstate Commerce Commission even mentioned this Conclusion of Law in their joint jurisdictional statement, and that the United States in its brief on this appeal has likewise totally ignored it. It will now be seen that, while the Commission's brief on this appeal does mention this Conclusion of Law, it both misrepresents the basis of it and attempts to evade it, by a disingenuous misconstruction of the grounds of the order of remand of the Statutory Court in connection with the prior temporary injunction granted by that Court against the Commission's order of October 14, 1946.

III.

THE COMMISSION, IN ITS EFFORTS BOTH TO IMPEACH THE STATUTORY COURT'S CONCLUSION OF *RES ADJUDICATA*, AND TO JUSTIFY THE MAKING OF ITS ENJOINED ORDER OF MAY 18, 1948 WITHOUT FURTHER HEARING OR EVIDENCE, HAS THE NAIVETE OR EFFRONTERY TO ATTEMPT TO SUPPORT SUCH EFFORTS BY INVOKING THE GROUNDS ON WHICH THE STATUTORY COURT MADE ITS ORDER OF REMAND IN CONNECTION WITH ITS PRIOR TEMPORARY INJUNCTION, ALTHOUGH THE COMMISSION IN ITS ORDER HERE ENJOINED, AND IN THE PROCEDURE ON WHICH THAT ORDER IS BASED, HAS TOTALLY DISREGARDED THE GROUNDS STATED BY THE STATUTORY COURT FOR SUCH REMAND.

Before referring to the Commission's attempt to impeach the Statutory Court's finding of *res adjudicata* as to the inclusion in the line-haul rates of compensation for all terminal services here involved, by misinterpreting the

grounds upon which the Statutory Court made its order of remand in connection with its prior temporary injunction, it is believed that it will be illuminating to note the Commission's persistent misrepresentation of the grounds upon which the Statutory Court reached such conclusion of *res adjudicata*, and the Commission's evasion of any consideration of that conclusion whatever until next to the last full page of its brief.

The Commission's brief is 127½ pages in length. Not until page 126 does that brief give any consideration whatever to the first Conclusion of Law of the Statutory Court, in granting the injunction here appealed from, that

"(1) It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers *include compensation* for all terminal switching services here involved at the respective smelters of the plaintiff industry." (italics supplied)

It is true that at page 32 of the Commission's brief this Conclusion of Law is cited as among the "Specification of Errors to be Urged." It is also true that as there cited, the basis of such Conclusion of Law is wholly misrepresented. The Commission's brief states as No. 5 of its "Specification of Errors to be Urged", the following:

"5. In deciding, court conclusion 1, that the question as to line-haul rates including compensation for all terminal services involved, is *res adjudicata*, because, under finding 6, no appeal was taken from the prior court order remanding prior Commission orders for further consideration."

Of course, the Statutory Court did not base such Conclusion of Law merely upon the failure of the Commission to appeal from the prior temporary injunction granted by

that Court's order of November 14, 1947 against the Commission's order of October 14, 1946.* Indeed, the Commission's own brief, when at page 126 it, for the first time, gives any consideration to such Conclusion of Law, so shows. There again, however, the Commission's brief persists in misrepresenting the basis of such Conclusion of Law by the Statutory Court. That brief says, page 126:

"Astonishingly, findings (6) and (7) in the last action (R. 453-454), is to the effect that no appeal was taken from the prior decisions, that the orders of October 14, 1946 were vacated, that reconsideration was based upon the existing record, and that no further hearings was held, no further evidence received, and no further briefs permitted. *Upon these findings* (1) held *res adjudicata* the question as to compensation for service being included in the line-haul rates (R. 459)." (Italics supplied)

Not only is it significant that the Commission's brief should twice misrepresent such Conclusion of Law of the Statutory Court, but the basis of this second misrepresentation is still more significant. This second misrepresentation omits any reference to the fact that such Conclusion of Law, in addition to being based on Findings of Fact (6) and (7) of the Statutory Court (R. 453, 454), is based on Findings of Fact (8) and (9) (R. 454, 455). Finding of Fact (8) has to do with the fact that the Commission, in

*Appellees would not have contended, nor would they assume, that a Statutory Court, of the competence of that here involved, would have upheld a contention that *the mere failure* of the Commission to take an appeal from such order of temporary injunction and of remand, would have barred the Commission from taking further evidence to support either its temporarily enjoined order of October 14, 1946, or its new order of May 18, 1948.

its report of May 18, 1948, *supra*, page 362 (R. 368), on which is based its order here permanently enjoined, *expressly repudiated* its prior finding in its report of October 14, 1946, *supra*, page 359 (R. 42), that,

*"It is clear that the line-haul rates * * * do not now include compensation for such services." (Italics supplied.)*

and expressly disclaimed at the same page of its report *any finding whatever in this respect*, in connection with its order of May 18, 1948, here permanently enjoined.

Finding of Fact (9) is based on the Commission's *express disclaimer* in its report of May 18, 1948, page 367 (R. 373, 374), *of any finding whatever* as to whether or not the switching charges in addition to the line-haul rates for so-called interrupted switching movements, published since 1938 in the tariffs at Garfield, *are or are not reasonable and compensatory*.*

The Commission's brief, having thus thoroughly misrepresented the basis of the conclusion of *res adjudicata* by the Statutory Court, thereupon seeks, at one and the same time, to impeach that conclusion and, in addition, to justify the making of its enjoined order of May 18, 1948, without further hearing or evidence. It does this by invoking, pages 125-127 of that brief, the grounds given by the Statutory Court for its order of remand of November 14, 1947, in connection with its prior temporary injunction of the Commission's order of October 14, 1946.

*Finding of Fact (9) also inadvertently refers to such additional switching charges at Leadville. As already noted, the record shows that no such additional switching charges have ever been published at Leadville, and the Commission's report of October 14, 1946, *supra*, p. 366 (R. 49), expressly so recognizes.

It is with regret that counsel for appellees feel compelled to say that the precise bases upon which the Commission's brief invokes the grounds given by the Statutory Court for its order of remand, are largely unintelligible. It is possible, however, to discern a few of them.

The Commission's brief states, starting at the bottom of page 125 and continuing on page 126:

"Actually the Commission, in entering the report, believed that it was precisely what was desired and expected by the lower court. This belief was based upon the findings, particularly (4) and (5) (R. 300), and the order (R. 302), which stated that the cases were remanded to the Commission 'for such action as it may find justifiable in the premises.'"

Findings (4) and (5) of the Statutory Court in connection with its prior temporary injunction, read as follows (R. 300):

"(4) That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

"(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

The best answer to the Commission's naive belief that its report of May 18, 1948 and its order here enjoined of the

same date, were "precisely what was desired and expected by the lower court," is the comment of Judge Phillips at the conclusion of the hearing before the Statutory Court (R. 475) where Judge Phillips stated:

"The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad(s) merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul and a separate specific charge for switching services beyond the end of the line haul, and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do."

What Judge Phillips here had reference to was the extraordinary suggestion made by counsel for the Commission in the earlier hearing before the Statutory Court in connection with the Commission's former order of October 14, 1946, that such order of the Commission could have been complied with by merely segregating in the tariffs the line-haul and terminal switching services, *without any increase in the aggregate rates*. Judge Phillips thereupon remarked that if this was all the Commission's order meant, the Commission should have made it plain, but that this was not the meaning of the Commission's order as drawn, which plainly required charges in addition to the line-haul rates.*

*The colloquy in this respect between Judge Phillips and Mr. Crenshaw, counsel for the Commission, appears in the reporter's transcript of hearing before the Statutory Court of June 18 and 19, 1947. While this transcript is contained in the record before this Court, because of its length, only a small portion of such transcript is printed of record. The portion here referred to is not printed but appears at pages 252 to 255 of that transcript. Also, see particularly pp. 259-261.

Counsel for appellee, moreover, in replying to this extraordinary suggestion of counsel for the Commission, pointed out, as had Judge Phillips, that both counsel for the Commission and counsel for the United States had charged the appellee carriers with rebating to the appellee industry, and asked how they could square any such charge with the position taken by counsel for the Commission that the Commission's order could be complied with merely by splitting the publication of the existing aggregate charges as between line-haul services and terminal switching services, and without any increase in the aggregate charge. Counsel then pointed out that under Section 6 (7), on which the Commission expressly based its order of October 14, 1946, the Commission had no authority merely to require the segregation of switching charges from line-haul charges, but that any such authority the Commission had was under Section 6 (1).*

On the subsequent hearing before the Statutory Court, of October 18, 1948, which resulted in the order of that Court of January 10, 1949, here appealed from, permanently enjoining the Commission's order of May 18, 1948, Mr. Dumbauld, speaking both for the United States and the Commission, renewed in connection with that order the contention that it, like the Commission's prior order of October 14, 1946, could be complied with merely by segregating in the tariffs the line-haul charges and the terminal switching charges *without any increase in the aggregate rates*. A lengthy colloquy again ensued between Mr. Dumbauld and Judge Phillips, in the course of which Judge Phillips remarked:

*See reporter's transcript of the hearing before the Statutory Court of June 18 and 19, 1947, pp. 269-270.

"We thought when we sent this case back that you would do one of two things; that you would either make an investigation and find the line-haul tariff (non) compensatory—you have got to—or put in a tariff for the line-haul and for the switching and you didn't do either."^{*}

The Commission's brief in any event fails to offer any reason why it did not avail itself of the opportunity afforded it by the Statutory Court, in its order of remand, to make an order under Section 6 (1) by merely requiring segregation in the tariffs of the line-haul charges and the terminal switching charges of the appellee carriers without any increase in the aggregate charges, instead of expressly basing its enjoined order of May 18, 1948, on Section 6 (7), and expressly requiring by that order in connection with the findings upon which it was made, that the appellee carriers publish terminal switching charges *in addition to the line-haul rates* for all terminal switching beyond the "plant yard" at Garfield and the "flat yard" at Leadville (R. 363; 374-375). It is notable, moreover, that the Commission's brief does not suggest that its enjoined order of May 18, 1948, can be construed as merely to require segregation in the tariffs of line-haul charges and terminal switching charges, without any increase in the aggregate rates.

The Commission's brief, however, pp. 126-127, does purport to offer an explanation for the failure of the Commission to hold any further hearing for the purpose of taking further evidence under the specific opportunity afforded by the Statutory Court in its remand of the pro-

^{*}See reporter's transcript of the hearing before the Statutory Court of October 18, 1948, pp. 95-98. Such transcript is of record before this Court, but is not printed in full because of its length.

ceedings to the Commission in connection with its temporary injunction of November 14, 1947 against the Commission's order of October 14, 1946.*

*Such opportunity was offered the Commission in the Conclusions of Law of the Statutory Court just preceding its formal order of remand (R. 300). The Statutory Court there said:

"CONCLUSIONS OF LAW

"(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, and that the cases should be returned to the Commission *for further proceedings upon the basis of evidence to be taken; or otherwise, upon a new theory* of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates ~~and plant service~~, such remand being justified by the recent holding of the Supreme Court laid down in *Securities & Exchange Commission vs. Chenery Corporation*, . . . U. S. . . . June 23, 1947 and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this Court." (Italics supplied)

Conceivably, this somewhat inartistic language of the Statutory Court might be construed to mean that the Commission, if it elected to proceed "upon a new theory of its inherent power", i.e., Section 6(1), to require the carriers to segregate in their tariffs their line-haul and terminal switching charges, might do so without further evidence. Such construction, however, would depend on the grammatical separation in the mandate of the words "evidence to be taken" from the words "upon a new theory", by the disjunctive phrase, "or otherwise". Such a construction, moreover, would have been an imprudent one on the part of the Commission, since the Commission must have known that whatever the Statutory Court said, the Commission could not legally proceed under Section 6(1), without invoking that Section and affording a hearing thereunder. In any event, whatever may be the proper construction of the mandate in this respect is a purely academic question, since, as will be seen, the Commission did not elect to proceed under Section 6(1), but elected in its enjoined order of May 18, 1948, still to proceed under Section 6(7).

Whether or not, as discussed in the footnote, the remand of the Statutory Court would have required a hearing under such remand, had the Commission based its new order under such remand on Section 6(1), by merely requiring the segregation of line-haul and switching charges without increase in the aggregate rates, the Court's remand clearly required a hearing should the Commission base its new order on Section 6(7) and require switching charges *in addition to the line-haul rates*, as the Commission expressly did in its enjoined order of May 18, 1948. This is beyond question, because the Statutory Court, in temporarily enjoining the Commission's prior order of October 14, 1946, which, like its order of May 18, 1948, was expressly based on Section 6(7), had expressly held that such prior order was without evidence to support it, since not only was there no evidence in the record to support the Commission's finding in connection with such prior order that the line-haul rates *did not include compensation* for the terminal services in question, but the sole evidence was to the contrary.

The attempted explanation, therefore, made in the Commission's brief, pp. 126-127, for its failure to hold any further hearing or take any further evidence before making its enjoined order of May 18, 1948, is almost incredibly naive. That brief, p. 127, quotes the Commission's attempted explanation in this respect in its report of May 18, 1948, *supra*, p. 366 (R. 373), where the Commission said:

"A further hearing would serve no purpose as the record contains a full and complete statement and description of all material facts appertaining to and the reasons for all services actually performed by respondents at each plant. This was impliedly con-

ceded by all parties as no request for a further hearing to introduce additional evidence was made."

There must be some limits to naivete, but apparently neither the Commission's report nor the Commission's brief recognizes any.

As has already been seen, the Commission, following the Statutory Court's temporary injunction and remand of November 14, 1947, without taking any appeal, proceeded, by its order of December 5, 1947 (R. 377) to vacate its order of October 14, 1946, and to reopen the proceedings before it

" * * * for reconsideration of the report and order entered October 14, 1946 *upon the present and existing record.*" (Italics supplied)

Under such an order, there was no reason why appellees should ask further hearing, and every reason why they shouldn't.

Unless the appellees were both mind-readers and sooth-sayers, they could not possibly know what the Commission intended to do upon such reconsideration "upon the present and existing record". In their wildest imagination, however, they never would have assumed that the Commission would again undertake to make an order under Section 6(7), without at least attempting, by further hearing, to offer evidence to rebut, what the Statutory Court had found to be "the sole evidence upon such *present and existing record*", that is, that the line-haul rates *do include compensation* for the terminal switching services in question, or to offer *affirmative* evidence that the line-haul rates *do not include* such compensation.

Furthermore, there was certainly no reason, even had appellees known that the Commission intended to make its new order under Section 6(7), why the appellees should have asked further hearing since "the present and existing record" was entirely satisfactory to them, particularly in view of the construction by the Statutory Court upon that record.

Indeed, appellees had no idea whatever what the Commission might do under such an extraordinary order. Had it occurred to the appellees that the Commission might, without further hearing and "upon the present and existing record" attempt to make an order under Section 6(1), there was still no reason why appellees should ask further hearing, since appellees knew, if the Commission did not, that the Commission could not make an order under Section 6(1) without expressly invoking that Section, and without a hearing under that Section. This would seem particularly clear in view of the Commission's repeated holdings in these proceedings that they are proceedings exclusively under Section 6(7): (See Report October 1, 1945, *supra*, p. 729 (R. 67); also Report October 14, 1946, *supra*, p. 358 (R. 40)). It seemed still more clear since this Court had affirmed the Commission's position in this respect in other cases, particularly in the *Staley Case*, *supra*, page 410.

Lastly, had the appellees, following the Commission's order of reopening of December 5, 1947, applied to the Commission for further hearing, the only reasonable assumption is that such further hearing would have been denied. This assumption would certainly be warranted by the Commission's *express disclaimer* in its report of May 18, 1948, *supra*, page 362 (R. 368), in connection with its order of the same date, *of the necessity of any finding what-*

ever as to whether the line-haul rates *do or do not include compensation* for the terminal switching services in question although that order was expressly based, as shown on page 368 of the Commission's report (R. 375) on a finding of violation of Section 6(7). It could hardly be supposed, therefore, that the Commission would have granted further hearing, even had appellees asked it, to supply further evidence on an issue which the majority of the Commission considered wholly irrelevant. Furthermore, there was no reason why the appellees should ask for it, since the record already contained uncontradicted evidence that the line-haul rates *did include compensation* for the terminal switching services in question.

IV.

THE COMMISSION IN ITS BASIC REPORT IN THESE PROCEEDINGS, EX PARTE 104, PART II, 209 I. C. C. 11, IN LAYING DOWN A GENERAL FORMULA FOR DETERMINING WHAT TERMINAL SWITCHING SERVICES ON INDUSTRIAL TRACKS ARE INCLUDED IN A CARRIER'S LINE-HAUL RATES, HAS ITSELF EXPRESSLY RECOGNIZED IN SUCH BASIC REPORT THAT THE LEGAL APPLICATION OF SUCH GENERAL FORMULA IS NECESSARILY LIMITED TO THE LINE-HAUL RATES WHICH DO NOT INCLUDE COMPENSATION FOR TERMINAL SWITCHING SERVICES IN EXCESS OF UNINTERRUPTED "SIMPLE SWITCHING OR TEAM-TRACK DELIVERY", AND THAT SUCH FORMULA CAN HAVE NO LEGAL APPLICATION TO LINE-HAUL RATES WHICH DO INCLUDE COMPENSATION FOR ADDITIONAL TERMINAL SWITCHING SERVICES.

The general formula which the Commission has laid down in its Basic Report in *Ex Parte 104, Part II, supra*, for determining what terminal switching service on indus-

trial tracks are included in a carrier's line-haul rates and may not be exceeded without violation of Section 6(7) of the Act without charges in addition to such line-haul rates, is nowhere concisely stated in any one place in that report. However, there is no disagreement as between the appellants and appellees as to what that formula in reality is, nor is there, as will be seen, any misapprehension upon the part of this Court in that respect.

Such formula imposes two conditions on the performance under a carrier's line-haul rates of the character there contemplated, of terminal switching services on industrial tracks:

First; that such terminal switching services shall not be in excess of "the equivalent of team-track or simple switch placement."

Second; that such terminal switching services shall be such as may be performed by the carrier "at its ordinary operating convenience * * * without interruption or interference by the desires of an industry or the disabilities of its plant."

The first part of such general formula appears in the Basic Report, p. 36, where in referring to certain rules adopted by the Central Freight Association, the Trunk Line Association and the New England Freight Association as set forth in Appendix A to the Basic Report, the Basic Report states:

"The first part of paragraph (3) 2 (c) of appendix A reads as follows:

"The Interstate Commerce Commission has held that switching services by a plant facility

for account of a carrier must not exceed the equivalent of team track or simple switch placement. If no unusual or marked difficulty of operation in a plant is presented, the service may be considered not in excess of a simple switch.'

This part of the paragraph is included in the formula used in western trunk-line territory, but the formula of the latter also contains the following sentence: 'Any service in addition to that shall be at the expense of the industry.' *This rule coincides with our conception of a carrier's duty with respect to the delivery and receipt of freight.* (Italics supplied)

The second part of the formula, which indeed includes the first, appears in the Basic Report, pp. 44-45, as follows:

"When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act."

For convenience, appellees have paraphrased this general formula at page 9 of this brief as providing that a

carrier may perform under its line-haul rates only such terminal switching services in the receipt and delivery of carload freight on industrial tracks *"as shall not be in excess of the equivalent of 'simple switching or team-track delivery', which can be performed at the carrier's ordinary operating convenience without interruption of movement by the industry."*

Appellees believe that this paraphrase of such general formula in the Basic Report will not be questioned by appellants. It is to be noted that elsewhere in this brief appellees for the sake of greater brevity have referred to the formula as limiting the terminal switching services which are included in a carrier's line-haul rates to such as shall not be in excess of "uninterrupted simple switching or team-track delivery."

Moreover, purely for the purposes of this appeal, this brief will assume that the terminal switching services essentially at issue in these proceedings, i.e. those rendered by the appellee carriers in connection with the delivery of inbound carloads of non-ferrous ores and concentrates at the Garfield and Leadville smelters of the appellee industry, *do exceed* "uninterrupted simple switching or team-track delivery."

What appellees will undertake to show here is what the Statutory Court has in terms found by its finding of fact (18) (R. 457-459) in connection with its permanent injunction here appealed from: This is, that the Basic Report itself expressly recognizes that the *legal application* of such general formula *is necessarily limited* to line-haul rates which *do not include compensation* for terminal switching services in excess of "uninterrupted simple switching or team-track delivery", and that such formula can have *no*

legal application to line-haul rates which do include compensation for terminal switching services in excess of "uninterrupted simple switching or team-track delivery."

In this connection appellees call attention to the fact that on page 44 of the Basic Report immediately preceding the statement of that report's general formula on that page and page 45, already quoted, that report states:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne." (Italics supplied)

It should, therefore, be clear from this statement alone in the Basic Report that the "service as here involved", to which the Commission in its Basic Report contemplated its general formula was to be applied, was a terminal switching service which the Commission's consideration of the record showed the line-haul rates had not been fixed to compensate for. Moreover, as will be further discussed and as likewise shown in finding of fact (18) of the Statutory Court, this Court in *United States v. Wabash Railroad Company* has expressly so construed the Commission's finding in its Basic Report.

However, the Basic Report prior to the quotation above made from page 44, had already, at pages 29, removed any

doubt as to its own view of the law in this respect. Under the section of the Basic Report entitled, p. 20, "DISCUSSION OF THE APPLICABLE LAW", the Commission said, p. 29:

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no further than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, *supra*. Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the act. *American Exp. Co. v. United States*, *supra*; *Louisville & N. R. Co. v. United States*, *supra*.

As previously stated, whatever transportation service or facility the carrier is required to supply it has a right to furnish. *Atchison, T. & S. F. Ry. Co. v. United States*, *supra*."

It is submitted that it would be impossible for the Commission to have made more clear its own recognition of the law or its own recognition that its general formula could have no legal application where "measured by the compensation received" the line-haul rates include compensation for terminal switching services in excess of "uninterrupted simple switching or team-track delivery."

Under the next point in this brief it will be shown that in every case in which this Court has sustained findings of the Commission that the carriers involved violated Section 6(7) of the Act by performing terminal switching services under their line-haul rates in excess of such "uninterrupted simple switching or team track delivery," without charges in addition to such line-haul rates, the record contains express findings by the Commission that the line-haul rates of such carriers *did not include compensation* for the terminal switching services which the Commission found to be in excess of "uninterrupted simple switching or team track delivery"; furthermore, that in every opinion which this Court has rendered in such cases, this Court in affirming the application of the Commission's general formula, has expressly recognized this fact.

It is, however, desired to point out here that because the records in the cases in which this Court has sustained prior orders of the Commission, based on the application under Section 6(7) of its general formula, did include express findings by the Commission in these respects, the attention of this Court, apparently, has never previously been called to the foregoing portions of the Basic Report in which the Commission itself recognized the legal limitations to the application of its general formula.

It will later be shown under Point VI of this brief that irrespective either of the recognition by the Commission, or of this Court, of the legal limitations on the application of the Commission's formula, it is self-evident that such general formula can afford no basis for a finding of a violation of Section 6(7), unless the line-haul rates *do not include compensation* for terminal switching services ren-

dered in excess of "uninterrupted simple switching or team track delivery".

What it is desired here particularly to emphasize, and what appellees trust this Court will clearly understand, is that neither this brief of the appellees nor the findings of the Statutory Court, in any way challenge the findings or conclusions of the Commission's Basic Report or the general formula there set forth. On the contrary, it is the appellees who accept *in full* the findings and conclusions of the Commission's Basic Report, and it is the appellants who seek to evade those findings and conclusions of that report, by suppressing all reference to those portions of that Report expressly recognizing the legal limitations inherent in, and intended by the Basic Report itself.

Furthermore, it can not be too clearly understood that since this brief assumes, for the purposes of this appeal, that the terminal switching services here principally involved, *i.e.*, those rendered by the appellee carriers upon inbound carloads of non-ferrous ores and concentrates at the smelters of the appellee industry, do exceed "uninterrupted simple switching or team track delivery", no question, therefore, is presented on this record which can involve an examination of the record underlying the Commission's Basic Report, to determine either what the Commission meant in that Basic Report by "uninterrupted simple switching or team track delivery", or whether the terminal switching services here in question are, or are not, in excess of those to which the Commission contemplated the application of its general formula.

V.

IN EVERY CASE IN WHICH THIS COURT HAS SUSTAINED PRIOR ORDERS OF THE COMMISSION, BASED ON THE APPLICATIONS OF THE GENERAL FORMULA IN ITS BASIC REPORT TO THE TERMINAL SWITCHING SERVICES OF OTHER CARRIERS AT OTHER INDUSTRIES, THE RECORD BEFORE THIS COURT HAS EXPRESSLY SHOWN THAT SUCH GENERAL FORMULA WAS APPLIED BY THE COMMISSION TO LINE-HAUL RATES WHICH *DID NOT INCLUDE COMPENSATION* FOR THE TERMINAL SWITCHING SERVICES THERE INVOLVED, AND THIS COURT HAS EXPRESSLY SO RECOGNIZED.

IN EVERY SUCH CASE, MOREOVER, THE COMMISSION IN FINDING THAT THE CARRIERS VIOLATED SECTION 6(7) OF THE ACT, BY RENDERING THE TERMINAL SWITCHING SERVICES IN QUESTION WITHOUT CHARGES IN ADDITION TO THE LINE-HAUL RATES, BASED SUCH FINDING UPON AN EXPRESS FINDING THAT THE LINE-HAUL RATES *DID NOT INCLUDE COMPENSATION* FOR TERMINAL SWITCHING SERVICES IN EXCESS OF "UNINTERRUPTED SIMPLE SWITCHING OR TEAM-TRACK DELIVERY".

It has already been noted in this brief, *ante* p. 5, that this Court in certain decisions there cited, has sustained all prior orders of the Commission which have come before this Court in prior supplemental proceedings under *Ex Parte 104, Part II* in which the Commission, upon the basis of the application of the general formula in its Basic Report to the terminal switching services rendered by other carriers of other industries, has found that such carriers violated Section 6(7) of the Act, either by rendering such terminal switching services under their line-haul rates without compensation in addition thereto, or by making allowances to

such industries for themselves performing such terminal services. For convenience of reference, however, such decisions of this Court are again cited in the subjoined footnote.*

This brief will show:

(a) That every such prior order of the Commission sustained by this Court was based on an express finding by the Commission that the line-haul rates *did not include compensation* for the terminal switching services there involved.

(b) That in every such case the Statutory Court in reviewing the Commission's order either found that there was evidence before the Commission to support the Commission's finding that the line-haul rates *did not include compensation* for the terminal switching services involved and sustained the Commission's order, or if the Statutory Court held there was no evidence to sustain such finding by the Commission and enjoined the Commission's order, the Commission and the United States appealed to this Court, and this Court thereupon sustained the Commission's order as based upon evidence justifying the Commission's finding.

(c) That in no case where a Statutory Court found that there was no evidence to sustain the Commission's finding that the line-haul rates *did not include compensation* for the terminal switching services in question,

**United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Company v. United States*, 301 U. S. 669; *A. O. Smith Corporation v. United States*, 301 U. S. 669; *United States v. Pan-American Petroleum Corporation*, 304 U. S. 150; *United States v. Wabash R. Co. (Staley case)*, 321 U. S. 403; *Corn Products Refining Company v. United States*, 331 U. S. 790.

did the Interstate Commerce Commission not only fail, as here, to appeal from the order of the Statutory Court based on such finding, but, as here, itself expressly repudiated such finding, and thereby, as here, render such finding of the Statutory Court *res adjudicata*.

(d) That in every case, except the *Corn Products* case, *supra*, what was involved were allowances paid by the carriers to the industries for the performance by the industries of terminal switching services, which the record showed had prior to such allowances been performed by the industries at their own expense, and there was not involved, as here, merely the performance by the carriers of terminal switching services which they had always performed under the compensation in their line-haul rates, and which the industry had never performed at all. Thus, the records in such other cases, unlike this case, afforded evidence to support the Commission's findings that the line-haul rates in such other cases *did not include compensation* for the terminal switching services for which allowances were paid.*

*These circumstances, it is to be noted, bring all the Commission's orders upon which this Court has previously passed, except in the *Corn Products* case, *supra*, precisely within the statement made by the Commission in its Basic Report (p. 44), already quoted, showing that the Commission contemplated the application of its general formula, there laid down, to line-haul rates which *do not include compensation* for terminal switching services in excess of those specified by such formula. The Commission's statement in this respect is here re-quoted:

"It is likewise urged that the line-haul rates be fixed to compensate the carrier for the performance of spotting service but our consideration of the service as here involved leads us to a different conclusion. Many of the industries

(c) That in all such allowance cases, moreover, the record shows that the industries, prior to such allowances, had always received cars from and delivered cars to the carriers at the points found by the Commission to be established "interchange tracks", and that the industries had never received cars from, or delivered cars to the carriers at points of unloading or loading on the industrial tracks beyond such "interchange tracks", but the industries had always performed all services between such "interchange tracks" and such points of unloading or loading at their own expense.

The record in this case, on the contrary, shows by uncontradicted testimony that the appellee industry has never delivered or received cars to and from appellee carriers, either at the "plant yard" at Garfield, or the "flat yard" at Leadville, that such points have never in fact been "interchange tracks" as between the appellee industry and the appellee carriers, and that all terminal switching services beyond such points have always been performed by the appellee carriers under the compensation in their line-haul rates, and have never been performed by the appellee industry. (See Finding of Fact 13 (R. 455, 456).)

Appellants, both in their joint jurisdictional statement and in their separate briefs, suppress all reference to these

which now receive allowances, for the performance by the carriers of the spotting services in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered, in such cases the carriers simply assumed a burden not previously borne."

highly relevant facts in connection with the prior decisions of this Court, which appellants presume to cite in support of their appeal. Indeed, appellants, both in their jurisdictional papers and in their briefs, have succeeded in misrepresenting both the nature of the Commission's orders upon which this Court passed in those decisions, and the grounds upon which this Court sustained such orders.

The appellants' tactics in these respects have been such that the only practical way to meet them, is not to attempt to follow them through their distortions of law and of fact in respect to such decisions, but to set out detailed proof in this brief of the facts here asserted as to those decisions.

Appellees regret the burden thus imposed upon this Court but the tactics of the appellants would seem to have made that burden unavoidable. In order, however, to lessen that burden as much as possible, appellees will confine the discussion in the body of this brief to the prior decisions of this Court itself, and will discuss the Commission's orders and findings relating thereto as well as the related orders of the respective Statutory Courts in Appendix C to this brief.

UNITED STATES v. AMERICAN SHEET & TIN PLATE CO., 301 U. S. 402.

In this decision this Court reversed the injunctions granted by a Statutory Court in the District Court of the United States for the Western District of Pennsylvania against the Commission's orders in six separate supplemental proceedings under *Ex Parte 104, Part II*,* and heard

*Footnote 3, page 405, of this Court's opinion tabulates the six supplemental proceedings there under review as follows:

and decided before the Court on a consolidated record. In so doing this Court said:

"The appellees are five industrial concerns affected by the orders. They contend that the spotting service in question is transportation within the meaning of the Interstate Commerce Act; that the performance of the service, or the payment of an allowance to an industry which itself performs it, is sanctioned by custom and practice and by previous adjudications of the Commission; and that line-haul rates were fixed in contemplation of the rendition of such service. They further charge the orders are void because not supported by the Commission's findings or the evidence." (p. 404)

* * * * *

"The Commission's report (209 I. C. C. 11) summarized its conclusions based on the evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers and numerous plants where such services were performed by the carrier. *The Commission found that line-haul rates had not been fixed to compensate the carriers for the performance of the serv-*

American Sheet & Tin Plate Co. Terminal Allowance, 209 I. C. C. 719;

Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273;

Pittsburgh Plate Glass Co. Terminal Allowance, 209 I. C. C. 467;

Weirton Steel Co. Terminal Allowance, 209 I. C. C. 445;

West Leechburg Steel Co. Terminal Allowance, 210 I. C. C. 213;

Pittsburgh Plate Glass Co. Terminal Allowance, 210 I. C. C. 527.

As already stated, these reports and orders of the Commission together with the decisions of the Statutory Court enjoining 15 F. Supp. 711 will be discussed in Appendix C to this brief.

ice in question and that the railroads, after fixing their rates, had assumed a burden not previously borne by them. * * * (p. 404)

* * * * *

"* * * Respecting § 6(7) they say that as, by that section and § 15(13) allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, *but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates.* * * *" (pp. 406, 407)

* * * * *

"The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. *Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed,* there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it." (p. 408)

It will be observed from the italicized portions of the above quotations from the opinion of this Court in the *American Sheet & Tin Plate* case, *supra*:

First: That at page 404 of that opinion, this Court expressly recognized that the line-haul rates as to which the Commission summarized its general conclusions in its Basic Report, 209 I. C. C. 11—i.e., referred to in this brief as its general formula—were line-haul rates which "*had not been fixed to compensate the carriers for the performance of the service in question.*"

Second: That at pages 406 and 407 of that opinion this Court expressly states that in the case of each report and order there under review by this Court (see preceding footnote), the Commission has found that the industry *performed no service beyond the "interchange tracks" for which the carrier is compensated under its interstate line-haul rates.*

Third: At page 408 of such opinion this Court expressly recognizes that the Commission's power in the cases there under review to enjoin the performance of them, is based on the Commission's finding that "*spotting within the plants is not included in the service for which the line-haul rates were fixed.*"

GOODMAN LUMBER CO. v. UNITED STATES, 301 U. S. 669;

A. O. SMITH CORP. v. UNITED STATES, 301 U. S. 669.

This Court in deciding the above cases rendered no formal opinions. It merely affirmed in *per curiam* memoran-

dum opinions, on the authority of its prior decision in the *American Sheet & Tin Plate* case, *supra*, the judgments of the respective Statutory Courts. These judgments had, without reported opinions, sustained the Commission's orders, respectively, in *Goodman Lumber Co. Terminal Allowances*, 214 I. C. C. 89, and *A. O. Smith Corp. Terminal Allowances*, 215 I. C. C. 534.

In Appendix C it will be shown that the Commission in both such reports had expressly found that the line-haul rates *did not include compensation* for the spotting services beyond the "inter-change tracks", which the respective industries performed under allowances from the respondent carriers; further, that in both cases, prior to such allowances, the industries had always performed such spotting services beyond the "inter-change tracks" at their own expense.

UNITED STATES v. PAN-AMERICAN PETROLEUM CORPORATION, *ET AL.*, 304 U. S. 150.

In this decision this Court reversed an injunction granted by a Statutory Court in the United States District Court for the Southern District of Texas, 18 F. Supp. 624, against orders of the Interstate Commerce Commission in nine separate supplemental proceedings under *Ex Parte 104, Part II*.*

*Footnote 3 to page 157 of this Court's opinion tabulates these nine supplemental proceedings there under review as follows:

Mexican Petroleum Corp. Terminal Allowance, 209 I. C. C. 394;

Celotex Co. Terminal Allowance, 209 I. C. C. 764;

Great Southern Lumber Co.—Bogalusa Paper Co. Terminal Allowance, 209 I. C. C. 793;

Standard Oil Co. Terminal Allowance, 209 I. C. C. 68;

Humble Oil & Ref. Co. Terminal Allowance, 209 I. C. C. 727;

(Continued p. 59)

In so doing, the opinion of this Court stated:

"The Commission held that, in the circumstances disclosed at each of the plants under consideration, the carriers' obligation of delivery was fulfilled by placing or receiving cars on interchange tracks and that the moving and spotting of cars in the industries' plants *formed no part of the service covered by the line-haul rate.*" (p. 157)

* * * * *

"The appellees charged that the Commission's findings and orders were not supported by substantial evidence. The District Court held with them upon this point. *We have examined the record and are of opinion that in each case there is substantial evidence to support the Commission's findings.*"

It will be shown in Appendix C that the Commission's findings and orders tabulated in the footnote show in every case a finding that the line-haul rates *did not include compensation* for the terminal services beyond the established "interchange tracks", for which the carriers made the allowances in question. Such reports show, moreover, in every case that, prior to the granting of such allowances, *the industries had performed all terminal services beyond the established "interchange tracks" at their own expense.*

UNITED STATES v. WABASH RAILROAD CO.
(Staley case), 321 U. S. 403.

In this decision this Court reversed an injunction granted by the District Court of the United States for the

Magnolia Petroleum Co. Terminal Allowance, 209 I. C. C. 93;

Texas Co. Terminal Allowance, 209 I. C. C. 767;

Gulf Ref. Co. Terminal Allowance, 209 I. C. C. 756;

Texas Co. Terminal Allowance, 213 I. C. C. 583.

Southern District of Illinois, 51 F. Supp. 141, against an order of the Interstate Commerce Commission in a supplemental proceeding under *Ex Parte 104, Part II*, in which the Commission had made two reports, *A. E. Staley Manufacturing Co. Terminal Allowance*, 215 I. C. C. 656, and 245 I. C. C. 383.

In so doing, the opinion of this Court stated:

"In *Ex parte 104*, the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. *After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, or the payment to the industries of allowances for its performance by them, is in violation of § 6 (7) of the Act.*" (p. 406).

* * * * *

"In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by

evidence. United States v. American Sheet & Tin Plate Co. supra (301 US 408, 81 L. ed. 1191, 57 S. Ct. 804); United States v. Pan American Petroleum Corp. supra (304 US 158, 82 L. ed. 1264, 58 S. Ct. 771); Interstate Commerce Commissions v. Hoboken Mfrs.' R. Co. 320 US 368, 378, ante. 107, 113, 64 S. Ct. 159, and cases cited." (p. 408)

* * * * *

"Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in Ex parte 104, are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks and the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here." (pp. 409-10)

* * * * *

"Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack. Their contention, upheld by the court below, is that the Commission's order cannot be supported merely by the circumstances disclosed by the evidence respecting the operations at the Staley plant, but that its validity must turn upon a comparison of the conditions at the Staley plant with those at competing plants. They urge farther, and the District Court so held, that, as it appears from the

record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley, contrary to §§ 2 and 3 (1).

"This argument ignores the nature of the present proceeding which is to enforce § 6(7), not §§ 2 and 3 (1). *Section 6 (7) prohibits departures from the filed tariffs and it is violated, as the Commission has pointed out, when carriers pay the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge.*" (p. 410)

* * * * *

"The Commission's decision here, and its finding of a 'preferential service,' are not based and do not depend on a comparison of conditions at the Staley plant with those obtaining at others. By its fifth finding the Commission found that the spotting service rendered at the Staley plant was a service 'in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks or industrial sidings and spurs,' and hence in excess of that provided for by the tariff rates. It concluded in its third conclusion of law that the performance of this service without charge would result in receipt by the Staley Company of 'a preferential service not accorded to shippers generally,' and hence would result in a prohibited refunding or remitting of a portion of the filed tariff rates.

"The Commission, after pointing out that evidence was introduced showing that spotting is performed without charge at various plants, some of which compete with the Staley Company, also found. 'The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially

similar to those at the Staley plant. If it did it would only show the probability of existence of unlawful practices at such plants and the need for investigation in connection therewith." The District Court relied solely on this evidence to support its conclusion of lack of evidentiary support for the Commission's finding of a 'preferential service not accorded to shippers generally' and to support its own finding that under the present order Staley is being discriminated against. For this reason it concluded that the Commission's order must be set aside.

"We think that this is a mistaken interpretation of the Commission's findings and misapprehends their legal effect. If the Commission's reference, in its conclusion of law, to 'a preferential service not accorded to shippers generally' means more than the statement in the fifth finding of fact that the service is 'in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks,' it is obviously irrelevant to the present proceeding. For it could not serve to foreclose the legal conclusion to be drawn from the fifth finding *that the free performance of the spotting service at the Staley plant is in violation of § 6 (7) because of the traffic conditions found to prevail there.*" (pp. 411-412).

* * * * *

"As the Commission and this Court have pointed out, a preference or rebate is the necessary result of every violation of § 6 (7) where the carrier renders or pays for a service not covered by the prescribed tariffs. *Davis v. Cornwell*, 264 U. S. 560, 562, 68 L. ed. 848, 850, 44 S. Ct. 410." (pp. 413-414)

It will be observed from the italicized portion here quoted from page 406 of the opinion of this Court in the

Staley case, *supra*, that this Court again expressly recognizes, as it had recognized in the *American Sheet & Tin Plate* case, *supra*, that the general conclusions of the Commission's Basic Report in *Ex Parte 104, Part II*, 209 I. C. C. 11, were directed to terminal services performed at industries where the Commission had found

"* * * that the freight rates *had not been so fixed as to compensate* the carriers for such service * * *"
(italics supplied)

It will further be seen from the portion above quoted from page 408 of this Court's opinion in the *Staley* case that, while this Court expressly recognized

"* * * that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not by the courts * * *,"

this Court implicitly recognized that the Commission's findings on such questions may be set aside by the Courts *if not supported by evidence*.

It is particularly to be noted from the two foregoing quotations from pages 409 and 410 of the opinion of this Court, that this Court there states that, aside from certain contentions of the *Staley* Company, based on a purely *formal* change of control of the interchange tracks by lease from that company to the Wabash Railroad, *executed subsequent to the Commission's report in Ex Parte 104*, which contentions this Court held irrelevant, that,

"Appellees make no other serious contention of want of evidentiary support of the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court so found."

The remainder of the decision of this Court in the *Staley* case above quoted shows (p. 410) that the real contention of the *Staley* Company upheld by the District Court was

"* * * that, as it appears from the record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against *Staley* contrary to Sections 2 and 3 (1)."

This Court held, however, that this argument ignored the fact that the proceedings under *Ex Parte 104, Part II*, were to enforce Section 6 (7) and not Sections 2 and 3 (1).

In Appendix C it will be shown that both in the Commission's original report in the *Staley* case, and in its report on further hearing, the Commission expressly found that the line-haul rates *did not include compensation* for the terminal switching services beyond the "inter-change tracks" there involved, for the performance of which services by the *Staley* Company the respondent carriers paid that Company the allowances in question.

CORN PRODUCTS REFINING CO. v. UNITED STATES, 331 U. S. 790.

This Court rendered no formal opinion in the above case. By a *per curiam* memorandum it sustained, on the authority of the prior decisions of this Court in the *American Sheet & Tin Plate* case, *supra*, and the *Staley* case, *supra*, a motion by the appellees to affirm the judgment of the Statutory Court, 69 F. Supp. 869. That judgment had sustained the orders of the Interstate Commerce Commission in *Corn Products Refining Co. Terminal Services*, 262 I. C. C. 57 and 266 I. C. C. 181.

In Appendix C it will be shown that the Statutory Court in its Conclusion of Law No. 9, expressly recognized that the Commission had found that the spotting service which the there respondent carriers performed within the Corn Products plant, *was not included in the service for which the line-haul rates were fixed*, and that the Statutory Court held that there was substantial evidence to support such finding by the Commission.

It will also there be shown that on appeal to this Court, the Corn Products Company *assumed that the general formula in the Commission's Basic Report applied even if the line-haul rates included compensation for terminal switching services in excess of "uninterrupted simple switching or team track delivery."*

VI.

ALTHOUGH SECTION 6(7) OF THE ACT MAY BE VIOLATED BY THE PERFORMANCE OF TERMINAL SWITCHING SERVICES WITHOUT COMPENSATION IN ADDITION TO THE LINE-HAUL RATES, EVEN THOUGH THE TARIFFS SPECIFICALLY PROVIDE THAT THE PERFORMANCE OF SUCH TERMINAL SWITCHING SERVICES IS INCLUDED UNDER THE LINE-HAUL RATES, THERE CAN BE SUCH VIOLATION ONLY IF THE LINE-HAUL RATES DO NOT INCLUDE COMPENSATION FOR SUCH TERMINAL SWITCHING SERVICES, AND THERE CAN BE NO VIOLATION IF THE LINE-HAUL RATES ALREADY INCLUDE SUCH COMPENSATION.

Section 6(7) of the Act is quoted verbatim pp. a-1 and a-2 of Appendix A to this brief. As is there shown, that Section, after providing that no carrier shall engage in transportation unless its rates, fares and charges have been filed and published, then provides:

"* * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariff."

If it were a matter of first impression, it might be assumed from a literal reading of that Section, that whatever other sections of the Act might be violated, Section 6(7) of the Act could not be violated, by the *compliance* of a carrier with the provisions of its published tariffs, no matter what such provisions might be, but could only be violated by a *departure* from such provisions.

Accordingly, it might be assumed that Section 6(7) of the Act would not be violated by the *compliance* of a carrier with the express provisions of its tariffs, either by performing terminal switching services which its tariff specified as included in its line-haul rates, or by paying an industry an allowance provided in such tariffs for performance of such terminal switching services by the industry, *even though its line-haul rates did not include compensation* for such terminal switching services.

This question, however, is no longer a matter of first impression. The decisions of this Court, already referred to, in the *American Sheet and Tin Plate* case, *supra*, in the *Pan-American Petroleum* case, *supra*, and in the *Staley*

case, *supra*,* make clear that a carrier can violate Section 6(7), even by compliance with its tariffs, if such compliance in fact results, as found in the *Staley* case, in affording an industry "a preferential service not accorded to shippers generally", and, therefore, results in "a prohibited refunding or remitting of a portion of the tariff rates."

It has just been shown, however, under Point V of this brief, that in all prior decisions of this Court, where this Court has sustained orders of the Commission, based on such violations of Section 6(7), the record before this Court has shown findings by the Commission, supported by adequate evidence, that the line-haul rates *did not include compensation* for the terminal switching services there in question.

Moreover, in all the prior decisions of this Court referred to under Point V of this brief, except in the *Corn Products* case, *supra*, the tariffs expressly provided for the allowances paid to the industries, but in all such cases, as just noted, the record showed that the line-haul rates *did not include compensation* for the terminal switching services covered by such allowances.

The *Corn Products* case, *supra*, as there shown, was not an allowance case, but was a case where the carriers themselves performed the terminal switching services in question. The record there showed, however, that the tariffs did not expressly provide for the performance of such terminal switching services under the line-haul rates, and showed, moreover, as found by the Statutory Court, that the line-haul rates *did not include compensation* for such terminal switching services.

*See also *Baltimore & Ohio R. Co. v. United States*, 305 U. S.

Appellees, therefore, submit that from the prior decisions of this Court, it must be clear that where a carrier's performance of such services is in compliance with the express provisions of the carrier's tariffs, Section 6(7) can be violated only if the line-haul rates *do not include compensation* for the performance of such terminal switching services.

It would seem self-evident that if the line-haul rates do include compensation for the performance of such terminal switching services, there can be no violation of Section 6(7) since there can be no preferential service to the industry in question "not accorded to shippers generally", since the industry, in paying the line-haul rate, pays full compensation to the carrier for both the line-haul service and the terminal switching service. For the same reason, there can be no "prohibited refunding or remitting of a portion of the tariff rates".

The only difference between the treatment by the carrier of such an industry and of other industries, is that the carrier, by publishing in its line-haul rates aggregate charges for the combined line-haul and terminal switching services, requires the industry in question to pay full compensation for both services in the line-haul rates, while other industries are required to pay the same relative aggregate compensation, segregated as between line haul and terminal switching services. If any correction of such a situation is necessary, the Commission has jurisdiction to correct it under Section 6(1), by merely requiring the segregation in the tariffs of the charges for the line-haul service from the charges for the terminal switching services.

Whether or not the line-haul rates *include compensation* for the terminal switching service is clearly determina-

tive, both in law and in common sense, of whether the Commission can require the carriers to collect and the industry to pay charges in addition to the line-haul rates for such terminal services. If the line-haul rates already *include compensation* for such terminal services, neither under Section 6(7), or any other section of the Act, can the Commission compel the carriers to collect, and the industry to pay charges in addition to the line-haul rates for such switching services. To do so would be to compel the carriers to collect, and the industry to pay twice for the same services, which would plainly violate, among other things, Section 1(5)(a) of the Act.*

On the other hand, if the line-haul rates *do not include compensation* for the terminal switching services, the Commission can under Section 6(7); *upon so finding and with evidence to support such finding*, require the carriers to collect and the industry to pay, charges in addition to the line-haul rates, which will be reasonably compensatory for such switching services.

VII.

THE RECORD FULLY SUSTAINS FINDINGS OF FACT 13 AND 14 OF THE STATUTORY COURT (R. 455-456), WHICH ARE IN SUBSTANCE:

(A) THAT THERE WAS NO EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE CONSTITUTE REASONABLY CONVENIENT POINTS FOR DELIVERY TO AND RECEIPT FROM THE

*Section 1(5)(a) is set out verbatim in Appendix A, to this brief.

RESPECTIVE SMELTERS OF CARLOAD FREIGHT BY THE APPELLEE CARRIERS.

(B) THAT ON THE CONTRARY, THE ONLY EVIDENCE BEFORE THE COMMISSION WAS THAT SUCH CARRIERS, IN ACCORDANCE WITH THEIR PUBLISHED TARIFFS, HAVE FOR APPROXIMATELY FIFTY YEARS DELIVERED AND RECEIVED CARLOAD FREIGHT AT ACTUAL POINTS OF LOADING AND UNLOADING AT THE RESPECTIVE SMELTERS, AND HAVE NEVER DELIVERED OR RECEIVED CARLOAD FREIGHT AT THE POINTS DESIGNATED BY THE COMMISSION.

(C) THAT THERE WAS NO EVIDENCE BEFORE THE COMMISSION TO SUPPORT ITS FINDINGS THAT THE TRACKS AT SUCH DESIGNATED POINTS CONSTITUTE THE INDUSTRIAL TRACKS OF THE APPELLEE INDUSTRY.

(D) THAT ON THE CONTRARY, THE ONLY EVIDENCE BEFORE THE COMMISSION WAS THAT THE TRACKS AT SUCH DESIGNATED POINTS CONSTITUTE THE ONLY AVAILABLE RAILROAD TERMINAL FACILITIES OF THE APPELLEE CARRIERS FOR THEIR ORDINARY RAILROAD TERMINAL HANDLING OF CARLOAD FREIGHT TO AND FROM SUCH SMELTERS.

The testimony of Mr. Moriarty, Superintendent of the Salt Lake Division of the D. & R. G. (R. 883-900) and the testimony of Mr. Dangerfield, Weighmaster of the appellee's Garfield smelter (R. 1023-1025), shows that the so-called "plant yard" at Garfield consists of ten parallel tracks, Nos. 1 to 10 inclusive, and two additional tracks known as No. 1 rip track and No. 2 rip track; that these ten tracks in reality constitute the joint railroad terminals of the three carriers who served the Garfield plant at the time of the hearing, these being the D. & R. G., the Union Pacific and

the Bingham & Garfield;* that the principal use of such tracks is to break up the inbound road-haul trains and to make up the outbound road-haul trains of the respective carriers, and hold outbound loads and empties for the making up into such trains and inbound loads and empties for spotting the industry; that, in addition, a portion of track No. 9 and the two so-called "rip tracks" are used by the appellee carriers either as repair tracks or as storage tracks for their bad order cars, and that adjacent to each of these tracks each of the appellee carriers maintain its own repair shop.

Mr. Moriarty specifically testified (R. 898) that none of the three carriers had any other terminals in the vicinity of the Garfield smelters at which they could perform their ordinary railroad terminal services, and that on account of the terrain could not have any such terminal yards in the vicinity of Garfield.

Mr. Moriarty having testified that the road-haul engines of the respective carriers cut off from, and coupled on to their road-haul trains at these tracks; after the switching engine of the D. & R. G. had made up or broken up their road-haul trains on such tracks, was questioned (R. 902) as to whether, even if the Railroad Brotherhoods would permit the carriers to use their road-haul engines for making up and breaking up their road-haul trains, and for weighing and

*The Commission between the time the Statutory Court granted its temporary injunction on November 14, 1947, and the time when the Statutory Court granted its permanent injunction on January 10, 1948, permitted the Bingham & Garfield to abandon its operations as a common carrier, and a portion of such operations, including those at Garfield, have been taken over by the appellee D. & R. G. (R. 519, 520).

spotting of cars, etc., it would be practical for such carriers to do so. He answered:

"A. No. That is evident, that we don't do it in our own terminals, and this switching at Garfield, your weighing and all that stuff, and lining all the cars for spotting at various points and various sequence wanted is very similar to any industrial switching at any large city where your cuts must be made up in the order in which they are going to be spotted, etc., and so on, in advance of the spotting engine's arrival, to working. This is practically the same as that. The only difference is this is one industry and the other may be twenty or thirty industries.

Q. In other words, Mr. Moriarty, it happens there are no other industries out here to use those joint facilities used by the three railroads?

A. That is right.

Q. But that is no different than any joint terminal, any joint railroads may maintain in any terminal district?

A. Or you might say a terminal used by any other railroad."

Moreover, the Commission's witness, Mr. MacDonald, testified in these respects as follows (R. 928):

"Examiner Way: Now, these tracks at the bottom of the map here, which you have just referred to, the ten storage tracks, those were the ones that were designated the receiving yard, and they are the storage tracks?

Mr. MacDonald: Been designated as a receiving yard, joint railroad terminal and the storage yard. That might possibly be referred to as the interchange yard somewhere in our reports."

Mr. Finerty: *But if so, Mr. MacDonald, it would be interchange between the three railroads?*

Mr. MacDonald: *That, of course, would be the reason for calling it interchange."*

The real nature of the so-called "flat yard" at Leadville is shown in the testimony of Mr. Moriarty (R. 1081-1094), Mr. MacDonald (R. 1103-1105) and the testimony of Mr. Hennebach, Superintendent of the Leadville smelter, (R. 1114, 1124-1126, 1130).

It there appears that the so-called "flat yard" consists of seven tracks designated as such on Exhibit 32. It appears, however, that these tracks while located on the smelter property are, unlike the "plant yard" at Garfield, owned and maintained by the appellee D. & R. G. It further appears that a portion of the main line of that appellee carrier between Leadville and Malta, as well as a portion of its Ore & Chemical Company spur, are also located on the smelter property.

It further appears that the "flat yard" tracks are not only owned and maintained by the D. & R. G., but that they are used by that appellee carrier for the handling of inbound and outbound cars for independent shippers and consignees, including those of the Ore & Chemical Company, the Resurrection Mill, and of independent shippers of ore and scrap iron.

It also appears that such tracks are the point at which the road-haul engines of the D. & R. G. cut off and couple on from its road-haul trains, and are used for the storage of empty and loaded cars inbound and outbound, both of the smelter and of such independent shippers.

As shown in Appendix B, by the uncontradicted testimony of Mr. Williams and Mr. Carey, the appellee carriers

have never received or delivered cars to the appellee industry at either the "plant yard" at Garfield or the "flat yard" at Leadville, but since the inception of the traffic have always received or delivered cars to and from the appellee industry at the points of actual loading or unloading on the smelter tracks beyond such "plant yard" or "flat yard". It further appears from the testimony of Mr. Williams and Mr. Carey that since 1908 the tariffs of the appellee carriers have always specifically provided for receipt and delivery at the actual point of loading or unloading on the tracks of the respective smelters.

Once again the Commission did not challenge the foregoing testimony either by cross examination or by rebuttal testimony, and there is no testimony contrary to the foregoing anywhere in the record.

It would seem too obvious to need further argument that, as the Statutory Court has expressly held, the Commission's findings (R. 374) that the "plant yard" at Garfield and the "flat yard" at Leadville are "reasonably convenient points for the delivery and receipt of carload traffic moving to and from the smelters of the appellee industry", are without any evidence to support them, and that the only evidence of record is that such points constitute, on the contrary, the only available terminal yards of the appellee carriers.

It must further be apparent that the "plant yard" at Garfield and the "flat yard" at Leadville are neither factually or legally comparable to the so-called "interchange tracks", which the Commission had held to be convenient points for the receipt and delivery of carload shipments to and from the respective industries, involved in the prior orders of the Commission which this Court has affirmed in its decisions discussed under Point V of this brief.

What is vitally important, however, in these findings of the Commission that the "plant yard" at Garfield and the "flat yard" at Leadville are reasonably convenient points for the delivery and receipt of carload traffic to and from the smelters of the appellee industry, is that, under the Commission's order requiring the appellee carriers to cease and desist from performing any terminal switching services beyond such points without compensation in addition to the line-haul rates, the appellee industry is, thereby, deprived even of the equivalent "of simple switching or team track delivery" under such line-haul rates, which is a direct violation of the Commission's own general formula in its Basic Report.

VIII.

THE SUGGESTION IN THE COMMISSION'S BRIEF, pp. 77-79, THAT THE RECORD UPON WHICH THE STATUTORY COURT BASED ITS ORDER OF INJUNCTION APPEALED FROM, IS INSUFFICIENT BECAUSE IT DOES NOT CONTAIN THE RECORD UNDERLYING THE COMMISSION'S BASIC REPORT IN EX PARTE 104, PART II, REPRESENTS EITHER A BREACH OF FAITH WITH THE STATUTORY COURT AND THE APPELLEES OR, AS APPELLEES PREFER TO BELIEVE, A MISUNDERSTANDING BY THE COMMISSION OF THE ISSUES INVOLVED ON THIS APPEAL.

In order to avoid any such question as arose in the *Corn Products* case, 59 F. Supp. 807 (affirmed on motion, 331 U. S. 790), as to whether it was necessary in passing on the validity of a supplemental order of the Commission under *Ex Parte 104, Part II*, for the Statutory Court, and ultimately for this Court, to have before it the entire record

in *Ex Parte 104, Part II*, upon which the Commission made its Basic Report, appellees took the following precautions:

Mr. Finerty, acting as counsel for all appellees before the Statutory Court, on the hearing before that Court of July 14, 1947, resulting in that Court's earlier temporary injunction of November 14, 1947, raised the question (R. 499-502) whether counsel for the Interstate Commerce Commission and for the United States would agree that, under the issues presented by the appellees before the Statutory Court, it would be unnecessary for that Court to have before it the original record before the Commission underlying its Basic Report. As there appears (R. 500-501), that record as printed and filed with this Court in *United States v. American Sheet and Tin Plate Co.*, *supra*, consists of over 15,000 printed pages, and cost \$35,000 to print. In the course of that discussion, Mr. Finerty stated (R. 500):

"Mr. Finerty: I want to state, to make my position entirely clear, that I concede the conclusions in the general report—what we call the basic report—209 I. C. C. 11, as to the customary and reasonable terminal switching services included in the line-haul rates are not challenged here so far as they apply to the facts stated in the basic report, and I will, of course, attempt to distinguish those facts from the facts here * * *."

The discussion then terminated as follows (R. 501-502):

"Judge Phillips: I think it is perfectly clear that Mr. Finerty accepts the report and starts his case with the supplemental hearings, and so long as that position obtains there is no reason why we should have this other. If there develops in the case any reason why we must have it or should consider it

here, we can have it. That question can-(not) be raised on the face of what is now presented. I see no reason for it.

"Mr. Dumbauld: I may say in the Hanna Furnace Company case I think they did present the entire original record, as well as the supplemental record. It has been done, but I agree if counsel takes the position that he is not challenging the basic record, it is entirely unnecessary to burden the Court with it at this time.

"Mr. Crenshaw: I am quite sure from my experience in the Corn Products case that it is not necessary to have that record here. We are not insisting upon it. I have tried the Wabash case, 321 U. S., and the Corn Products case; I tried them both. We didn't have that general record in either one. The effect of the ruling in the Corn Products case was to say that (it) is no more needed in that case because the law and the facts have already been decided by the Supreme Court. So this Court in this case doesn't need to be concerned with it.

"Judge Phillips: I think that is right."

Upon the hearing before the Statutory Court of October 18, 1948, resulting in the permanent injunction of that Court of January 10, 1949, here appealed from, it was expressly stipulated (R. 517, 518) that the entire record in the prior hearing before the Statutory Court of July 14, 1947, resulting in the earlier temporary injunction order of that Court, should be incorporated as part of the record in the hearing upon such permanent injunction. Appellees, and obviously the Statutory Court, assumed that thereby the stipulation in the prior hearing on the temporary injunction, that it was unnecessary to have before the Court the record underlying the Commission's Basic Report, carried over to

the subsequent hearing on the permanent injunction here involved. No indication to the contrary was at any time subsequently given during that hearing by counsel for appellants, nor was any such question raised by them in their suggested Findings of Fact and Conclusions of Law which they requested (R. 446-448), or in their objections to the Findings of Fact and Conclusions of Law submitted by appellees, and ultimately made by the Court. Appellants first raised any question in this respect in their Assignments of Error filed in the District Court, March 7, 1949, coincident with the filing of their petition for the allowance of this appeal to this Court (R. 466-468). It was there raised by appellants' Assignment of Error No. 9 (R. 467), as follows:

"9. In finding that the record before the court included the entire evidence before the Commission in the proceedings before it, when in fact the record before the Commission in *Ex Parte No. 104* upon which its basic report, 209 I. C. C. 11, was based, was not put in evidence before the court, but merely the records made in supplemental proceedings relating to the operating practices at plaintiffs' respective plants."

No such question in this respect was raised, however, by appellants' jurisdictional statement, nor is any such question specifically raised in their "Statements of Points to be relied upon", filed in purported compliance with Paragraph 9 of Rule 13 of this Court, but which in reality consists of a mere blanket statement reading:

"Come now the appellants and say that they will rely in brief and oral argument before this court on the points made in their assignments of errors on their appeal in the above-entitled causes."

Finally, no such question is presented in the brief filed by the United States on this appeal, but is raised solely in the brief of the Interstate Commerce Commission.

Appellees prefer to believe that what otherwise must thus appear to be a breach of faith not only toward appellees but toward the Statutory Court, in the raising of this question by the Commission on this appeal, is in reality accounted for by some misapprehension on the part of counsel for the Commission that either the Findings of Fact and Conclusions of Law of the Statutory Court in connection with its permanent injunction here appealed from, or the contentions of appellees on this appeal, in some way involve an attack upon the findings and conclusions of the Commission in its Basic Report. The express concession, heretofore made by the appellees, that for the purposes of this appeal it may be assumed that the terminal switching services performed by the appellee carriers at the smelters of the appellee industry are in excess of "uninterrupted simple switching or team-track delivery", it is hoped will remove any misapprehension of counsel for the Commission in this respect. Appellees here desire to emphasize that nothing in the order of the Statutory Court, or in the Findings of Fact and Conclusions of Law on which that order was based, or in the contentions of appellees on this appeal, involves any question as to whether the record before the Commission, on which it founded its Basic Report, was sufficient to sustain the Commission's Findings and Conclusions in such Basic Report, and therefore that such record would be entirely irrelevant and superfluous on this appeal.

Conclusion

In conclusion, it would seem superfluous to point out more than the following:

(1) That appellees resorted to the courts only after they had failed to get, despite exhaustive efforts, any real consideration by the majority of the Commission, either of the uncontradicted and unchallenged evidence of record that the line-haul rates of the appellee carriers *include compensation for all* terminal switching services here involved at the smelters of the appellee industry, or of the legal effect of such evidence.

(2) That thereupon the Statutory Court found that there was no evidence to support the Commission's findings that such line-haul rates *do not include compensation* for the terminal switching services in question, but that the sole evidence was to the contrary.

(3) That the Statutory Court, over the protests of appellees, thereupon granted in the first instance only a temporary, instead of a permanent injunction, against the order of the Commission of October 14, 1946.

(4) That moreover, in so doing, the Statutory Court remanded the proceedings to the Commission for the expressed purpose of affording the Commission an opportunity, either (a) to show by further hearings that the line-haul rates *do not include compensation* for such terminal switching services and thereby to justify an order under Section 6(7), requiring charges *in addition to the*

line-haul rates for such services, or (b) to make a new order under Section 6(1), merely requiring the segregation in the tariffs of the line-haul charges from the terminal switching charges, *without any increase in the aggregate rates.*

(5) That the Commission took no appeal from such order and mandate of the Statutory Court. Instead it set aside its temporarily enjoined order of October 14, 1946, and reopened the proceedings before it for "reconsideration *on the present and existing record.*"

(6) That, thereupon, the Commission made its here enjoined order of May 18, 1948, without adopting either of the alternatives afforded it by the prior mandate of the Statutory Court. Instead, without further hearing, it *expressly repudiated* its former finding that the line-haul rates *do not include compensation* for such terminal switching services, and expressly undertook to make its new order without any finding whatever in this respect.

(7) That such order, in connection with the finding upon which it is made, purports to require, under Section 6(7), that the appellee carriers make charges *in addition to the line-haul rates* for all terminal switching services at the smelters of the appellee industry, though it now has become *res adjudicata* on this record, and the Statutory Court has expressly so found, that such line-haul rates *already include compensation* for all such terminal switching services.

Appellees, therefore, respectfully submit that this Court should affirm the judgment and order of the Statutory Court,

here appealed from, since otherwise on this record, under the Commission's enjoined order, appellee carriers would be required to collect, and appellee industry required to pay, twice for the same services.

Respectfully submitted,

OTIS J. GIBSON,

ELMER B. COLLINS,

JOHN F. FINERTY,

Counsel for Appellees.

VI

Se

Se

S

APPENDIX A

VERBATIM QUOTATIONS OF PERTINENT PROVISIONS OF INTERSTATE COMMERCE ACT REFERRED TO IN THIS BRIEF.

1(5)(a):

"(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

6(1):

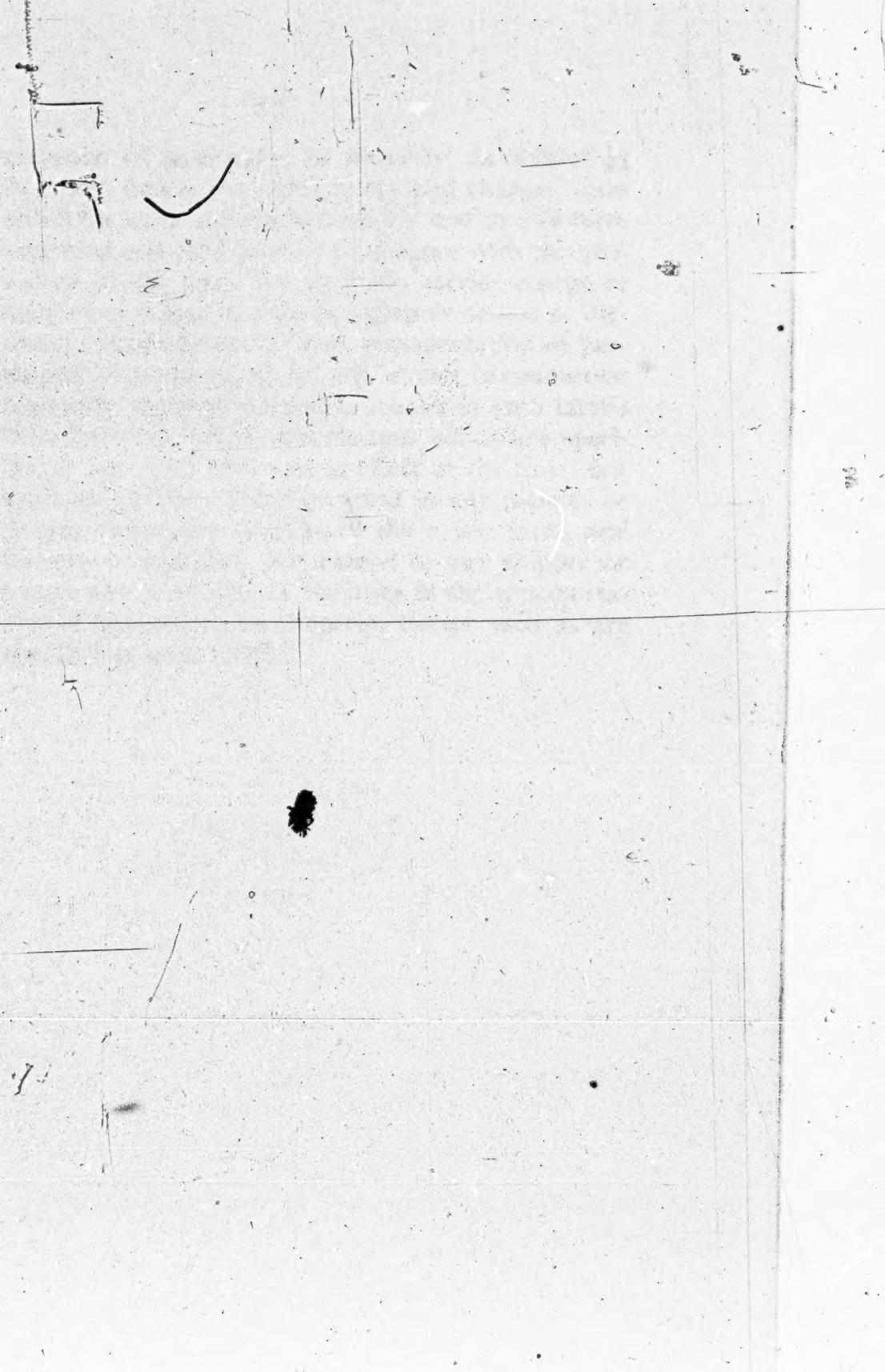
"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * *

The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, *and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require * * **. (Italics supplied.)

c. 6(7):

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the trans-

portation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff."



APPENDIX B

ABSTRACT OF TESTIMONY OF MR. WILLIAMS
AT HEARING OF MAY 19, 1932, AND OF MR.
CAREY AND MR. TUCKWOOD AT HEARING OF
MAY 26 AND 27, 1944.

Abstract of testimony at hearing of May 19, 1932, of Mr. George Williams, then Traffic Manager of appellee, D. & R. G.

Mr. Williams testified (R. 554-555) on direct examination by counsel for the D. & R. G., Mr. Gallagher, that it was necessary for the carrier to get the weights over the industry's scales on inbound shipments of non-ferrous ores and concentrates, because the carrier could not practicably maintain scales at all the producing mines;* that such commodities also moved on line-haul rates graded according to actual value. He testified (R. 556) that as shown by his Exhibit W-1, (R. 574), that under Item 1670 of the D. & R. G. tariff, delivery of line-haul carload shipment at Garfield included movement within smelter plant over track scale to and from thaw house, to and from a smelter, sampler, or to and from a combination sampler and concentrator to a designated point indicated by the sampling company (the smelter), without charge in addition to the line-haul rate. He further testified that under the same Item, for each additional intraplant movement from track to track within the smelter, a charge would be made of \$2.70 per car. He also called attention to the fact that under Items 1680 and 1690 of the tariff, concentrates and sand originating on the Bingham and Garfield Railroad, the D. & R. G. would assess switching charges specified in the tariff for delivery of such cars. *On cross examination by counsel for the Commission, Mr. Gwynn, he testified as follows (R. 558-561):*

*Tariffs provide that for this reason commodities shall move under destination weights, Exhibit 15, witness Tuckwood (R. 319).

Q. (By Mr. Gwynn) Going back to item 1670, also 1680, the respondent company has collected certain charges for performing switching services upon certain shipments within the plant of the American Smelting & Refining Company. Now can you distinguish between those shipments and the shipments which the respondent considers its duty to spot free of charge as part of the transportation service under the line haul rates?

A. Yes.

Q. What is your distinction?

A. Take a carload of ore originating at, say, Eureka, Utah, going to the Garfield smelter; if we handle that carload of ore in the winter time it may be frozen; we would take the car to the scales first, then take it to the thaw house and thaw it, on the theory we had not completed our transportation until we have delivered the shipment in shape for unloading. Now, having completed that, we are through with that performance. If the industry wants something else done, then the two dollar and seventy cent per car charge as published would be assessed.

Q. That is, after you have taken the car to the thaw house and the ore is thawed out ready to unload—

A. Yes, sir.

Q. —you consider you should collect two dollars and seventy cents for spotting the car in the plant where the plant wishes to unload it?

A. When we specifically provide in this item what we determine is a part of our road haul common carrier service for delivery, if there is additional service then we would make the charge as published. Now, my explanation goes to this, the answer as to why we consider our common carrier duty is not fully met with when we make delivery in the yard or up to the plant of the smelter of a carload of frozen ore.

Q. In other words, if the ore was not frozen you could take it to the smelter without first taking it to the thaw house, and that service would be included in the line haul rate, and you would not collect the two dollars and seventy cents?

A. Correct.

Q. But if you are required to take it to the thaw house first, you would assess the additional charge of two dollars and seventy cents for completing the spotting service?

A. Let me put it this way—I don't think we are thinking along the same line, exactly—When we bring a carload of ore or concentrates into the smelter yards we have to get the weight first, we have to get an assay certificate; we will perform switching service for the purpose of scaling the car; we will take it to the sampling plant for the purpose of the assay; if it is in the winter time we will take it to the thaw house to have the ore thawed out.

Q. You will do both services?

A. All those are included in our line haul rate. Does that make a clear answer to your question?

Q. To complete the service you take it to the sampler and the thaw house as part of the line haul service—or part of the service under the line haul rate. Now, what else will you do with it?

A. We take it to the plant they want it unloaded. Perhaps I haven't made it clear, Mr. Gwynn, but we regard the service for weight and the service for sampling in order that we may know the value of the ore—

Q. Pardon me, this two dollars and seventy cents is an intraplant charge purely, isn't it?

A. That is purely an intraplant charge.

Exam. Bardwell: I would like the witness to finish what he was going to say. I think he was

going to say he considered that part of the common carrier service.

A. We consider the scaling of the car for the weight and the getting of the assay as part of our common carrier duty.

Exam. Bardwell: And the thawing?

A. Yes sir, and the thawing also, in the winter time.

Q. (By Mr. Gwynn) Pardon me for the interruption. Will you explain what is meant by the combination sampler and concentrator service? I believe you have given an illustration of the sampler and the thaw house service.

A. I am not familiar enough, but I should say at Garfield we would have what we would term a common sampler and concentrator, that is, a plant that is called a sampling and concentrating plant; combination of both.

Q. As I understand the two dollar and seventy cent charge is purely an intraplant charge, and item 1680 naming the charge as two dollars and twenty-five cents is something that is not an intraplant charge, is it?

A. That is correct.

Q. And inasmuch as the two dollars and twenty-five cents named in item 1680 is not an intraplant charge, will you distinguish or explain the reason why you should assess that charge and not perform the service as a part of the carrier's duty?

A. We do not receive a line haul in connection with that transaction.

Q. Do you collect that charge from the B. & G.?

A. No; from the smelter; from the industry. The B. & G., as I explained, have a freight rate of their own on the concentrates from the sampling plants at Magna and Arthur to Garfield; that freight charge must be paid before that goes to the B. & G.; then

the Rio Grande service is necessary for the switching, and we make this charge for switching the concentrates. This is in addition to their freight rate.

Q. It will appear if it was the common carrier duty of respondent carrier to spot this ore and coal in the plant, that it would be the duty of the carriers also to spot this other traffic, although I understand your carrier receives no line haul, at the same the B. & G. receives a line haul, the two carriers, the B. & G. and the D. & R. G. perform the completed service and collect from the industry a charge of two dollars and twenty-five cents, while in the case of this other traffic no charge is collected, and the respondent considers it a part of its duty to perform the service without a charge?

A. In one instance the Rio Grande gets a line haul and the freight rate, and for that freight rate they consider certain terminal service included involved in their common carrier duty. In the case of the two-dollar and twenty-five cent switching charge on concentrates which the D. & R. G. receives from the B. & G., we have no line haul whatever; we perform a straight switching service on that for which we get no other remuneration.

Q. I can see the point why the D. & R. G. would want to perform the service without receiving the line haul.*

*At the 1944 hearing in the same connection, Mr. Dangerfield, a witness for the appellee industry, testified (R. 1031) that the \$2.25 switching charge made by the D. & R. G. for the delivery of cars of concentrates and sand originating on the Bingham and Garfield, was because of the short distance of the haul of the Bingham and Garfield from the originating points at Magna and Arthur on its line. He testified (R. 1017) that Magna was approximately 5½ miles and Arthur approximately 3½ miles from the Garfield smelter. In other words, this is an instance where, because of the short line haul of the Bingham and Garfield, its line-haul rate could not be made high enough to include compensation for the

(Continued p. b-6)

Mr. Williams, on re-direct examination by his counsel, Mr. Gallagher, then testified (R. 562):

"Q. (By Mr. Gallagher) The line haul, Mr. Williams, you consider absolutely as the duty of the company to deliver the car at the unloading point, do you not?

A. Yes, we have that obligation everywhere, not only at the Garfield smelting plant but at our freight houses and industries all over the system. There is, however, a difference, in my opinion, with respect to ore and concentrate traffic, which requires perhaps a little more additional so-called common carrier service than would be given to ordinary freight. That is by reason of the moisture in the concentrates and also in crude ore, and in the winter time the necessity of thawing it out before it can be unloaded. There is also, as I previously explained, the need of our getting the weights and the need of our getting assay certificates in order to compute our freight charges. We can not do it without computing the weight and the valuation of the ore."

On re-cross examination by the Commission's counsel, Mr. Gwynn, Mr. Williams testified as follows (R. 563):

"Q. (By Mr. Gwynn) If the line haul rates of the B. & G. on the items of traffic designated in item 1680, 1690 and 1700 were made in contemplation of the same service as the D. & R. G. makes its line haul rates on iron ore, coal and other traffic, the

terminal delivery by the D. & R. G. at the Garfield smelter, of shipments originating at such short haul points. On the other hand, as Mr. Gwynn, counsel for the Commission, remarked at the 1932 hearing (R. 561), he could understand why the D. & R. G. would not perform the delivery without charge since it had not received the line-haul.

industry would be entitled to this terminal service without a charge, wouldn't it?

A. If they made them in the same way, but they do not; they can not."

Abstract of Testimony of Mr. W. M. Carey, Freight Traffic Manager of The Denver and Rio Grande Western Railroad Company at Hearing of May 26 and 27, 1944.

Note: Mr. Carey and Mr. Tuckwood both introduced exhibits showing the tariff history of the provisions of the line-haul rates applying at Garfield and Leadville, including within such rates the terminal switching services here in question. These exhibits are Mr. Carey's Exhibit No. 4 (R. 1132-1152) and Mr. Tuckwood's Exhibits Nos. 10, 11, 12 and 13 (R. 1243-1315)

Throughout the proceedings before the Commission, the following tariff provisions from those exhibits have been accepted as representative.

Effective 1908 until February, 1920:

"Switching from track to track within smelter plants served by the Denver and Rio Grande Railroad all cars containing freight which has paid transportation charges to the plant . . . free."

Effective February 25, 1920, the tariffs were changed to provide as follows (Exhibit 10, p. 1)

"ITEM #15—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah will include *one movement* of Commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination

sampler and concentrator), to a designated unloading point indicated by the Smelting Company." *Italics supplied*)

"ITEM # 20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

From track to track within smelter plant for each additional movement not provided for in Item No. 15, \$2.50 per car (see also Item No. 10)."

Effective November 27, 1920, the tariffs were corrected to read as follows (Ex. 10, p. 2):

"ITEM # 15-A—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah, will include *movement* of a commodity within a smelter plant over track scales, *to and from thare-house*, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company." *(Italics supplied.)**

Mr. Tuckwood's Exhibit 13 shows that the foregoing provisions of Item 15-A for inclusion within the line-haul rate of the switching charges there specified, are still carried without change in the tariffs presently effective at the Leadville smelter. (See Item 1370, p. 19 of Ex. 13.)

*It will be noted that neither this tariff provision nor the immediately preceding one of February 25, 1920, provided for any greater terminal switching services under the line-haul rates than were provided by the carriers' tariffs prior to 1920. On the contrary these tariff changes in 1920 imposed charges for *intra-plant switching*, which the tariffs from 1908 to 1920 had provided for without any charge in addition to the line-haul rates.

Effective July 5, 1938, the tariffs at Murray and Garfield were changed to read as follows (Ex. 10, p. 11; Ex. 11, 4; Ex. 12, p. 7):

"Item 2322

- (a) The 'line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), *from the road-haul point of delivery to the switching line*. Any additional movement within the plant (except as noted below) will be charged for at \$1.00 per car for each such movement.

NOTE—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew, without interruption, *resulting from orders from, or requirements of, the smelter*.

- (b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from the house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.
- (d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car." (Italics supplied.)

- (c) The line-haul rate will also include the out-bound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of the smelter."

In connection with these tariff provisions, Mr. Carey testified as follows (R. 912):

"Mr. Carey: I would like to elaborate on certain portions of these exhibits. As I stated before, prior to February 25, 1920, free switching was given within these plants on all freight which had paid transportation charges to the plant, and effective on that date a charge for intra-plant switching of \$2.50 per car was provided, and that up to June 25, 1938, on intrastate traffic and July 5, 1938, on interstate traffic, the tariff provisions remained the same, with the exceptions of the fluctuations made necessary by decisions of the Commission in various ex parte proceedings. Now, with respect to the change that was made in June and July, 1938, I would like to state that while it was felt at the time these changes were made, the findings of the Commission of May 14, 1935, in Ex Parte 104, Part II, Terminal Services, required these changes, it is my thought in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration. The railroads now allow free movement over the scales on line-haul traffic.

Exam. Way: In other words, it is your thought that the free service should be reinstated under the line-haul rates.

The Witness: For that portion of those services that are in order to assess their freight charges.

Exam. Way: In other words, you mean the weighing of the cars and the movement for sampling.

The Witness: Yes, sir.

Mr. Finerty: And thaw house if necessary.

The Witness: Yes, sir.

Mr. Finerty: I then understand one spotting, after those things have been accomplished.

The Witness: That is right."

Mr. Carey then testified further as to the switching movements necessary to determine value of ores and concentrates, the necessity of determining such value both from the point of view of the carriers and the industry, and the necessity of rates based on actual value in order to permit the movement of low grade ore from marginal mines. He testified (R. 912-915):

"Mr. Carey: By referring to pages 10, 11, and 16 of the exhibit (Exhibit 4), it will be noted that in addition to having the weights, the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the smelters did not. In the latter event, in all probability after the railroad had performed for itself the operation over the scales, through the thaw house, and through the sampler, a free movement to a designated point of unloading would be accorded providing that movement could be accomplished with-

7

out interruption, resulting from orders from or requirements of the smelter. So, as I say, it is my thought that because of the fact that the railroads have to have this information, in order to assess their freight charges, that the smelting company should be accorded this free movement through the sampler and to the first designated point of unloading.

Exam. Way: Now, I have noticed in some instances where the shipments are moved to the thaw house. For example, that is, they are weighed, they move to the thaw house, and then they are moved back over the scales. It is your thought that the plant should be accorded more than one scaling?

The Witness: Yes, for this reason, that it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. After it has gone through the thaw house—Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary, not only for the railroad to have the actual weight of that ore, but the smelters too, in their settlements with shippers.

Exam. Way: But what you haul, you haul the wet weight?

The Witness: We assess our charges on the wet weight.

Mr. Finerty: Based on a dry weight valuation?

The Witness: That is right.

Mr. Finerty: Translated into a wet weight?

The Witness: Yes.

Exam. Way: And that necessitates weighing twice?

The Witness: That is right.

Exam. Way: That also necessitates placing the car to the sampler for sampling?

The Witness: Yes, sir.

Exam. Way: I don't assume you are the proper witness to ask about that, the servicing, but in any event, it includes the sampling, whatever service is necessary in the sampling?

The Witness: That is right, in order to ascertain the correct value.

Q. (By Mr. Campbell) Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

Q. So it would have to build them and maintain them for those purposes?

A. Yes.

Exam. Way: Now, that contemplates the service that is satisfactory with the present method of making the rates. Is there any other way to make the rates so that the rates will cover the service?

The Witness: No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that

there wouldn't be any movement of the low grade ore, and the same thing would result.

Exam. Way: Why?

The Witness: Because the ore couldn't afford to pay the higher freight charge, the low grade ore.

Mr. Finerty: In other words, the small miner and the small mine producing a fairly low grade ore could not afford to produce that ore if you had your rates on a single-rate basis?

The Witness: That is correct.

Mr. Finerty: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

The Witness: That is right.

Mr. Finerty: And a declared value would let the big miner get the same transportation as the low grade ore and at the same time put the low grade ore mine out of business?

The Witness: I say in connection with that it would result in the railroads not getting the higher rates on this high-valued ore.

Mr. Finerty: Also it would mean there would be no inducement to the smelter to buy low-grade ore if it had to pay the same freight rate as on high-grade ore?

The Witness: That is right, only as a matter of getting trucks.

Mr. Finerty: Yes.

Abstract of Testimony of May 26 and 27, 1944, of Mr. O. W. Tuckwood, then General Traffic Manager, now Vice President of the Appellee, American Smelting and Refining Company.

Mr. Tuckwood, as already noted in this Appendix, introduced his Exhibits Nos. 10-13, inclusive. As already noted in the main brief, Mr. Tuckwood in his testimony referred to and introduced as his Exhibit 14 (R. 1315-1318) the

unreported decision of Judge Johnson of the United States District Court for the District of Utah in *Oregon Short Line Railroad Company v. American Smelting and Refining Company*, construing the word "free" as used in the tariffs in connection with the terminal switching services prior to 1920 as not meaning that such switching services were performed without compensation, but that compensation for them was included in the line-haul rate.

In addition, Mr. Tuckwood testified as follows in connection with the same matters covered by Mr. Carey's testimony last quoted (R. 948-950):

"Mr. Tuckwood: * * * it is very important to point out here, that the railroad will only accept such sampler weights on the condition that the smelter uses the same weight, and that the same weight is used as the basis of settlement with shippers. Ores, concentrates, mill and smelter products all contain varying percentages of moisture, and since the smelter pays shipper on the basis of metal values on a dry weight basis the carriers cannot compute their freight charges until the moisture determination has been secured and the assay run on the dry weight basis. The carrier can then learn how much per ton, on a dry weight basis, the smelter pays the shipper. Using this smelter value the carrier can then convert the figure to a wet weight basis for the assessment of freight charges. For example, a shipment arrives at a sampler or smelter and when weighed there the net is 100,000 pounds, but there is 10 percent moisture in the material which means that the smelter will pay the shipper for 90,000 pounds of dry weight based on the metal values contained in that dry weight. Assume the assay shows the metal values to be \$50 per dry weight ton, or \$2,250 for the entire carload, and which is the basis of settlement with the shipper. The railroad will then compute its freight charges by converting the value to a wet

ton basis of \$2,250 for the 100,000 pounds of wet material transported, which would give the railroad a value for freight purposes of \$45 per ton and the rate applicable to that value would be applied to the net wet destination weight to determine the freight charges due. An accurate destination tare weight is of as great importance to the carrier as is a correct net weight in all cases where freight rates are based on smelter values.

Q. (By Mr. Finerty) Before you go into that, in other words, the railroad company receives the same rate on 10,000 pounds of water that it carries in that shipment which you mention as it receives on the ore?

A. Correct.

Q. But it receives in place of the value of the dry sample, it receives a slightly lower value based on the wet weight of the car?

A. That is correct.

Q. Therefore, it is essential for the railroad, in order to know what freight charges it can legally charge the industry to have the dry weight first determined and then translate that back to a wet basis?

A. Absolutely. A metallurgical engineer will, later testify that no smelter settlement with shipper can reflect the correct values of the metals contained in a shipment unless, among other things, an actual tare weight of the car is obtained. Carriers would be compelled to revise their entire rate structure on ores, concentrates and mill and smelter products if they discontinue securing actual tare weights. The railroads in their tariffs specifically say that the rate used for waybilling, and I quote, "and rate shall be revised in accordance with such certified value." The railroads further reserve for themselves the right to verify the smelter valuation by special assay or otherwise. When a railroad publishes its rates based

on destination weights and values it must be assumed that it implies correct value and no value based on weight is correct unless all weights, gross, tare and net, are actual and accurate, and not inflated or deflated, which would happen in the case of practically each and every shipment if the stencilled tare of the car was used.

Exam. Way: And that is, you mean by that, if the stencilled weight of the car was used?

Mr. Finerty: If the weather were dry it might be the actual weight of the car would be less than the stencilled weight; if the weather were wet it would be greater than the stencilled weight.

The Witness: It would fluctuate greatly, especially with materials that contain considerable quantities of moisture.

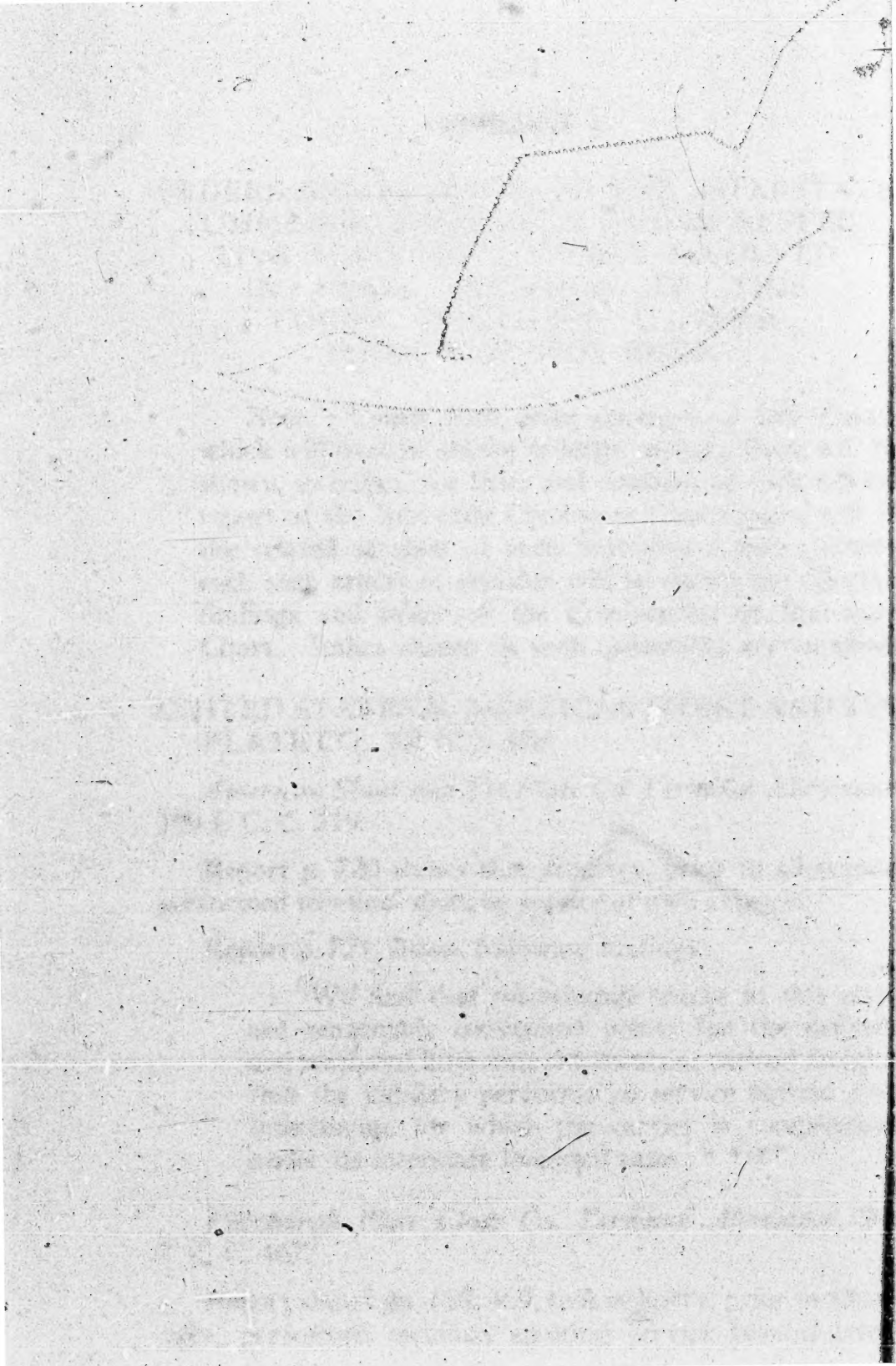
Q. (By Mr. Finerty) And you couldn't get your dry weight basis for assay?

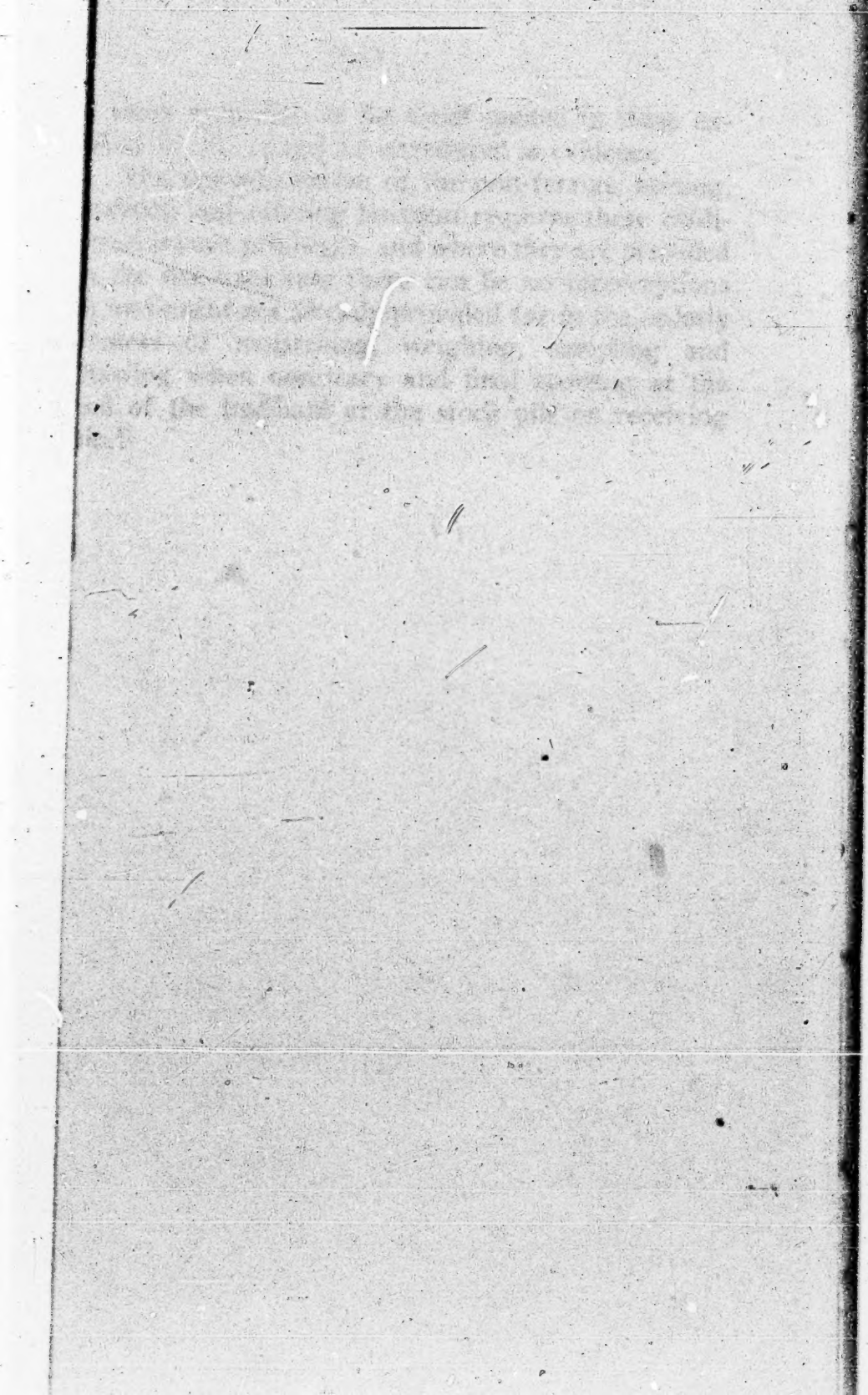
A. You wouldn't have a correct dry weight unless you had actual weight. Therefore, the car is still in transit until all these determinations have been made.

As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course. The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built. Solid and convincing confirmation of those agreements have been carried down through the years in the tariff publication of the carriers and

is today explained in the tariff quoted in these exhibits 10, 11, 12 and 13 introduced in evidence.

The unusual nature of the non-ferrous mining, smelting and refining business requires these traditional transit privileges, and where they are provided in the line-haul rate there can be no interruptions in movement not already provided for in the orderly process of moistening, weighing, sampling and thawing when necessary and final spotting at the end of the line-haul at the stock pile or receiving bin."





APPENDIX C

ORDERS AND FINDINGS OF THE INTERSTATE
 COMMERCE COMMISSION, AND OF RESPEC-
 TIVE STATUTORY COURTS, INVOLVED
 IN PRIOR DECISIONS OF THIS
 COURT, DISCUSSED UNDER
 POINT V OF THIS BRIEF.

Note: Under each prior decision of this Court, which will here be shown in large capitals, there will be shown, in italics, the titles and citations of each related report of the Interstate Commerce Commission, and of the related decision of each Statutory Court. Under each such report or decision will be shown the relevant findings and order of the Commission or Statutory Court. Italics shown in such quotations are supplied.

UNITED STATES V. AMERICAN SHEET AND TIN
 PLATE CO., 301 U. S. 402.

American Sheet and Tin Plate Co. Terminal Allowance,
 209 I. C. C. 719.

Report p. 720 shows that industry, prior to allowance, performed terminal spotting service at own expense.

Report p. 721, shows following findings:

"We find that interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments or carload freight; that the industry performs no service beyond such interchange for which the carrier is compensated under its interstate line-haul rates; * * *"

Pittsburgh Plate Glass Co. Terminal Allowance, 209
 I. C. C. 467.

Report shows pp. 468, 469, that industry, prior to allowance, performed terminal spotting service beyond inter-

change tracks at own expense; also shows prior finding by the Interstate Commerce Commission, 58 I. C. C. 81, that the failure of the carriers to make the industry an allowance *was not unreasonable*, but that such failure of carriers to make allowance or perform terminal spotting service themselves, was unduly prejudicial because of allowances to competitors.

Report states p. 470:

"Service of this character is not covered by respondent's interstate line-haul rates.

"We find that the respondent carrier has complied with its legal obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record."

Weirton Steel Co. Terminal Allowance, 209 I. C. C. 445.

Report shows pp. 446, 447, that industry, prior to allowance, performed terminal switching services to scales and back to interchange tracks at own expense; also terminal spotting services.

Report shows following finding, p. 448:

"We find that the switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates.

West Leechburg Steel Co. Terminal Allowance, 210 I. C. C. 213.

Report shows, p. 214, industry, prior to allowance, performed terminal spotting services at own expense.

Following finding appears p. 214:

"We find that the existing line haul rates of the Pennsylvania must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the interchange tracks * * * constitute such a point."

Syllabus p. 213 reads:

"Carriers' compensation under its line-haul rates found not to include service for which allowance is paid."

Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273.

Report shows p. 274, industry, prior to allowance, performed terminal spotting services at own expense; that in *Allegheny Steel Co. v. Director General*, 60 I. C. C. 575, 578, the Commission had found that the failure of the carriers to perform such spotting services or make an allowance to industry, *was not unreasonable*, but was discriminatory because of allowances to competitors.

Report shows following finding, p. 276:

"We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; * * * and that the switching movements by the Steel Company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondents to perform under its line-haul rates."

Syllabus, p. 273, reads:

"Carriers compensation under their line haul rates found not to include service for which allowance is paid."

Pittsburgh Plate Glass Co. Terminal Allowance, 210 I. C. C. 527.

Report shows p. 528 industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 530:

"We find that the existing line haul rates of the Frisco and the Missouri Pacific must be construed as framed to cover the delivery and receipt of car-load freight at reasonably convenient points; that the interchange tracks * * * constitute such reasonable points * * *."

Syllabus, p. 527, reads:

"Carriers compensation under their line-haul rates found not to include service for which allowance is paid."

GOODMAN LUMBER CO. v. UNITED STATES, 301 U. S. 669.

Goodman Lumber Co. Terminal Allowance, 214 I. C. C. 89.

Report shows, p. 90, industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 92.

"We find that the existing line-haul rates of respondent must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the * * * interchange tracks * * * constitute such reasonable points."

Syllabus p. 89 reads:

"Service beyond the interchange tracks found to be a service for which a carrier is not compensated in its interstate line haul rates."

Goodman Lumber Co. v. United States, District Court, Eastern District of Wisconsin, Equity No. 4853 (unreported).

Statutory Court affirmed Commission's order without opinion, December 5, 1936. Appellees have obtained copies of Findings of Fact from the Clerk. Court's Finding of Fact 11 reads as follows:

"The Commission found that the transportation included in the published rates begins and ends at said interchange tracks at Goodman, and that the 'spotting' service between those tracks and points within the plants is a plant service and not transportation covered by the line-haul rates * * *."

Finding of Fact 12 reads:

"The court finds that the evidence received by the Commission supports the finding made by the Commission."

A. O. SMITH CORPORATION v. UNITED STATES,
301 U. S. 669.

A. O. Smith Corporation Terminal Allowance, 215
I. C. C. 534.

Report shows, p. 535, industry, prior to allowance, performed terminal spotting service at own expense.

Report there states:

"The carrier has never performed the services upon the industrial track and in fact has never been requested to do so."

Further finds, p. 536:

"The payment of an allowance to the Smith Corporation for performing the terminal spotting services depletes unnecessarily the revenues of the carriers and thus tends to shift the burden of paying for such delivery from the shoulders of the respondents, where it belongs, to the shoulders of the shipping public, who pays the bills."

Report also makes following finding, p. 536:

"We find * * * that the service beyond such interchange tracks, is a plant service which respondent is not obligated to perform on the basis of the line-haul rates."

A. O. Smith Corporation v. United States, District Court, Eastern District of Wisconsin, Equity No. 4988.

Statutory Court affirmed the Commission's Order without opinion. Appellees have obtained copies of Findings of Fact from the Clerk. Only Finding relevant here is Finding 4:

"The evidence before the Commission was sufficient to support the findings of the Commission and its order."

UNITED STATES v. PAN AMERICAN PETROLEUM CORPORATION, 304 U. S. 156.

Mexican Petroleum Corporation Terminal Allowance, 209 I. C. C. 394.

Report shows, p. 396, that industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 396:

"We find * * * that the Mexican Corporation performs no service beyond such points of inter-

change for which the respondent carrier is compensated in its interstate line haul rates; * * *".

Celotex Co. Terminal Allowance, 209 I. C. C. 764.

Report shows, p. 765, that industry, prior to allowance, performed terminal spotting service at own expense. Originally, carrier had performed part of terminal spotting service.

Report shows following finding, p. 766:

"We find * * * that the transportation service for which the carriers are compensated in their line haul rates begins and ends at said interchange tracks; * * *".

Great Southern Lumber Co.—Bogalusa Paper Co. Terminal Allowance, 209 I. C. C. 793.

Report shows, p. 794, that industry, prior to allowance, performed terminal spotting service at own expense. Also, no tariffs covering allowance.

Report shows finding p. 796:

"We further find that the transportation service, which it is the duty of the respondent carrier to perform under its line-haul rates, begins and ends at the interchange tracks * * *; that the service for which payment herein considered is made, is a plant service which respondent is not obligated to perform under its line haul rates."

Standard Oil Co. of Louisiana Terminal Allowance, 209 I. C. C. 68.

Report shows, p. 70, industry, prior to allowance, performed terminal spotting service at own expense.

Shows following finding, p. 72:

"In accordance with principles announced in the original report in this proceeding, we find the

carriers have complied with their obligations under the interstate line haul rate by the delivery and receipt of carload freight on the interchange tracks * * *."

Humble Oil and Refining Co. Terminal Allowance, 209 I. C. C. 727.

Report shows, pp. 728, 729, industry, prior to allowance, performed terminal spotting service at own expense.

Shows p. 730:

"We find * * * that the Humble Company performs no service beyond such points of interchange for which the T. & N. O. and the Missouri Pacific are compensated in their interstate line haul rates * * *."

Magnolia Petroleum Co. Terminal Allowance, 209 I. C. C. 93.

Report shows p. 95-97, industry, prior to allowance, performed terminal spotting service at own expense.

Also finding p. 98:

"We find * * * that the industry performs no service beyond such points of interchange for which the respondent carriers are compensated in their interstate line haul rates."

Texas Co. Terminal Allowance, 209 I. C. C. 767.

Report shows, p. 768, industry, prior to allowance, performed terminal spotting service at own expense.

Shows following finding, p. 769:

"The tariffs of the respondent carriers properly construed contemplate only the delivery or receipt of cars at a reasonable point. We find that the trans-

portation service, which it is the duty of the carriers to perform for the Texas Company under the interstate line haul rates or switching charges, begins and ends at the interchange tracks.

Gulf Refining Company Terminal Allowance, 209 I. C. C. 756.

Report shows, p. 758 that, prior to allowance, terminal spotting service covered by allowance, was performed partly by industry at own expense and partly by railroad.

Report also shows, pp. 759-760:

"The record is convincing that due to the competitive situation as between the respondent carriers little, if any, consideration was given by either to its common carrier obligation under the line haul rates when granting the allowance."

* * *

"By the allowance to the Gulf Co. both respondent carriers provided a substantially greater service at the same rate than they furnished prior to granting the allowance, and the effect is a reduction in the line haul rates, as to which there was no question of reasonableness at the time the allowance was granted."

The report shows the following finding, p. 760:

"We find * * * that the service for which the respondent carriers are compensated in their line haul rates begins and ends at said interchange tracks."

Texas Company Terminal Allowance, 213 I. C. C. 583.

Report shows, pp. 584-588, that apparently some of the spotting services were performed by industry at own expense prior to allowances.

Report makes following finding, p. 589:

"Following the principles announced in *Propriety of Operating Practices—Terminal Services, supra*, and upon this record we find that the transportation service which it is the duty of the respondent carriers to perform for the Texas Company under interstate line-haul or switching charges, begins and ends at the interchange tracks described of record, which are reasonably convenient points for the receipt and delivery of carload freight, and that the service performed by the Texas Company within its plants beyond said interchange tracks is a plant service which it is not the duty of said respondents to perform."

Syllabus reads, p. 583:

"Carriers' compensation under their interstate line-haul rates found not to extend beyond the present points of interchange, * * *".

**UNITED STATES v. WABASH RAILROAD CO.
(STALEY CASE), 321 U. S. 403.**

A. E. Staley Manufacturing Company Terminal Allowance, 215 I. C. C. 656.

The report shows, p. 657, that prior to 1922, the Wabash and the Baltimore & Ohio apparently performed terminal spotting service at their own expense, but on account of interference, industry wished to perform such service itself, and allowance was granted May, 1922.

Shows p. 657 that in 1930, industry constructed Burwell Yard for interchange with all other carriers except Baltimore & Ohio, which continued interchange on prior interchange tracks.

Also states, p. 658, in connection with allowances granted by Pennsylvania, Illinois Central and Illinois Terminal Company:

"These carriers having apparently for competitive reasons granted same allowance as that paid between Baltimore and Ohio and Wabash * * *"

Then states, pp. 659, 660:

"The record is conclusive that the service performed by the two respondents which served the plant was continued because it was unsatisfactory to the Staley Company and interfered with industrial operations and that thereupon the allowance was granted * * *."

It is likewise shown by the record that the interchange tracks of the Staley Company were constructed primarily for its convenience and those tracks constitute a reasonably convenient point for the interchange of cars.

The report then finds, p. 660:

"We find * * * that the transportation service for which the respondents are compensated in their line haul rates, begins and ends at said points (i.e. interchange tracks)."

A. E. Staley Manufacturing Co. Terminal Allowance,
245 I. C. C. 383.

Upon further hearing, the full Commission, in referring to former report says:

"The Division found * * * that transportation service for which respondents were compensated in their line haul rates, began and ended at those the (interchange) tracks."

The report then finds, p. 408:

"2. That all services between the Burwell or the storage or general yard of the Wabash and points of loading or unloading within the plant area within

the Staley Company are plant services for the Staley Company and not common carrier services covered by the line haul rates and charges of respondent carrier."

Wabash R. Co. v. United States, 51 E. Supp. 141.

The decision of the Statutory Court in setting aside the orders of the Commission, is so thoroughly covered in the opinion of this Court, *supra*, that no further comment is here necessary.

CORN PRODUCTS REFINING COMPANY v.
UNITED STATES, 331 U. S. 790

Corn Products Refining Co. Terminal Services, 266 I. C. C. 57.

The Commission's report shows that the carriers apparently had always performed the terminal spotting services in question. All terminal spotting, however, beyond certain "interchange" tracks was performed for the other carriers by the Chicago Belt.

The Report shows, p. 76:

"We find that the interstate line-haul rates of respondents cover the delivery and receipt of car-load shipments at reasonably convenient points; that the plant yard described above constitutes such a reasonable point for the delivery and receipt of cars by the Chicago Belt and Alton; that the Indiana Harbor's yard adjacent to the plant or the main tracks within the plant taking off from its lead track from that yard, whichever the parties may agree on, constitutes such reasonable point for the delivery and receipt of cars by the Indiana Harbor; and that the transportation services which it is the duty of respondents to perform for the Corn Products Re-

fining Company under the line-haul rates begin and end at those tracks."

It is to be noted that the report does not show that the carriers' tariffs expressly provided for the performance of the terminal spotting services under the line-haul rates.

Corn Products Refining Co. Terminal Services, 266 I. C. C. 181.

The Commission, in this report on further hearing, stated, p. 199:

"We affirm the findings in the prior report."

Corn Products Refining Co. v. United States, 69 F. Supp. 869.

Prior to the reported decision of the Statutory Court, that Court had, on December 5, 1946, entered certain Findings of Fact, No. 9 of which reads as follows:

"9. There is sufficient substantial evidence to support the Commission's finding that the carriers' transportation service was complete upon delivery of cars to the interchange tracks and that spotting within plaintiff's plant is not included in the service for which the line-haul rates were fixed."

Further consideration of this case, in other respects, will be reserved for argument.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

FEB 17 1950

CHARLES ELMORE CROMLEY
CLERK

IN THE
Supreme Court of the United States

No. 173

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MIN-
ING COMPANY, DENVER & RIO GRANDE
WESTERN RAILROAD COMPANY, and UNION
PACIFIC RAILROAD COMPANY,

Appellees,

and

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAIL-
ROAD COMPANY, UNION PACIFIC RAILROAD
COMPANY and AMERICAN SMELTING AND
REFINING COMPANY,

Appellees.

CONSOLIDATED CAUSES

**SUPPLEMENTAL MEMORANDUM FOR APPELLEES
IN UNITED STATES v. DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY, UNION PACIFIC
RAILROAD COMPANY, and AMERICAN SMELTING
AND REFINING COMPANY**

OTIS J. GIBSON,
ELMER B. COLLINS,
JOHN F. FINERTY,

IN THE
Supreme Court of the United States

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MIN-
ING COMPANY, DENVER & RIO GRANDE
WESTERN RAILROAD COMPANY, and UNION
PACIFIC RAILROAD COMPANY,

Appellees,

and

No. 173

UNITED STATES and INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAIL-
ROAD COMPANY, UNION PACIFIC RAILROAD
COMPANY and AMERICAN SMELTING AND
REFINING COMPANY,

Appellees.

**SUPPLEMENTAL MEMORANDUM FOR APPELLEES
IN UNITED STATES v. DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY, UNION PACIFIC
RAILROAD COMPANY, and AMERICAN SMELTING
AND REFINING COMPANY**

This supplemental memorandum will show:

(1) That it is not impracticable for the Commission in any case of alleged violation of Section 6 (7) of the Act to make a finding as to *whether or not* the line-haul rates include compensation for the terminal switching services in question.

(2) That this is not impracticable is shown by the fact the Commission has made such a finding in every report in connection with every order in the 74 supplemental proceedings which preceded the instant proceedings, the *American Smelting and Refining Company* case being the seventy-fifth, and *United States Smelting, Refining & Mining Company* being the seventy-sixth supplemental proceeding. Even in these two supplemental proceedings the Commission made such a finding in every report except in its respective reports in connection with its order here permanently enjoined.

(3) That the Commission in making such findings has never based them on any "cost study" of the line-haul rates, as counsel for the Commission suggested on argument of this case would be necessary here.

(4) That the Commission in every supplemental proceeding, except the two instant ones and except the *Corn Products* case, has based its finding as to whether the line-haul rates did or did not include compensation for terminal switching services *on the history of such rates*.

(5) That the suggestion made on argument that the Commission's order might be complied with by the carriers subsequently reducing the line-haul rates by the equivalent of the separate charge for terminal switching services, has already been considered and rejected by the majority of the Commission.

(6) That *on this record* the order of the Statutory Court should be affirmed. Such affirmance will not prevent the Commission from subsequently instituting proper proceedings either

(a) Under Section 6 (7), to require the appellee carriers to make charges *in addition* to their present line-haul rates for the terminal switching services involved, if after hearing it can be shown by evidence that such line-haul rates *do not in fact include compensation* for such terminal switching services; or

(b) Under Section 6 (1), merely to require segregation of the charges for line-haul and for terminal switching services without increase in the aggregate rates, if on hearing it can be shown by proper evidence that such segregation is practicable.

AS TO (1), (2), (3) AND (4) ABOVE:

On argument counsel for the Commission suggested that it would be impracticable to make a finding in these cases as to whether or not line-haul rates include compensation for terminal switching services, because such a finding would require an elaborate "cost study" of the line-haul rates.

The fact is that the Commission has made such a finding in every supplemental proceeding, including the instant proceedings, until it disclaimed any such finding in connection with its orders here permanently enjoined.

As shown by Appendix C to the brief of these appellees, such a finding was made in connection with every order which has been reviewed by this Court, and in every instance the Commission found that the line-haul rates *did*

not include compensation for the terminal switching services here involved.

There is, moreover, the record before this Court, though not printed, the original brief of the appellee industry before the Commission of November 1, 1944. In the Appendix to that brief are listed the Commission's reports in the seventy-four supplemental proceedings which preceded the two instant proceedings.* In every one of these proceedings the Commission made a finding, in one form or another, as to whether or not the line-haul rates included compensation for the terminal switching services. In ten of them the Commission found that the line-haul rates included compensation for some or all of the terminal switching services. In none of the supplemental orders there listed nor in those shown in Appendix C to appellees' brief before this Court, did the Commission base its finding on any "cost study". As shown in Appendix C, where the Commission found the line-haul rates did not include compensation, such findings were based on the history of the rates, which in every case, except the *Corn Products* case**, showed that *prior to receiving allowances* from the carriers the *respective industries* had always performed at *their own expense* the terminal switching services between established "interchange tracks" and actual points of loading and unloading. This is also referred to in the Commission's

*Such appendix shows that *all but seven* of these supplemental proceedings dealt with *payment of allowances* by the carriers to the industries for performance by the industries of the terminal switching services.

**In the *Corn Products* case, as shown in Appendix C, the tariffs did not expressly provide, as here, that the terminal switching services were included in the line-haul rates. Also, as there shown, the Commission found, and the Statutory Court sustained such finding as supported by the particular evidence of record, that the line-haul rates *did not include compensation* for the terminal services.

Basic Report, 209 I. C. C. 11, p. 44, where the Commission says:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne." (Italics supplied.)

As shown in Appendix B to the brief of these appellees, all terminal switching services since at least 1908 have always been performed by the appellee carriers under their line-haul rates, and the appellee industry has never performed any such terminal switching services at its expense or otherwise.

Moreover, as shown in appellees' brief, Point VII, pp. 70-76, neither the "plant yard" at Garfield nor the "flat yard" at Leadville have ever been points at which the appellee industry has received or delivered cars to or from the carriers, and such points have never been "interchange tracks" as between the industry and the carriers, but have been the only railroad terminal facilities of the carriers themselves.

The Commission's prior findings in connection with its order of October 14, 1946, which the Statutory Court temporarily enjoined (R. 42) that

"It is clear that the line-haul rates when first established did not include the expensive switching

performed at the smelter, and that they have not been increased since that time to include, and *do not now include* compensation for such services."

was simply made in utter disregard of this fundamental distinction between the history of the line-haul rates in these proceedings and the history of the line-haul rates involved in the Commission's orders in all prior proceedings. It was also, as shown under Point II of appellees' brief, made in complete disregard of the uncontradicted evidence of Mr. Williams, Mr. Carey and Mr. Tuckwood.

The Commission in disclaiming any findings in this respect in connection with its enjoined order merely undertook to avoid making the finding required by the record here, which finding would have made it clearly impossible to make its enjoined order.*

*In this connection, it is counsel's recollection that on argument, counsel for the Commission agreed with the suggestion of Mr. Justice Black that the following statement in the Commission's report of October 14, 1946 (R. 40) had reference to the Commission's conclusions in its Basic Report, rather than to the issues in the instant case: This statement reads as follows:

"One of the principal and important facts in issue in this proceeding is whether the line-haul rates included compensation for the switching services."

As shown by the paragraph of the report in which the foregoing statement was made, it was, in fact, made with reference to the contentions of the appellee industry on argument before the full Commission. Moreover, as shown at pp. 16-18 of appellees' brief, it was only after exceptions to the Examiner's report and two petitions for rehearing, that the appellees were able to get the majority of the Commission to recognize that this issue, and particularly the evidence relating to it, were important. As further noted, at pp. 27-28 of the appellees' brief, the majority of the Commission, nevertheless, did not hesitate in their report, on which their enjoined order is based, to stultify their previous recognition of the importance of this issue by undertaking in that report (R. 368) expressly to repudiate their prior findings on this issue in their report of October 14, 1946, and by expressly undertaking to make the order here enjoined without any findings whatever on "one of the principal and important facts in issue in this proceeding."

AS TO (5) ABOVE:

The suggestion that the Commission's enjoined order might be complied with by the carriers, subsequent to publishing terminal switching charges *in addition* to their present line-haul rates, reducing their line-haul rates by the equivalent of such separate switching charges, was originally made by Commissioner Miller in his dissent from the original report of Division 3 in these proceedings, of October 1, 1945 (R. 55-84, 85). As there shown, Commissioner Miller (R. 85), in stating that in his opinion *there was no contradiction in the record* of the evidence that the line-haul rates *do include compensation* for the terminal switching services, said:

"If we accept that contention as correct—and the record does not contradict it—it is my view that since we are here prohibiting the performance by respondents of such switching services without charge, *the line-haul rates should be adjusted so as to eliminate that part of such rates which was included as compensation for the intraplant switching.*"

In the first petition for rehearing of such report of the Commission, filed by the appellee industry (R. 215-255), it is stated (R. 242):

"Commissioner Miller's suggestion, however, that the dilemma in which the majority report places the Commission by its insistence that respondent carriers charge, and petitioner pay, terminal switching charges in addition to such line-haul rates, be solved by eliminating from the line-haul rates the compensation now contained in them for such terminal switching, is wholly impracticable. To determine exactly what part of each individual line-haul

rate from the innumerable producing points, here involved, represents compensation for such terminal switching, and to proportionately reduce each individual rate, would be an almost impossible task. What would be a fair apportionment of each line-haul rate, as between line-haul and terminal services, would differ in each instance. It would depend, among other things, upon the length of haul, the measure of the particular rate, and the difference in competitive factors which may affect each rate."*

It is to be noted that the majority of the Commission have never adopted Commissioner Miller's suggestion, primarily because it would not effect the real goal of all of the Commission's orders, that is to compel switching charges in addition to the line-haul rates, and perhaps, secondarily, because of the recognition that such suggestion was impracticable. The only basis for such a suggestion on this record is, as shown in appellees' brief, pp. 35-36, the unsuccessful attempt of counsel for the Commission and counsel for the United States, before the Statutory Court, to lead that Court to believe that this was the meaning both of the Commission's order of October 14, 1946 and of its order of May 18, 1948. As has been seen, that Court, by express findings in both instances, held that this was not the meaning of either order (Finding of Fact (5),

*These reasons why such segregation of the line-haul and switching charges is impracticable, are in addition to those suggested on argument, and also in the brief of the appellees, Public Service Commission of Utah and the State of Utah, p. 6, that it would be impracticable to have switching charges at each smelter vary with the actual value of each car of ores and concentrates, and that a flat switching charge would favor the high grade ores against the lower marginal ores, to such extent defeating the purpose of the line-haul "valuation" rates.

R. 300); (Finding of Fact (19), R. 459; Conclusion of Law (9), R. 462).

CONCLUSION

The Statutory Court, after exhaustive hearing, gave the Commission, by its remand in connection with its order of temporary injunction of November 14, 1947 (R. 300, 302), every opportunity to clarify its order by either (a) under Section 6(7) requiring the appellee carriers to make charges in addition to their present line-haul rates for the terminal switching services involved, if, after hearing, it could be shown by evidence that such line-haul rates *do not in fact include compensation* for such terminal switching services; or (b) under Section 6(1) plainly to require merely the segregation of the line-haul and switching charges without any increase of the line-haul rates.

As has been seen, the Commission, by its enjoined order, did neither. Affirming the order of the Statutory Court, moreover, will not preclude the Commission from yet adopting either alternative by the institution, if it desires, of a new investigation. Should the Commission elect to do this under Section 6(1), appellees would, however, insist on their right to a hearing to show by evidence that such segregation of the line-haul and terminal charges is impracticable.

Appellees respectfully submit that a failure to affirm the order of the Statutory Court, made only after a futile attempt to get the Commission to act pursuant to its statutory authority, would deprive appellees of the right, to

which they are entitled under the law, to judicial protection of their substantial rights.*

Respectfully submitted,

OTIS J. GIBSON,
ELMER B. COLLINS,
JOHN F. FINERTY,
Counsel for Appellees.

*Appellees regret that it proved impossible to keep this Supplemental Memorandum within the five-page limit suggested in their request to the Court.

LIBRARY
SUPREME COURT, U. S.

No. 173.

Office - Supreme Court, U. S.

FILED

MAR 27 1950

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellees.

and

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY and AMERICAN
SMELTING AND REFINING COMPANY, *Appellees*.
Consolidated Causes

On Appeal from the United States District Court for the
District of Utah

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMO-
RANDUM AND SUPPLEMENTAL MEMORANDUM
FOR APPELLEE AMERICAN SMELTING AND RE-
FINING COMPANY**

JOHN F. FINERTY
Attorney for Appellee

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

UNITED STATES SMELTING REFINING AND MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, and UNION PACIFIC RAILROAD COMPANY,
Appellees.

and

THE UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION, *Appellants*,

v.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY and AMERICAN
SMELTING AND REFINING COMPANY, *Appellees*.
Consolidated Causes

On Appeal from the United States District Court for the
District of Utah

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
MEMORANDUM**

Argument of this case was had on February 13 and
14, 1950. At that time, counsel were not advised of the
most recent decision of the Interstate Commerce Com-
mission in the so-called *Staley* case. This new decision
was dated February 6, 1950, and apparently published
and served on February 14, 1950, and is entitled *Can-*

cellation Terminal Charges at Decatur, Ill., I. & S.
Docket No. 5387. It has a direct and important bearing on the instant case, to which we desire to call the Court's attention.

This new decision came to the attention of the undersigned on Thursday, March 9. This Motion and Memorandum are presented as promptly as possible.

Wherefore, it is requested that this Court permit the filing of the attached Supplemental Memorandum.

Respectfully submitted,

JOHN F. FINERTY
Attorney for Appellee.

March, 1950

SUPPLEMENTAL MEMORANDUM

At the argument before this Court on February 13 and 14, 1950, counsel for appellee urged that the decision below should be affirmed, since it was incontestable that the carriers were already fully compensated by way of the "line-haul" rates for the terminal services which they rendered. Such was the decision of the District Court; indeed, that Court found that on this record it was *res judicata* that such compensation is included in the "line-haul" rates.

Counsel for appellants attempted to meet this contention by asserting that the issue was not as to the compensability of the rates; rather, they urged, that the issue was whether the Commission could be prevented, in an *Ex parte* 104 proceeding, from segregating a single rate into its "line-haul" and "terminal" components. Such a segregation, the argument went, was required by the Commission's finding that the "line-haul" ended at the "assembly yard" or interchange tracks. The suggestion was advanced that only when such a segregation was made could the Commission determine whether the compensation for each segment was proper. Considerable reliance was placed on the decision of the Commission in *A. E. Staley Mfg. Co., Terminal Allowances*, 245 I. C. C. 383, as sustained by this Court in *United States v. Wabash R. Co.*, 321 U. S. 403.

It is not the purpose of this Memorandum to repeat the several arguments already made to show that the order of the Commission in the present case cannot be treated solely as a "segregation" order. Rather, we show here that in its most recent decision in the *Staley* case itself, which decision was not brought to the attention of the Court in briefs or argument, the Com-

mission has made clear that it, at least, does not regard the segregation of "line-haul" and "terminal" charges as essential. This decision thus deals a fatal blow to the justification referred to above for the Commission's order in the instant case.

This latest decision of the Commission, a further proceeding in the very Staley proceeding which has already been before this Court, is entitled *Cancellation of Terminal Charges at Decatur, Ill.*, I. & S. Docket No. 5387, and *A. E. Staley Mfg. Co. Terminal Allowances*, I. & S. Docket No. 4736, decided February 6, 1950, and, counsel is advised, served and made public on February 14, 1950. (Ten mimeographed copies of this decision have already been lodged with the Clerk.) In that proceeding, the two respondent carriers had filed schedules "to cancel the charge for spotting interstate traffic at the plant of A. E. Staley Mfg. Co." (Sheet 1). These schedules were suspended by the Commission, but such suspension has now been set aside by the Commission's latest decision, and the cancellation of such spotting charges has been authorized. It is important to note that the Commission, in connection with this latest order, has not revoked its original finding (215 I. C. C. 656, 660) that

"We find * * * that the transportation service for which the respondents are compensated in their line-haul rates, begins and ends at certain points (i.e. interchange tracks)."

See also 245 I. C. C. 383, 385. Nor has the Commission revoked its prior finding that the "line-haul" transportation service begins and ends at the interchange tracks. See 215 I. C. C. 659-660.

By this latest decision of the Commission in the *Staley* case, the Commission has now:

1. Held, that the determination of where the "line-haul" ends does not require segregated charges for service before and service after that point, even in a case in which this Court had already sustained a prior refusal by the Commission to permit cancellation of separate terminal charges,

2. Authorized, the "de-segregation" of previously segregated "line-haul", and "terminal" spotting, charges.

3. Necessarily appears to have found, that there is no violation of Section 6 (7) of the Interstate Commerce Act in the performance by carriers of terminal spotting services on industrial tracks, without, so far as appears, any compensation whatever to the carriers for such terminal spotting services.

The Commission's only justification for this reversal of its prior decision is that the plant trackage and operating procedure at the Staley plant have been somewhat improved, thereby lessening the magnitude of the carriers' terminal spotting services.

It is to be observed, however, despite this lessening, that the Commission's latest report shows that each of the two carriers now sends a locomotive into the plant twice a day for the sole purpose of terminal switching and spotting services, and that on the average about eleven locomotive hours of service per day were rendered to the plant by the two carriers in such terminal switching and spotting services during the test period, (see sheets 12 and 13). It is also to be observed that the terminal spotting charges which the Commission has now authorized to be cancelled, cover, so far as the Wabash Railroad is concerned, 10 different buildings or other locations where cars are loaded or unloaded, and so far as the Baltimore & Ohio is con-

cerned, 14 such different buildings or other locations, (see sheet 7).

This latest decision of the Commission in the *Staley* case is, therefore, irreconcilable (1) with the representations of its counsel on argument in the instant case that the segregation of all line-haul and terminal charges is essential, and (2) with the Commission's finding of violation of Section 6 (7) in the instant case, by reason of the rendition of terminal switching services without charge in addition to the line-haul rates.

JOHN F. FINERTY
Attorney for Appellee.

March, 1950

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED

MAY 7 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 173

173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

JOINT PETITION OF THE APPELLEES, THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF COLORADO
AND PUBLIC SERVICE COMMISSION OF UTAH, FOR RE-
HEARING AND REARGUMENT.

JOHN R. BARRY

State Office Building
Denver, Colorado

Attorney for The Public
Utilities Commission of the
State of Colorado

CHARLES A. ROOT

State Capitol
Salt Lake City, Utah

Of Counsel for the Public
Service Commission of Utah

CLINTON D. VERNON

State Capitol
Salt Lake City, Utah

Attorney for Public Service
Commission of Utah

IN THE
Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE
COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-
PANY, UNION PACIFIC RAILROAD COMPANY AND
AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

JOINT PETITION OF THE APPELLEES, THE PUBLIC
UTILITIES COMMISSION OF THE STATE OF COLORADO
AND PUBLIC SERVICE COMMISSION OF UTAH, FOR RE-
HEARING AND REARGUMENT.

The Public Utilities Commission of the State of Colorado
and the Public Service Commission of Utah hereby respect-
fully petition the Court for rehearing and reargument of
the judgment of reversal of this Court of March 27, 1950,
in the above proceedings.

While said State Commissions adopt the grounds set forth
in the joint petition for rehearing and reargument filed with
this Court by the appellee carriers and industries, they
hereby assign in addition the following independent grounds
for such rehearing and reargument.

I.

Said State Commissions most respectfully, but earnestly, protest against the apparent failure of this Court, as disclosed by its opinion upon which its judgment of reversal was based, to give any consideration whatever to the grounds set forth in the briefs filed by such State Commissions as appellees in these proceedings, showing:

(a) that the orders of the Interstate Commerce Commission constitute unlawful and arbitrary attempts to usurp the jurisdiction of such State Commissions over the regulation of purely intrastate traffic;

(b) that in making such orders the Commission has arbitrarily disregarded the serious adverse economic effect such orders would have on the mining industry of the States of Colorado and Utah; and

(c) that the segregation of line-haul and terminal switching charges in connection with rates based on actual valuation is not only impractical, but would *pro tanto* serve to defeat the purpose of such rate basis.

II.

As set forth at page 4 of the brief of the Public Utilities Commission of the State of Colorado, and likewise at page 4 of the brief of the Public Service Commission of Utah, the terminal switching particularly in issue in these proceedings are rendered almost wholly in connection with purely intrastate traffic, over which intrastate traffic the jurisdiction of said State Commissions is exclusive, in the absence of proceedings instituted and shown warranted under Section 13 of the Interstate Commerce Act.

As shown at page 4 of the brief of the Colorado Commission, 96% of all inbound shipments to the smelter of the appellee industry, American Smelting & Refining Company at Leadville, Colorado, have been of purely intrastate traffic.

As similarly shown at page 4 of the brief of the Utah Commission, approximately 90% of all inbound shipments to the Midvale smelter of the appellee industry, United States Smelting, Refining and Mining Company, were of purely intrastate traffic. The record shows, moreover (R. 1370-1372, Exh. 21), that over 93% of all inbound shipments to the Garfield smelter of the appellee industry, American Smelting & Refining Company, likewise were of purely intrastate traffic.

As well stated and demonstrated at pages 9 and 10 of the brief of the Colorado Mining Association,* the orders of the Interstate Commerce Commission, therefore, either are intended unlawfully to affect intrastate traffic or such orders have no substantial purpose.

III.

As shown at page 3 of the brief of the Colorado Commission, the orders of the Interstate Commerce Commission will have seriously adverse economic effects on the mining industry of Colorado.** This is also shown as to the mining industry of Utah in the brief of the appellee Utah Mining Association, pages 3 to 6, to which the brief of the Utah Commission makes reference.

IV.

As shown at pages 6 and 7 of the brief of the Utah Commission, a segregation of line-haul and terminal switching charges in connection with rates on non-ferrous ores and concentrates based on actual valuation is not only impractical but would, *pro tanto*, destroy the actual valuation basis of such rates.

*It will be noted that as stated at p. 2 of the brief of the Colorado Commission, that brief, in order to avoid burdening this Court with repetition, adopts the brief of the Colorado Mining Association.

**Further in this connection, see showing in this respect made at p. 4-9 of the brief of the Colorado Mining Association.

V.

The appellee State Commissions have been parties to the proceedings before the Interstate Commerce Commission since their inception, but despite their best efforts, the Commission has arbitrarily declined to give any consideration whatever to the foregoing matters. Such State Commissions recognize that there has, of course, been no such intentional disregard of these matters by this Court, but believe that they may have been overlooked due to the fact that the State Commissions waived participation in the oral argument before this Court in order to afford the appellee carriers and industry more adequate opportunity to present the legal and factual issues peculiarly affecting such appellees. Such State Commissions, therefore, most earnestly hope that this Court will grant rehearing and reargument particularly to permit opportunity for the clarification of the scope and effect of the Commission's orders without further litigation.

Respectfully submitted,

**THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF COLORADO**

By JOHN R. BARRY, Attorney.

PUBLIC SERVICE COMMISSION OF UTAH

By CLINTON D. VERNON, Attorney.

CHARLES A. ROOT

Of Counsel

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED

MAY 5 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1949

No. 173

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COMPANY,
Appellees,

and

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, AND AMERICAN
SMELTING AND REFINING COMPANY,
Appellees.

**PETITION BY APPELLEE CARRIERS AND INDUSTRIES
FOR REHEARING**

OTIS J. GIBSON
ELMER B. COLLINS
CHARLES A. HORSKY
HERBERT R. SILVERS
JOHN F. FINERTY
Counsel for Appellees

PAUL B. CANNON
Of Counsel

May 5, 1950

IN THE
Supreme Court of the United States

OCTOBER TERM 1949

No. 173.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COM-
PANY, DENVER & RIO GRANDE WESTERN RAILROAD
COMPANY, AND UNION PACIFIC RAILROAD COMPANY,
Appellees,

and

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, AND AMERICAN
SMELTING AND REFINING COMPANY,
Appellees.

**PETITION BY APPELLEE CARRIERS AND INDUSTRIES
FOR REHEARING**

Appellee carriers and industries, in hereby respect-
fully petitioning for rehearing of the judgment of re-
versal of this Court of March 27, 1950, are aware, of

course, that the granting of such a petition is, and must be, confined to exceptional circumstances. Appellees believe that the circumstances here are not only exceptional but, very possibly, unique.

Appellees doubt if any Opinion of this Court, involving the validity of the orders of the Interstate Commerce Commission, has ever made so apparent, as does the Opinion here, the complete failure of the parties to convey to the Court any clear understanding of the real nature of the Commission's orders and of the facts of record on which they purport to be based. Appellees themselves may have contributed in substantial measure to such seeming confusion, through their apparent inability, either on argument or even by their two Supplemental Memoranda,* to meet effectively the persistently shifting and contradictory bases upon which counsel for the Commission has sought to interpret and to justify the Commission's orders.

If such confusion exists, however, apportionment of responsibility here is probably irrelevant. An important consideration is that as a result, not only that the appellee carriers and industry would seem to have been

* *Note:* Throughout this petition the following abbreviated designations will be used:

1. "United States Smelting brief" will refer to the original Joint Brief of appellee Carriers and appellee United States Smelting, Refining & Mining Company.

2. "American Smelting brief" will refer to the original Joint Brief of appellee Carriers and of appellee American Smelting & Refining Company.

3. "First Supplemental Memorandum" will refer to the Joint Supplemental Memorandum of appellee Carriers and appellee American Smelting & Refining Company, filed on February 15, 1950, under telegraphic permission from Mr. Justice Black.

4. "Second Supplemental Memorandum" will refer to the Supplemental Memorandum of appellee American Smelting & Refining Company, filed on motion allowed by the order of this Court of March 27, 1950.

subjected to a capricious and arbitrary interpretation of § 6(7) of the Interstate Commerce Act by the Interstate Commerce Commission, unwarranted by any construction previously put on that section either by the Commission or by this Court. Even more important, however, is that all carriers and all industries are now subject to the probability of like capricious and arbitrary interferences by the Commission. Unless, therefore, the Opinion in this case be clarified, the inevitable consequence would seem to be that, both this Court, and the lower federal courts will be burdened with future needless litigation.

That confusion does exist in the present Opinion seems clear from the following uncertainties and self-contradiction which seem apparent on the face of that opinion.*

I.

The Opinion purports to sustain the power of the Commission to find violations of § 6(7) of the Act, whether or not the line-haul rates include compensation for the terminal services involved. In this respect, however, the Opinion appears to be self-contradictory.

(A) At pp. 4 and 5, and also at p. 11, the Opinion purports to accept the Commission's disclaimer of any finding as to whether the line-haul rates *do or do not include compensation* for such terminal services as unnecessary to support its ultimate findings of violations of § 6(7). Nevertheless, the Opinion, pp. 5 and 6, appears expressly to recognize that

*"The essential part of the findings is that line-haul began and ended at the interchange tracks * * **

* The two seemingly fundamental misconceptions which underlie these apparent uncertainties and contradictions in the Opinion are set out in Point VI, *infra*.

and that the performance of services beyond these points *without compensatory charges* results in preferential service in violation of § 6(7)." (Italics supplied)

(B) A further apparent contradiction in this respect appears from the following statement, p. 10 of the Opinion, and by the quotation there made from *United States v. American Sheet and Tin Plate Co.*, 301 U. S. 402, 408. The Opinion there states, referring to the terminal services beyond the "flat-yard" at Leadville:

"These industry services *must be so compensated for, and may not be wrapped up* in delivery of a line-haul shipment." (Italics supplied)

This statement would seem to involve either (1) the assumption that the terminal services *are not now compensated* for in the line-haul rates, despite the express disclaimer of any such finding by the Commission and the purported acceptance of such disclaimer in the Opinion, or (2) the acceptance in the Opinion of the representations made on argument by counsel for the Commission that, whether or not the line-haul rates include compensation for such terminal services, such services "may not be wrapped up in delivery of a line-haul shipment", on the theory that segregation of line-haul and terminal charges is, in any event, necessary to avoid a violation of § 6(7). As will later be shown, any such construction of § 6(7) has been repudiated by the Commission itself by its latest order in the so-called *Staley* case, and moreover, is in direct conflict with the construction placed on that section in the Commission's Basic Report in *Ex Parte 104, Part II*, 209 I. C. C. 11.

II.

The Opinion, p. 11, seems implicitly to recognize that the Commission could not lawfully require double payment by the appellee industries for the same services. It, however, seems equally implicit in the Opinion that it recognizes that the Commission's order may nevertheless so result, since the Opinion, in proper concern for protecting the appellees from any such double payment which the carriers might impose under such order, specifically undertakes to indicate, p. 11, that in such event the appellee industries would have a remedy *in futuro*, stating:

"If the carrier makes a double or unreasonable charge, the industry may be heard upon the reasonableness of the rates."

In thus recognizing that under the Commission's orders the carriers may make "a double or unreasonable charge," it would seem the Opinion should recognize that such potentiality necessarily must invalidate those orders on any of the following grounds:

First: If under the Commission's orders the carriers may make a double charge, those orders cannot be saved from present invalidity by any remedy which the appellee industries may have *in futuro*, even were such remedy clear, which, it will be shown, is doubtful.

Second: The very fact that the Opinion seems unable to determine whether the Commission's orders may result in a double charge should render those orders void for uncertainty.

Third: Even assuming that the Commission's orders are to be construed, contrary to their plain terms, as merely requiring a segregation of line-haul and

switching charges without any increase in the aggregate charges, neither the appellee carriers nor the appellee industries have ever been afforded any hearing to determine whether such segregation is practicable.

It would appear that such hearing is essential in connection with rates on non-ferrous ores and concentrates, which rates, for approximately 50 years, have been graded according to the actual value of such ores and concentrates. Such valuation basis the record shows is necessary in order that small "marginal" producers may ship their low-grade ores and concentrates in competition with high-grade ores and concentrates, thus affording the carriers traffic which would not otherwise move and the smelters raw materials which would not otherwise be available. That such segregation may be impracticable is shown in appellees' First Supplemental Memorandum, pp. 7 and 9, and likewise in the Joint Petition for Rehearing and Reargument already filed by the appellees, Public Utilities Commission of Colorado and Public Service Commission of Utah, Point IV, p. 3.

Fourth: It is further pertinent to note that, should such segregation be impracticable, it would make doubtful whether the appellee industries would have any such remedy *in futuro* as the Opinion suggests, without foregoing, at least in part, the actual valuation basis of rates on non-ferrous ores and concentrates long recognized by the Commission itself as essential to maximum production and transportation of those commodities. *Arlington Silver Mining Co. v. Great Northern Ry. Co.*, 83 I. C. C. 255; *Nonferrous Metals*, 204 I. C. C. 319.

III.

The Opinion fails to recognize that any construction of the Commission's orders as not resulting in a double charge must rest on one or the other of the following bases:

(A) The assumption that the line-haul rates *do not include compensation* for the terminal services, which assumption is not open on this record even though, as the Opinion holds, pp. 11-12, the statutory Court was not justified in finding that it is either *res judicata* or the law of the case that such rates *do not* include such compensation. As the record shows, the statutory Court, in temporarily enjoining the Commission's prior orders of October 14, 1946, expressly found that there was no evidence to support the Commission's prior findings that the line-haul rates *do not include compensation* for the terminal switching services, and thereupon, without further hearing, the Commission, in its reports of May 18, 1948, upon which its orders here enjoined are based, expressly repudiated its prior findings in this respect, and expressly disclaimed any finding whatever as to whether line-haul rates do or do not include compensation for the terminal switching services.¹

(B) The acceptance of the representations of Commission's counsel on argument that segregation of charges for line-haul and terminal services is essential in any event to prevent violations of § 6(7). As already noted, the Opinion, page 10, indicates that the Court may have accepted such representations in there stating:

¹ See United States Smelting brief, pp. 21-23; American Smelting brief, pp. 24-28.

"These industry services must be so compensated for, and may not be wrapped up in delivery of a line-haul shipment."

Such representations, however, of its counsel on argument have been repudiated by the Commission itself in its latest order in the so-called *Staley* case. This is shown by the appellees' Second Supplemental Memorandum. As there appears, pp. 4-6, the Commission, by its order of February 6, 1950, in *Cancellation of Terminal Charges at Decatur, Illinois*, I. & S. Docket No. 5387 and *A. E. Staley Mfg. Co., Terminal Allowances*, I. & S. Docket No. 4736, expressly authorized "*de-segregation*" of line-haul and terminal spotting charges which the carriers had previously segregated under the Commission's prior order in *A. E. Staley Mfg. Co., Terminal Allowances*, 245 I. C. C. 383, which order was sustained by this Court in *United States v. Wabash R. Co.*, 321 U. S. 403. As shown in such Supplemental Memorandum, the Commission by its latest order authorized the cancellation of charges in addition to line-haul rates for terminal spotting charges, although the carriers had published such additional charges in compliance with the prior order of the Commission sustained by this Court. In so doing the Commission failed to revoke its original finding, 215 I. C. C. 656, 660, likewise sustained by this Court, that the line-haul rates *do not include compensation* for such terminal switching services. It is perhaps significant that the Court's order accepting such Supplemental Memorandum was entered on the very day the Court entered its judgment of reversal. It would, therefore, seem possible that the controlling significance of the Commission's latest order in the *Staley* case was overlooked.

IV.

Wholly aside from the Commission's latest order in the *Staley* case, the Commission, in its Basic Report, in *Ex Parte 104, Part II, supra*, had already expressly recognized that *by appropriate tariff* provision carriers might include both line-haul services and terminal switching services in a single rate, *provided such single rate includes compensation for both services*. Furthermore, it may be said that the Commission itself, as distinguished from its counsel, has never even suggested otherwise, unless its findings in connection with its orders here enjoined be construed to so imply.

The Commission, in its Basic Report in construing § 6(7) states, p. 29:

"If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed on the carrier by the statutes." (Italics supplied)

The Basic Report further states, p. 33, specifically with reference to § 6(7):

"The statute prohibits every method of dealing by a carrier by which it directly or indirectly charges less than the published tariff rates. *In the absence of a tariff provision*, for a carrier to assume under its line-haul rates an obligation which is not properly includible under such rates is clearly in violation of § 6 of the act, and necessarily preferential." (Italics supplied)

These constructions placed by the Commission itself in its Basic Report on § 6(7), represent not only good law but good sense. If a carrier collects full compensation from both Industry A and Industry B for the line-haul and switching services each receives, no preference can result to Industry A as against Industry B merely because the tariffs applicable to Industry A permit the payment of full compensation for both line-haul and terminal services in a single inclusive rate, while the tariffs applicable to Industry B provide that such full compensation shall be paid by separate rates respectively applicable exclusively to line-haul and to switching services. Neither, of course, can the payment of full compensation for line-haul and switching services, under appropriate tariff provisions for such payment by a single inclusive rate, result in refunding or remitting any portion of the rates so specified in the tariffs. As will later be shown, both the Commission and this Court have heretofore recognized that tariffs providing a single rate for line-haul and terminal services can violate § 6(7) *only if such single rate does not in fact include compensation for both services*, and therefore is merely an attempt to cloak by tariff provisions rebating and preferential service.

V.

The Point X-Point Y illustrations, p. 9 of the Opinion, seem to be the result of basic misconceptions in the following respects:

(A) These illustrations seem to assume that the Commission by its Basic Report had already designated Point X (the "assembly yard" at Midvale, the "plant yard" at Garfield and the "flat yard" at Leadville) as the points at which line-haul begins and ends,

and that the appellee carriers have undertaken by their tariffs to extend the line-haul to Point Y (points of actual loading and unloading at the smelters), "and even to add one subsequent movement." This assumption inexplicably ignores, without comment or apparent notice, the showing made under Point IV, pp. 42-49 of the original American Smelting brief that the Commission, in its Basic Report, had found merely that preferential service *generally*, though not invariably, results from affording, under line-haul rates, terminal switching services which exceed the equivalent of uninterrupted "simple switching or team-track delivery."

The Basic Report specifically states in this connection, p. 45:

"Generally the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally."
(Italics supplied)

As has already been shown under Point IV of this petition, *ante*, pp. 8-10, the Basic Report expressly recognizes, pp. 29 and 33, that this "general" finding has no application where the line-haul rates *include full compensation for both line-haul and terminal services*, and where the carriers' tariffs *expressly provide for the inclusion of the terminal services* in the single rate so published.

(B) Such Point X—Point Y illustrations, moreover, ignore the controlling distinctions between both

the tariff provisions and the physical nature of the terminal services in the instant cases, and those involved in all prior decisions of this Court cited in its Opinion.

As shown in Appendix C to the original Brief of the American Smelting, all prior decisions of this Court cited in its Opinion, except that in *Corn Products Refining Co. v. United States*, 331 U. S. 790,* involved tariffs providing for the payment by the carriers of "allowances" to the industries for the performance by the industries of terminal services between agreed "interchange tracks" and points of actual loading and unloading at the industries. Moreover, the records in such cases show that such "interchange tracks", and not such points of actual loading and unloading, had always constituted the points of actual receipt and delivery as between the carriers and the industries; and that prior to the publication of such "allowance" tariffs, the carriers had never performed any terminal services beyond such "interchange tracks", all such terminal services having always been performed by the industries at their own expense.

As shown at p. 46 of the American Smelting Brief, the Commission's Basic Report, in recognition of this, states, p. 45, of that Report:

"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. *Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at*

* The *Corn Products* case will be shown distinguishable from the instant cases on other grounds.

the time the change was made, the line-haul rates were not altered. In such cases, the carriers simply assumed a burden not previously borne."

In the instant cases the record shows without contradiction* that the appellee carriers have never delivered or received car-load freight at the points now arbitrarily designated by the Commission as "interchange tracks", but for approximately 50 years have received and delivered all shipments at their own expense at points of actual loading and unloading at the smelters. Further, the record shows that the points so designated by the Commission have never been actual "interchange tracks" as between the appellee carriers and the appellee industries, but have been "interchange tracks" only as between the appellee carriers themselves, as at Midvale and Garfield, or as at Leadville, between the road-haul and switching engines of the sole carrier there involved.**

Third: In consequence of the foregoing, the Court's Opinion in the paragraph beginning at the bottom, p. 9, and ending on p. 10, and in the footnote thereto, wholly misinterprets the effect of the change in 1938 of the tariff provisions at Midvale and Garfield in relation to the tariff provisions previously applying at those points, and still applying at Leadville. The result of the 1938 change at Midvale and Garfield *was to reduce the terminal services previously rendered at all three points* under the line-haul rate without additional charge, and to impose additional charges at Midvale and Garfield for so-called "interrupted move-

* United States Smelting Brief, pp. 31-46; American Smelting Brief, Point VII, pp. 70-76.

** United States Smelting Brief, pp. 40-41; American Smelting Brief, pp. 73-74.

ments", although the record shows without contradiction that compensation for *all* terminal switching services, including such "*interrupted movements*", is included in the line-haul rates at all three points (R. 456).

VI.

The foregoing uncertainties and contradictions which seem to inhere in the Opinion would appear to be the result of two basic misconceptions which permeate the Opinion, due to the failure of these appellees to make clear to the Court two propositions which appellees believe cannot be contraverted:

(A) That while, as the Opinion states, p. 6, the authority of the Commission "to establish the point where line-haul service begins and ends is not to be doubted," nevertheless the very terminal services here involved are expressly defined by § 1(3) of the Act* as constituting "transportation", which under § 1(4) of the Act,** the carriers are expressly required to furnish "upon reasonable request therefor." The reason that the Commission, nevertheless, has undoubted authority to determine that line-haul rates do not include terminal services, is that such authority is obviously essential to prevent rebating or preferential service under § 6(7), or undue discrimination or undue preju-

* See *United States v. American Sheet & Tin Plate Co.*, *supra*, p. 407, quoting § 1(3) as follows:

"The term 'transportation' shall include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit . . . of property transported."

** § 1(4) of the Act provides:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor . . ."

dice under § 2 and § 3, *where particular line-haul rates do not in fact include compensation for terminal services.*

These appellees are undeniably at fault in having failed previously to call to the Court's attention these express provisions of § 1(3) and § 1(4). It is, however, to be noted that in every case cited in the Court's Opinion, where the Court has heretofore recognized the authority of the Commission to determine that line-haul rates do not include terminal services, whether such determination was made under § 6(7), or under §§ 2 and 3, the record has expressly shown that the line-haul rates *did not include compensation* for the terminal services in question in those cases.* In such cases, the Court might also have recognized, though it did not expressly do so, that no "reasonable request" could be made under § 1(4) for the furnishing of such terminal services, *in the absence of compensation for them* either in the line-haul rates or by charges in addition to the line-haul rates.

(B) That there is a basic distinction between what is necessary to constitute violations of § 6(7) where, *as here*, violations are alleged to result solely from compliance by carriers with the express provisions of their duly filed and published tariffs, and where violations are alleged to result from *departures* by carriers from the provisions of their tariffs.

It will be observed from the quotation of § 6(7) in

* See analysis of prior decisions of this Court under Point V of Brief of American Smelting, pp. 50-66, and analysis of findings of Commission in connection with its orders under § 6(7) embraced by such decisions, Appendix C, to that Brief, pp. c-1 to c-13. Also see *Interstate Commerce Commission v. Hoboken R. Co.*, 320 U. S. 368, 377 (cited in footnote to p. 7 of the Opinion here) and *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507, 525-526 (cited Opinion, p. 11).

the footnote to p. 4 of the Opinion, that by the express terms of that section, *any departure* by carriers from the provisions of their filed tariffs constitutes *per se* a violation of § 6(7). Nothing, however, in the express terms of that section, it will further be observed, makes *compliance* by carriers with the provisions of their tariffs a violation of that section. Therefore, neither this Court nor the Commission, has ever held in any case, including the instant cases, until the Commission's latest orders herein, that § 6(7) can be violated by *compliance* by carriers with the express provisions of their tariffs, *unless such tariff provisions themselves violate either the provisions of § 6(7), against rebating or preferential service, or the provisions of §§ 2 and 3 of the Act against undue discrimination or undue prejudice.* Accordingly, neither this Court nor the Commission has never previously found that carriers have violated § 6(7) by rendering terminal services or paying "allowances" therefor in *compliance* with the express provisions of their tariffs, except where the line-haul rates have been found *not to include compensation* for such terminal services.

Indeed, the first case in which this Court recognized that *compliance* by carriers with the express provisions of their tariffs might constitute a violation of § 6(7), was in *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507. There this Court held, pp. 525-526, that despite the fact that the carriers' tariffs expressly provided for "in-transit storage" under the line-haul rates, the rendition of such service in *strict compliance* with such tariffs, nevertheless violated not only § 6(7) but §§ 2 and 3 of the Act, because the line-haul rates were found not to include any compensation for such "in-transit" storage, and in fact to be rendered by the carriers at "out-of-pocket" expense.

On the same basis, the other decisions of this Court cited in its Opinion, and here re-cited for convenience in the sub-joined footnote,* sustained orders of the Commission forbidding the payment of "allowances" to industries for the performance of terminal services by industries beyond the "interchange tracks" at which the Commission found line-haul service to begin and end, as violative of § 6(7), although the payment of such "allowances" was in compliance with the express provisions of the tariffs of such carriers. In all such cited cases however, the Commission had expressly found, and this Court expressly so recognized,** that the line-haul rates *did not contain compensation for any terminal services* beyond established "interchange tracks", designated by the Commission as the points at which line-haul transportation began and ended. Moreover, as already shown, under Point V (B), the record in such cases showed that such "interchange tracks" had always been the actual points of delivery and receipt of shipments between the carriers and the industries, and that prior to the publication of tariff provisions for such "allowances", the industries had always performed at their own expense all terminal services between such "interchange tracks" and points of actual loading and unloading at the industries.

The only other decision of this Court, cited in its Opinion, sustaining findings of the Commission of violations of § 6(7) in connection with the performance of terminal services at industries, is *Corn Products*.

* *United States v. American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Company v. United States*, 301 U. S. 669; *A. O. Smith Corporation v. United States*, 301 U. S. 669; *United States v. Pan American Petroleum Corp.*, 304 U. S. 150; *United States v. Wabash R. Co.* (Staley case), 321 U. S. 403.

** See American Smelting brief, Point V, pp. 50-65 and Appendix C thereto, pp. c-1 to c-13.

Refining Co. v. United States, 331 U. S. 790, is also the only cited case which is not an "allowance case", and the only such case in which the violations of § 6(7) were based on *departures* and not on *compliance* by the carriers with their published tariffs. As shown by the Commission's Reports, 262 I. C. C. 57 and 266 I. C. C. 181, and by the Opinion of the Statutory Court, 69 F. Supp. 869, whose judgment was affirmed on motion by this Court, the carriers' tariffs did not expressly provide for the performance under the line-haul rates of the terminal services to and from points of actual loading and unloading at the industry. Therefore, the Commission held; consistently with its "general" finding in *Ex Parte 104, Part II, supra*, p. 45, that the carriers' line-haul rates did not include such terminal services, and that the rendition of them under such line-haul rates consequently constituted a *departure* from the provisions of the carriers' tariffs.

CONCLUSION

Appellees respectfully submit that the order of reversal should be set aside and the judgment of the Statutory Court affirmed, without prejudice to the obvious right of the Commission to make any proper order under any appropriate section of the Act should it appear, after due hearing by adequate evidence, that the line-haul rates of appellee carriers *do not in fact contain compensation* for the terminal services here involved.

PAUL B. CANNON
Of Counsel

May 5, 1950

OTIS J. GIBSON
ELMER B. COLLINS
CHARLES A. HORSKY
HERBERT R. SILVERS
JOHN F. FINERTY

Counsel for Appellees